

ARIZONA

GOVERNOR'S REGULATORY
REVIEW COUNCIL

Five-Year Review Reports

Presented by:

Krishna R. Jhaveri, Esq.

(602) 542-2024/krishna.jhaveri@azdoa.gov

Simon Larscheidt, Esq.

(602) 542-2015/simon.larscheidt@azdoa.gov

GRRC Staff Attorneys

DISCLAIMER:

All statements made in this seminar are solely the opinion of Council staff.

Main Topics

- Overview of Five-Year Review Reports (5YRRs)
- Why is a 5YRR beneficial to the agency?
- What does a 5YRR contain?
- Submitting a 5YRR
- Council Action on a 5YRR
- Reports outside the 5YRR Process
- Preparing a 5YRR

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 report is a concise, written analysis of an agency’s administrative rules.
- Agencies must attend two GRRC Meetings:
 - **Study Session** (last Tuesday of each month; 10 am; ADOA, Room 300) (where the report will be considered and discussed, but not voted on)
 - **Regular Council Meeting** (first Tuesday of each month; 10 am; ADOA, Room 300) (where the report will be voted on - approved or returned)

Why is a 5YRR Beneficial?

- 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 - Determine “whether any rule should be amended or repealed” – **A.R.S. § 41-1056(A)**;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)**.

What does a report contain?

- 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 (**note**: the specific person GRRC staff can contact about questions relating to the 5YRR must be identified in the cover letter),
 - 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)**.

Note: A template for the 5YRR and the cover letter is available on GRRC's website:

<https://grrc.az.gov>

What does a report contain?

Concise analysis of the following for each rule:

1. Are the rules effective in achieving their objectives?
2. Have any written criticisms of the rules been received during the past five years?
3. What is the statutory authority for the rules?
4. Are the rules consistent with statutes and other rules?
5. Are the rules being enforced as written?
6. Are the rules clear, concise, and understandable?
7. What is the current economic impact of the rules? Was an EIS prepared?
8. Was a business competitiveness analysis submitted?
9. Was the proposed course of action in the previous five year review report completed?
10. Do the rules impose the least burden and costs to persons regulated by the rules?
11. Are the rules more stringent than federal law?
12. Are the rules in compliance with **A.R.S. § 41-1037** [General Permits]?

- *Under **A.R.S. § 41-1056(B)**, an agency may also include the text of a proposed expedited rule as part of the report.*

Effectiveness

(A.R.S. § 41-1056(A)(1) and R1-6-301(A)(2))

- An objective is “something that one’s efforts or actions are **intended to attain or accomplish.**” *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.

Note: If a rule is not clear, concise, and understandable, it can impact the effectiveness of a rule.

Written Criticisms

(A.R.S. § 41-1056(A)(2) and R1-6-301(A)(7))

- 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

(A.R.S. § 41-1056(A)(3) and R1-6-301(A)(1))

- An example of **general authority**: “make rules and regulations for the organization and proper and efficient operation of the department...” **A.R.S. § 36-104 (3)**.
- An example of **specific authority**: “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

(A.R.S. § 41-1056(A)(4) and R1-6-301(A)(4))

- 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

(A.R.S. § 41-1056(A)(4) and R1-6-301(A)(5))

- Is the agency enforcing the rules as written?
 - If not, provide an explanation and the agency's proposal for resolving the issue.

Clarity, Conciseness, and Understandability

(A.R.S. § 41-1056(A)(5) and R1-6-301(A)(6))

- 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 improve them.

EIS Comparison

(A.R.S. § 41-1056(A)(6) and R1-6-301(A)(8))

- 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

(A.R.S. § 41-1056(A)(7) and R1-6-301(A)(9))

- 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.

The Previous 5YRR

(A.R.S. § 41-1056(A)(8) and R1-6-301(A)(10))

- 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.

Costs v. Benefits

(A.R.S. § 41-1056(A)(9) and R1-6-301(A)(11))

- A determination after analysis that the probable benefits of the rule within this state outweigh the probable costs of the rule, and 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)**.
- An agency should:
 - Describe the analysis used to determine that the probable benefits of the rule outweigh the probable costs of the rule; and
 - Describe the analysis used to determine the rules reviewed impose the least burden and costs to regulated persons.

NOTE: Conclusory statements are insufficient.

Stringency

(A.R.S. § 41-1056(A)(10) and R1-6-301(A)(12))

- 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)(10)**.
- 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.

Permits

(A.R.S. § 41-1056(A)(11) and R1-6-301(A)(13))

- 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:
 - Issue general permits under **A.R.S. § 41-1001(11)**, or
 - Fall within an exception under **A.R.S. § 41-1037(A)**.

Proposed Course of Action

- Develop proposed course of action to address issues identified in the report and guide the agency's future rulemaking activity
- **R1-6-301(A)(14)** - Course of action the agency proposes to take regarding each rule, including the **month and year** in which the agency anticipates **submitting the rules to the Council** if the agency determines it is necessary to amend or repeal an existing rule, or to make a new rule. If no issues are identified for a rule in the report, an agency may indicate that no action is necessary for the rule
- Agencies should state a **justification** for the timeframe they indicate in the proposed course of action. The Council is unlikely to approve a report that does not justify the timeframe provided, particularly if it is longer than one (1) year.

Submitting a 5YRR

- GRRC schedules review of rules by Article(s), not for individual rules.
- GRRC notifies the agency of the upcoming deadline, 90 days before a report is due.
- Typically, reports are due on the **last business day of the month** the report is scheduled. **Reports must be submitted electronically to grrc@azdoa.gov.**
- If agency is unable to submit a report by the deadline, the agency has the options to request for:
 - One-time automatic **extension of 120 days, (R1-6-303)** or
 - Longer **one-year extension (R1-6-303)**
- **Rescheduling of a 5YRR (R1-6-302)**

Council Action on a 5YRR

- The Council can vote to either: **(1) approve the report or (2) return the report. A.R.S. § 41-1056(C)**
- If a report is **approved**, no further action is required. GRRC does not issue a certificate or other document that says it approved a particular 5YRR. Proof of a report's approval can be found in GRRC's **Action Report** which is prepared and posted to GRRC's website after each Council Meeting. The Action Report states the action taken for each agenda item. Action reports are also sent to the Secretary of State.
- If a report is **returned** it will be returned **in whole** or **in part** pursuant to R1-6-305:
 - “[t]he Council may vote to return, in whole or in part, a five-year review report after identifying the manner in which the five-year review report does not meet the standards in A.R.S. § 41-1056(A). 1. The Council, in consultation with the agency, shall schedule submission of a revised report. 2. An agency submitting a revised five-year review report shall attach to the revised report a letter that: a. Identifies all changes made in response to the Council’s explanation for return of the five-year review report, and b. Explains how the changes ensure that the five-year review report meets the standards in A.R.S. § 41- 1056(A).”

Reports outside of the 5YRR Process

Under A.R.S. 41-1056(D), the Council may:

- “review rules outside of the five-year review process if requested by at least four council members.”
- A common reason this happens is because an agency needs to expire its rules. For information about the process of rule expiration, please consult the expiration flowchart available on GRRC’s website: <https://grrc.az.gov> under the Rulemaking tab.

Preparing to Write a 5YRR

- Become familiar with the 5YRR flowchart on GRRC's website which outlines the process.
- Review the last five-year-review report.
 - If you have difficulty locating an old report, EIS, or rulemaking, contact Council staff.
- Review the last Economic, Small Business, and Consumer Impact Statement for the rules.
- Contact Council staff with questions.