

# ARIZONA

GOVERNOR'S REGULATORY  
REVIEW COUNCIL

## Rulemaking

Presented by:

*Krishna R. Jhaveri, Esq.*

*(602) 542-2024/[krishna.jhaveri@azdoa.gov](mailto:krishna.jhaveri@azdoa.gov)*

*Simon Larscheidt, Esq.*

*(602) 542-2015/[simon.larscheidt@azdoa.gov](mailto:simon.larscheidt@azdoa.gov)*

*GRRC Staff Attorneys*

### **DISCLAIMER:**

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

# *THE “PLAYERS”*

- ▶ Arizona Legislature – passes legislation which grants rulemaking authority to agencies to implement broad policy
- ▶ Agencies - implement rules that fill gaps in broad policy, except in instances where detail is provided in statute
- ▶ The Public - any “person,” including individuals and organizations
  - ▶ Rules may not be approved unless an agency adequately addresses comments from the public.
- ▶ Governor’s Office – rulemaking moratorium (Executive Order 2020-02)

# *THE “PLAYERS”*

- ▶ Secretary of State’s Office – the “keeper of the rules”
- ▶ GRRC – final approval authority over most rules
- ▶ Courts – decisions have dealt with:
  - ▶ Agency policies not adopted in rule
  - ▶ Rules inconsistent with statute
  - ▶ Rules invalid because an agency did not follow the A.P.A.

# ***THE LAWS OF RULEMAKING***

- ▶ **An agency's statutes**
  - ▶ Create authority, responsibilities, and program direction
- ▶ **Administrative Procedure Act (A.P.A.): A.R.S. Title 41, Chapter 6**
  - ▶ Procedures to make a rule - Article 3
  - ▶ GRRC authority - Article 5
- ▶ **Secretary of State rules: A.A.C. Title 1, Chapter 1**
  - ▶ Standards for publication
- ▶ **GRRC Rules: A.A.C. Title 1, Chapter 6**
  - ▶ Rule review procedures
- ▶ **Also: Federal and AZ Constitutions, Applicable Federal Laws**

## **REMINDER**

Throughout a rulemaking, make sure you are using the most recent version of all laws.

# **TYPES OF RULEMAKING**

**Regular** – See generally A.R.S. §§ 41-1021 through 41-1024, and 41-1052

## **Exempt**


- ▶ Under A.R.S. § 41-1057 - See generally A.R.S. §§ 41-1021 through 41-1024, and 41-1044
- ▶ Under the agency's statutes or session law or A.R.S. § 41-1005

**Emergency** – See generally A.R.S. §§ 41-1026 and 41-1044

**Expedited** – See generally A.R.S. §§ 41-1027 and 41-1053

## **REMINDER**

Before beginning any rulemaking activities, an Agency must receive an exemption from Executive Order 2020-02 via an email from its policy advisor in the Governor's Office.

-  A copy of the written request and the email granting the exemption must be included with any applicable rulemaking submission.

# Exempt Rulemaking

- ▶ How broad is your exemption?
  - ▶ **A.R.S. 41-1005** exemptions: The entire APA
  - ▶ **A.R.S. 41-1057** exemptions: Article 5 (GRRC)
  - ▶ Statutory or Session Law exemptions: It depends.
- ▶ Fees made under an exemption:
  - ▶ **A.R.S. 41-1008(E)**: A fee that is established or increased through exempt rulemaking is effective for two years unless the Council grants an extension.
  - ▶ **A.R.S. 41-1008(F)**: After two years, an agency shall not charge or receive the fee unless it has completed a regular rulemaking to establish or increase the fee.



# *Exempt Rulemaking*

## 2016 LEGISLATION – Established A.R.S. 41-1095:

For an agency that the legislature has granted a one-time rulemaking exemption, within one year after a rule has been adopted the agency shall review the rule adopted under the rulemaking exemption to determine whether any rule adopted under the rulemaking exemption should be amended or repealed.

**Note: This review is known as a One Year Review Report (1YRR).**

# *Emergency Rulemaking*

- ▶ If an agency makes a finding that a rule is necessary as an emergency measure, the rule may be made, amended, or repealed:
  - ▶ Without the notice prescribed by sections **41-1021** and **41-1022** and prior review by the Council,
  - ▶ If the AG approves the rule first and it is filed with the SOS.
- ▶ Emergency rules are valid for 180 days after filing with the SOS and may be renewed for 180 additional days if six conditions are met in **A.R.S. 41-1026(D)**.

