

# Five-Year-Review Reports

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**DISCLAIMER:** All statements made in this seminar are solely the opinion of Council's staff.



# Agenda

- Overview of five-year-review report
  - What does a five-year-review report contain?
  - Discussion of § 41-1037
  - How to format a five-year-review report?
  - The role of Council's staff
  - How to prepare to write a five-year-review report?
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# Overview

- Every five years, each agency is required to review “all of its rules, including rules made pursuant to an exemption from this chapter or any part of this chapter” within that five year period. A.R.S. § 41-1056(A).
- Five-year-review reports, if properly prepared, can allow an agency to:
  - Determine “whether any rule should be amended or repealed” – A.R.S. § 41-1056(A);
  - Discover potential issues with rules before problems arise;
  - Assemble and preserve institutional knowledge; and
  - Prevent its rules from expiring under A.R.S. § 41-1056(J).
- GRRC schedules review of rules by Article(s), not for individual rules.

# What does a report contain?

- ▶ Under A.R.S. § 41-1056(B), an agency may also include the text of a proposed expedited rule as part of the report.
- ▶ Under A.R.S. § 41-1056 (A)(1) – (11) and R1-6-301, each five-year-review report shall contain:
  - ▶ Cover Letter - R1-6-301 (C)
    - ▶ Certification of compliance with A.R.S. § 41-1091,
    - ▶ A person to contact for information regarding the report,
    - ▶ Any rule not reviewed with the intention that the rule expire under A.R.S. 41-1056(J), and
    - ▶ Any rule not reviewed because the Council rescheduled the review under A.R.S. 41-1056(H).

# Effectiveness

- An objective is “something that one’s efforts or actions are **intended to attain or accomplish**,” aka purpose, goal, or target. *Dictionary.com (emphasis added)*.
- To concisely analyze the objective of a rule, think about **why the rule was adopted**.
- Avoid simply thinking about what the rule does.
- A.R.S. § 41-1056(A)(2) also requires “a summary of any available data supporting the conclusions reached.” (i.e., data supporting the conclusion that the rules are effective in achieving their objective).

# Written Criticisms

- ▶ A summary of the comments themselves, as well as the agency's response, should be included.
- ▶ An analysis may be submitted to the agency questioning whether the rule is based on valid scientific or reliable principles or methods.
- ▶ Unless such analyses are submitted to the agency, this does not need to be addressed in the report, other than to say that no such analysis was submitted.





# Statutory Authority

- ▶ Although language may vary, **general authority** typically looks like: “make rules and regulations for the organization and proper and efficient operation of the department...” A.R.S. § 36-104 (3).
- ▶ **Specific authority**, on the other hand, should look something like: “the director shall promulgate such rules and regulations as are required by state law or federal law or regulation to protect confidential information.” A.R.S. § 36-107.



# Consistency

- ▶ Inconsistencies may include:
  - ▶ Terms that are not uniformly used throughout the rules,
  - ▶ Citation errors, or
  - ▶ Errors of a more substantive nature.
- ▶ An agency should take statutory or rule changes into consideration.
  - ▶ Explain how any inconsistencies are being addressed (i.e. by a future rulemaking).
  - ▶ Explain how the agency is dealing with the inconsistency until it can be resolved.




# Enforcement

- ▶ Is the agency enforcing the rules as written?
  - ▶ If so, wonderful!
  - ▶ If not, provide an explanation.
    - ▶ Include the agency's proposal for resolving the issue.





# Clarity, Conciseness, and Understandability

- ▶ In other words, general readability.
  - ▶ The agency should indicate whether it believes the rules are clear, concise, and understandable, or should suggest how it plans to amend the rules to make them such.
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# Economic Analysis

- ▶ There are two variations of this requirement, which varies depending upon the agency's individual circumstances, as outlined in R1-6-301 (A) (8):
  - ▶ **IF AN EIS WAS PREPARED:** A comparison of the current economic, small business, and consumer impact of the rule with the economic, small business, and consumer impact statement prepared on the last rulemaking or,
  - ▶ **IF AN EIS WAS NOT PREPARED:** An assessment of the actual economic, small business, and consumer impact of the rule.



# Business Competitiveness

- Theoretically, an agency would need to consider the rule's impact on business competitiveness in this state compared with the impact on businesses in other states.
- This analysis is limited to consideration of materials submitted to the agency by another person.
  - At this time, no such analysis has ever been submitted to an agency.



# The Previous 5YRR

- ▶ This item allows the Council to review any action proposed by an agency in a past report. The Council looks to see:
  - ▶ If the action was completed, when and how?
  - ▶ If the action was not completed, why not?
- ▶ If no action was proposed in the last five-year-review report, a simple statement to that effect should be included.
- ▶ GRRC staff can provide electronic copies of most five-year-review reports dating back to October 2002 if needed.

# Costs vs. Benefits

- “A determination that the rule imposes the least burden and costs to persons regulated by the rule, including paperwork and other compliance costs necessary to achieve the underlying regulatory objective.” R1-6-301(A)(11).
- Under this analysis, an agency should either:
  - Indicate the reason the rules reviewed impose the least burden and costs to regulated persons, or
  - State something to the effect of “The agency believes that once the changes indicated in this report are made, the rules will impose the least burden and costs to persons regulated by the rule.”



# Stringency

- ▶ Under Arizona law, a state law is not allowed to be more stringent than federal law unless there is statutory authority to exceed the requirements of federal law. A.R.S. § 41-1056(A)(12).
- ▶ If federal law does not apply, simply say so.
- ▶ If federal law does apply, then include a statement explaining why federal law applies, and either:
  - ▶ Explain why the agency believes the rules are less stringent than corresponding federal law, or
  - ▶ Provide a citation to the statutory authority authorizing the rules to be more stringent than federal law.

# A.R.S. § 41-1037



- This analysis only applies to rules:
  - Adopted after July 29, 2010, and
  - That require issuance of a regulatory permit, license, or agency authorization.
- What is a general permit? – A.R.S. § 41-1001(11)
- Analysis under this section should analyze applicable rules to ensure that they either:
  - Issues general permits under A.R.S. § 41-1001(11), or
  - Fall within an exception under A.R.S. § 41-1037(A).



# Formatting the Report

- There is no precise template for how an agency structures its report, but certain elements must be contained under R1-6-301 (A).
- Summarizing Tables are not allowed, as stated in R1-6-301 (B).
- Most categories of analysis may be analyzed together.
- R1-6-301 requires an agency to provide a copy of the rules being reviewed and attach a cover letter, signed by an agency head.

# The Role of Council Staff

- R1-6-301 (E): “Council staff shall review the report for compliance with the requirements of A.R.S. § 41-1056 and...[1 A.A.C. 6]...and may ask questions or suggest changes to the agency.”
- An agency is allowed to obtain an extension of 120 days by filing a written notice of extension with the Council before the due date of the report.
- A.R.S. § 41-1056(J)(1) requires the Council to “[c]ause a notice to be published in the next register that states the rules have expired and are no longer enforceable” if an agency fails to submit a timely report.



# Preparing to Write a 5YRR

- Consult the five-year-review report schedule on the GRRC website.
- Review the last five-year-review report.
  - If you have difficulty locating an old report, EIS, or rulemaking, contact Council staff.
- Talk with your supervisor/colleagues about any comments/analyses/data applicable to the rules.
- Review the last Economic, Small Business, and Consumer Impact Statement for the rules.
- If in doubt, contact Council staff with questions.



# Thank you!

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