

FIVE YEAR REVIEW REPORT

THE BASICS

PURPOSE OF COUNCIL AND ITS STAFF

“The purpose of the governor’s regulatory review council is to review and approve or reject rules, preambles, economic, small business and consumer impact statements and summary [now expedited] rule packages submitted by agencies.”

Laws 1997, Ch. 59, § 4.

WHY FIVE YEAR REVIEW REPORTS (5YRR) ?

If properly prepared, a 5YRR 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- “determine whether any rule should be amended or repealed” A.R.S. § 41-1056(A);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;
 - Helps train new hires or for new rule-related responsibilities;
 - Will expedite future rulemakings and 5YRRs if done properly.
- Prevent its rules from expiring under A.R.S. § 41-1056(J).
 - In addition, an agency submitting a 5YRR that is not adequate may:
 - Have its report moved to the following month’s GRRC agenda for further consideration, OR
 - Be required to amend or repeal a rule, even if it doesn’t want to, if the Council determines the rule is “materially flawed” See, A.R.S. 41-1056(E)

Determine

Discover

Assemble & Preserve

Prevent

WHICH RULES NEED TO BE REVIEWED?

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” at least once every five years. A.R.S. § 41-1056(A) (Emphasis added).

In scheduling five-year-review reports, GRRC will attempt to incorporate exempt rules into the current report schedule. However, exempt articles may be scheduled separately, depending on the needs of the agency and the workload of GRRC staff.

GRRC schedules review of rules by Article(s), not for individual rules.

Please visit <http://www.grrc.state.az.us/forms-and-reports/5-year-review.asp> for all of the 5YRRs due in 2013/2014.

LAWS 2012, CHAPTER 352, SECTION 17, (HB 2744)

In response to HB 2744, specifically new A.R.S. § 41-1056, and to clarify and improve the 5YRR process, GRRC has amended its rules. See, *GRRC Notice of Final Rulemaking, 19 A.A.R. 2731, August 30, 2013.*

Salient changes, other than those updates required by revisions to A.R.S. § 41-1056 through HB2744, contained in the proposed rules in Article 3, include (discussed later), but are not limited to:

- Paper **and** electronic copies now required for initial submission of the report, cover letter, and petitions under A.R.S. § 41-1056(M) (a petition for an agency to consider including an obsolete rule in a 5YRR w/ recommendation for repeal);
- Must tell “how,” not simply “whether,” the previous 5YRR course of action was/is being completed;
- Narrative rather than tabular “analysis” required (e.g., no table of identical information);
- Clarification that the first delay of a 5YRR (i.e., moving the report to a later agenda) is done by “notice” whereas a subsequent delay is granted, if at all, by “request” to the Chair;
- Rescheduling a 5YRR may be done more than 90 days before due;
- The Chair may reschedule a 5YRR on the Chair’s own initiative; and
- Includes a new Section regarding requirements for returned 5YRRs.

ADDED TO A.R.S. § 41-1056 FROM HB 2744

- 41-1056(A)
 - Exempt rules required to be reviewed
 - GRRC process for adding exempt rules to schedule
 - 5YRRs must contain certification of compliance with A.R.S. 41-1091
- 41-1056(A)(2)
 - Written criticisms- specifically includes whether rule based on “valid scientific or reliable principles or methods.” *
- 41-1056(A)(4)
 - Consistency- whether rule is consistent with “**statutes** or other rules made by the agency **and** current agency enforcement policy.”
- 41-1056(A)(7)
 - Clarified that the comparison of business competitiveness is “**as compared to the competitiveness of businesses in other states.**”
- 41-1056(A)(9)
 - Adds “probable benefits of the rule outweigh within this state the probable costs of the rule...”

* See Discussion on Slide 18

ADDED TO A.R.S. § 41-1056 FROM HB 2744

➤ 41-1056(A)(10)

➤ “A determination that the rule is not more stringent than a corresponding federal law unless there is statutory authority to exceed the requirements of that federal law.”

➤ 41-1056(A)(11)

➤ “For rules adopted after July 29, 2010 that require issuance of a regulatory permit, license or agency authorization, whether the rule complies with section 41-1037.”

➤ 41-1056(B)

➤ “An agency may also include as part of the report the text of a proposed expedited rule pursuant to section 41-1027.”

➤ 41-1056(C)

➤ Clarified that Council shall not approve a 5YRR unless it complies with section 41-1056(A) by adding “of this section.”

➤ 41-1056(D)

➤ Council may review rules outside the 5YRR process if requested by at least four council members.