# *Expedited Rulemaking*

- ▶ See A.R.S. 41-1027 and 41-1053; R1-6-203, R1-6-204, and R1-6-205.
- ▶ Established in 2012 legislation
- ▶ An increasingly used process after 2017 statutory changes
- ▶ **A.R.S. 41-1027(A)** - An agency may conduct expedited rulemaking if the rulemaking does not 1) increase the cost of regulatory compliance, 2) increase a fee, or 3) reduce procedural rights of persons regulated and does one or more of the following:

# *Expedited Rulemaking*

- ▶ 1. Amends or repeals rules made obsolete by repeal or supersession of an agency's statutory authority.
- ▶ 2. Amends or repeals rules for which the statute on which the rule is authorized has been declared unconstitutional by a court with jurisdiction, there is a final judgment and no statute has been enacted to replace the unconstitutional statute.
- ▶ 3. Corrects typographical errors, makes address or name changes or clarifies language of a rule without changing its effect.
- ▶ 4. Adopts or incorporates by reference without material change federal statutes or regulations pursuant to section **41-1028**, statutes of this state or rules of other agencies of this state.

# *Expedited Rulemaking*

- ▶ 5. Reduces or consolidates steps, procedures or processes in the rules.
- ▶ 6. Amends or repeals rules that are outdated, redundant or otherwise no longer necessary for the operation of state government.
- ▶ 7. Implements, without material change, a course of action that is proposed in a five-year review report approved by the council pursuant to section **41-1056** within one hundred eighty days of the date that the agency files the proposed expedited rulemaking with the secretary of state.
- ▶ 8. Adopts, without material change, rules of another agency of this state that has been or imminently will be consolidated into the agency.

**Note: An expedited rulemaking submission must state the specific basis under 1027(A) that justifies the expedited rulemaking. Citing only to 1027(A) is insufficient.**

# *Expedited Rulemaking*

- ▶ Three main benefits for agencies and rule writers:
  - ▶ No EIS required.
  - ▶ 30-day public comment period begins on date that Notice of Proposed Expedited Rulemaking is posted to agency website.
  - ▶ Automatic immediate effective date.

# Regular Rulemaking Procedure

## Docket Opening

- **A.R.S. § 41-1021** describes requirements
- Publish a Notice of Docket Opening in the Administrative Register by filing with the SOS
- A docket automatically terminates one year after publication if the Notice of Proposed Rulemaking is not filed.

## Stakeholder Input

- **A.R.S. § 41-1023**
- It is optional, but highly recommended, to informally meet with stakeholders for input.
- Stakeholders can include program staff, other agencies, the regulated public, the protected public, advocacy groups, agency AAG, etc.

## *A.R.S. 41-1023(A) and (B)*

- ▶ A. After providing notice of docket openings, an agency may meet informally with any interested party for the purpose of discussing the proposed rulemaking action. The agency may solicit comments, suggested language or other input on the proposed rule. The agency may publish notice of these meetings in the register.
- ▶ B. For at least thirty days after publication of the notice of the proposed rulemaking, an agency shall afford persons the opportunity to submit in writing statements, arguments, data and views on the proposed rule, with or without the opportunity to present them orally.



# Regular Rulemaking Procedure

## Draft Rules

- If amending an existing rule, download the rule from the SOS website.
- If the rule was recently amended, use the text of the final rules in the Administrative Register

## Draft EIS

- Prepare preliminary economic, small business and consumer impact statement.
- Consult **A.R.S. §§ 41-1035** and **41-1055**

# Regular Rulemaking Procedure

## Oral Proceeding Decision

- Decide whether an oral proceeding is necessary per **A.R.S. § 41-1023(C)-(F)**.
- An oral proceeding may be held no sooner than 30 days after Notice of Proposed Rulemaking is published.
- If anyone requests one, an agency must hold one.

## Notice of Proposed Rulemaking

- **A.R.S. §§ 41-1001(16)(a) and (b) and 41-1022.**
- Complete form for Notice of Proposed Rulemaking, which includes the preamble, table of contents and text of rule.
- File with SOS.

## *Oral Proceedings*

- ▶ Oral proceedings must be conducted in a manner that allows discussion and opportunity for questions.
- ▶ If not included in the Notice of Proposed Rulemaking and a proceeding is requested, another notice will be required (this delays the process by about 2 months).