ADDED TO A.R.S. § 41-1056 FROM HB 2744

➤ 41-1056(E)

- An agency may be required (no earlier than 6 months from after date of Council Meeting) to amend or repeal a rule **IF** the Council determines a rule is **materially flawed** based on its analysis under subsection (A), including demonstration that the rule:
 - Is not authorized by statute;
 - Is inconsistent w/ statutes, rules, or enforcement policies, which results in significant burden on the regulated public;
 - Imposes probable costs that significantly exceed the probable benefits w/in this state;
 - Is more stringent than federal law (w/ no authority to be more stringent);
 - Violates section 41-1037 [general permit requirement]; **OR**
 - Does not rely on scientific or reliable principles and methods, if rule relies on such and a person has submitted an analysis questioning their validity;
 - See, A.R.S. § 41-1052(G) [factors to consider for scientific or reliable principles/methods]

➤ 41-1056(F)

- An extension of 1 yr. or less may be requested in writing for completing actions required under (E).
 - To Council – ID reason for extension and demonstrate good cause.

ADDED TO A.R.S. § 41-1056 FROM HB 2744

- **41-1056(G)**
 - An agency required to amend or repeal a rule under subsection (E) must notify Council when the action is completed.
 - If the agency fails to complete the required action by the expiration date set by Council, the rule automatically expires.
 - Council will file a Notice of Rule Expiration w/ the SOS and notify the agency
- **Other changes**
 - Renumbering of subsections related internal citation corrections throughout.

REMOVED FROM A.R.S. § 41-1056 PER HB 2744

- **41-1056(A)(4)**
 - Analysis of the agency views regarding the wisdom of the rule
- **41-1056(K)**
 - Removed reference to compliance with only Article 3
 - As such, now refers broadly to requirements of “this chapter”
- **41-1056(L)**
 - Removed the requirement that the Council must send 5YRR reminder letters to the Governor and the ADOA Director.
- **41-1056(H)**
 - Repealed this subsection- Yearly reporting on progress toward completion of the course of action established is NO LONGER REQUIRED.
- **Other Changes**
 - Renumbering of subsections related internal citation corrections throughout.

WHAT DOCUMENTS MAKE UP A 5YRR ?

According to A.R.S. § 41-1056(A)(1) – (A)(11) and A.A.C. R1-6-301:

1. 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).
- Any rule not reviewed because the Council rescheduled the review under A.R.S. 41-1056(H).

2. Concise Analysis of the following for each rule reviewed:

- Effectiveness in achieving objective
- Written criticisms received during past five years
- Statutory authority
- Consistency
- Enforcement
- Clarity, conciseness, and understandability
- Economic Impact Statement (EIS)
- Business competitiveness analysis
- Previous 5YRR follow up
- Costs vs. Benefits/Least Burden
- Stringency compared to federal law
- A.R.S. § 41-1037 [General Permits] compliance

NOTE¹: Wisdom of the rules no longer required to be analyzed.

NOTE²: Text of proposed expedited rules may also be included. See, A.R.S. § 41-1056(B)

CONCISE ANALYSIS. WHAT DOES THAT EVEN MEAN?

What does R12-4-406 do?

List wildlife that are restricted for ownership in the absence of an exception (this is, admittedly, over-simplified).

Why was R12-4-406 created? To prevent something? To protect?

What makes a statement conclusory?

- Conclusions deal with the “what”

Are these statements conclusory?

The rule effectively meets its objectives.

The rule imposes the least burden on persons regulated by the rule.


Let's start with what it does NOT mean.

Conclusory

Consisting of or relating to a conclusion or assertion for which no supporting evidence is offered.

<http://www.merriam-webster.com/dictionary/conclusory>

REMAINING ITEMS OF ANALYSIS

- Effectiveness in achieving objective
 - **Written criticisms** received during past five years
 - **Statutory authority**
 - Consistency
 - Are the rules enforced as written?
 - Clarity, conciseness, and understandability
 - **EIS**
 - Business competitiveness analysis
 - **Previous 5YRR follow up**
 - **Costs vs. Benefits/Least Burden**
 - Stringency compared to federal law
 - A.R.S. § 41-1037 [General Permits] compliance
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SCIENTIFIC OR RELIABLE PRINCIPLES OR METHODS

A.R.S. § 41-1052(G)

Scientific/reliable principles/methods must be specific, not general;

Factors Council shall consider in determining reliability/validity:

The author's knowledge of the study subject matter;

That the study is:

Based on sufficient facts/data;

Product of reliable principles/methods;

Subjected to peer review publications;

Known or potential error rate has been ID'd along with its basis; and

Methodology and approach are generally accepted in the scientific comm.

NOTE: Studies must be disclosed in the report if the rule relies on it; otherwise, this analysis is not required in the report.

STATUTORY AUTHORITY

Although the language may vary, general authority typically looks something like this: “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 this: “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.

- **The difference is that this specific authority is just that- specifically related to implementing rules for an enumerated activity or subject matter.**

EIS

As outlined in A.A.C. R1-6-301(A)(8), an agency must provide either:

1. 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 making of the rule;

(i.e., the current economic impact versus the anticipated economic impact).


—OR—

2. If no economic, small business, and consumer impact statement was prepared on the last making of the rule, an assessment of the actual economic, small business, and consumer impact of the rule.

(i.e., the actual impact of the rules today since there is no comparison available).



PREVIOUS 5YRR FOLLOW UP

- Former proposed action (if any) should have contained a month/year in which the agency committed to complete a certain action. See, A.A.C. R1-6-301(A)(10) and (A)(14).
 - Here, an agency is required to report back on its last 5YRR and tell whether/how it completed the previously proposed course of action –OR– explain why such action has not occurred.
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COST VS. BENEFIT/LEAST BURDEN

- “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.” A.A.C. R1-6-301(A)(11).
 - If there is ANYTHING the agency proposes to change with the rules, arguably the rules do not impose the **least** burden and/or costs.
 - An agency may state something to this extent (if applicable):
 - “By making the changes proposed in this report, the agency believes these rules will impose the least burden...”
 - This should not be a conclusory statement but should be supported by analysis showing:
 - How the agency determined that the rule imposes the least burden/cost;
 - A comparison of the burdens/costs of the rule with any alternatives that were considered and why they were not used; or
 - Analysis of any numbers/data that support the agency’s determination.

EXTENSION TO FILE A 5YRR

A.R.S. § 41-1056(J)

If an agency finds that it cannot provide the written report to the council by the date it is due, the agency may file an extension with the council **before the due date indicating the reason for the extension**. The timely filing for an extension permits the agency to submit its report on or before the date prescribed by the council. (Emphasis added).

A.A.C. R1-6-303. Extension to File a Five-year Review Report

- A. An agency may obtain an **extension of 120 days** to file a five-year review report by filing a written notice of extension with the Council before the due date of the report. The agency **shall specify in the notice the reason for the extension**.
- B. An agency may request **one extension of more than 120 days but less than 181 days** to file the report by sending a written request to the **Chair at least 40 days prior to the due date of the report**. The agency shall **specify the length of the requested extension and the reason for the requested extension**.

1. A request for an extension of more than 120 days but less than 181 days shall be placed on the agenda of a Council meeting scheduled to occur prior to the due date of the report.

2. Council shall consider the extension request and may grant a request that is greater than 120 days but shall not grant an extension request that exceeds 180 days.

(Emphasis added).

NOTE: Council staff provides notice to agencies of upcoming 5YRRs 90 days before the due date of the report. A.R.S. § 41-1056(L). One year of upcoming 5YRRs is available on the GRRC website at <http://www.grrc.state.az.us/forms-and-reports/5-year-review.asp>

RESCHEDULING A 5YRR

A.R.S. § 41-1056(H)

The council may reschedule a report or portion of a report for any rule that is scheduled for review and that was initially made or substantially revised within two years before the due date of the report as scheduled by the council. (Emphasis added).

See also, A.A.C. R1-6-302 (listing requirements for a request to reschedule), essentially:

- ID rules to be rescheduled; and

- A description of the change(s) that qualify the rules to be rescheduled.

(substantial revision typically means that every rule within an article has been changed in a substantive way)

NOTE: Rescheduling is done at the discretion of the Chair.

New GRRC rules eliminate the restriction that the request to reschedule not be filed more than 90 days before the due-date of the report and allows the Chair to reschedule a 5YRR on the Chair's own initiative. See, GRRC Notice of Proposed Rulemaking, A.A.C. R1-6-302 at 19 A.A.R. 806, April 26, 2013.

Please network and build relationships among other rulewriters, who can provide you with support and guidance. Networking can be a valuable tool for providing you with years of knowledge regarding layout, analysis, pitfalls to avoid, and advice on best practices for 5YRRs and rulemakings alike.

ADDITIONAL QUESTIONS



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