# Regular Rulemaking Procedure

## Interested Persons

- **A.R.S. § 41-1022(C):** When an agency files a notice of the proposed rulemaking with the SOS, the agency shall notify each person who has made a timely request for notification of the proposed rulemaking and to each person who has requested notification of all proposed rulemakings.

## Rulemaking Record

- Maintain information required in **A.R.S. § 41-1029.**

## Public Comments

- Accept written comments for at least 30 days
- Respond (if necessary/appropriate) to comments
- Hold oral proceeding (recommended)

# Regular Rulemaking Procedure

## Close of Record

- Date the agency chooses as deadline for public comment (it is recommended that this date be included in the Notice of Proposed Rulemaking)

## Rule Revision

- Based on public comments or internal review, decide whether rules will be revised.
- Assess if revisions are substantial as defined in **A.R.S. § 41-1025**.
- If a rule change is substantial, file a Notice of Supplemental (New) Proposed Rulemaking and allow 30 additional days for comment.

# A.R.S. 41-1025

- ▶ A. An agency may not submit a rule to the Council that is substantially different from the proposed rule contained in the notice of proposed rulemaking.
- ▶ B. In determining whether a rule is substantially different from the published proposed rule on which it is required to be based, all of the following must be considered:
  - ▶ 1. The extent to which all persons affected by the rule should have understood that the published proposed rule would affect their interests.
  - ▶ 2. The extent to which the subject matter of the rule or the issues determined by that rule are different from the subject matter or issues involved in the published proposed rule.
  - ▶ 3. The extent to which the effects of the rule differ from the effects of the published proposed rule if it had been made instead.

# Regular Rulemaking Procedure

## Submission

- Rule package includes: Cover Letter, email granting exemption (if applicable), NFR, EIS, copies of comments received (and responses), and current version of applicable statutory authority.
- Submit to GRRC.

## GRRC Staff Review

- Council staff reviews the submission, and may have comments and/or questions.
- Council staff has the authority to suggest revisions.

# Regular Rulemaking Procedure

## Council Review

- Agency attends Council Study Session and Council Meeting.
- Council may ask questions of an agency.
- Council approves or returns the rules in whole or in part

## Rule Effective

- Agency files approved rules with SOS
- Rule becomes effective 60 days after filing with SOS unless agency requests otherwise and meets the requirements in **A.R.S. § 41-1032(A)**.



# A.R.S. 41-1032

- ▶ A. A rule may only be effective immediately for any of the following reasons:
  - ▶ 1. To preserve the public peace, health or safety.
  - ▶ 2. To avoid a violation of federal law or regulation or state law, if the need for an immediate effective date is not created due to the agency's delay or inaction.
  - ▶ 3. To comply with deadlines in amendments to an agency's governing statute or federal programs, if the need for an immediate effective date is not created due to the agency's delay or inaction.
  - ▶ 4. To provide a benefit to the public and a penalty is not associated with a violation of the rule.
  - ▶ 5. To adopt a rule that is less stringent than the rule that is currently in effect and that does not have an impact on the public health, safety, welfare or environment, or that does not affect the public involvement and public participation process.
- ▶ B. An agency may specify an effective date more than sixty days after filing of the rule if:
  - ▶ The agency determines that good cause exists, and
  - ▶ The public interest will not be harmed.

**Note: If requesting an immediate effective date in a regular rulemaking, it must cite to the specific basis under 41-1032 that allows for an immediate effective date.**

# *GRRRC Review of Rulemakings*

## A.R.S. 41-1052

- ▶ D. The council shall not approve the rule unless:
  - ▶ 1. The economic, small business and consumer impact statement contains information from the state, data and analysis prescribed by this article.
  - ▶ 2. The economic, small business and consumer impact statement is generally accurate.
  - ▶ 3. The probable benefits of the rule outweigh within this state the probable costs of the rule and the agency has demonstrated that it has selected the alternative that 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.
  - ▶ 4. The rule is written in a manner that is clear, concise and understandable to the general public.
  - ▶ 5. The rule is not illegal, inconsistent with legislative intent or beyond the agency's statutory authority.

# *GRRC Review of Rulemakings*

## A.R.S. 41-1052

- ▶ D. The council shall not approve the rule unless:
  - ▶ 6. The agency adequately addressed, in writing, the comments on the proposed rule and any supplemental proposals.
  - ▶ 7. The rule is not a substantial change, considered as a whole, from the proposed rule and any supplemental notices.
  - ▶ 8. The preamble discloses a reference to any study relevant to the rule that the agency reviewed and either did or did not rely on in the agency's evaluation of or justification for the rule.
  - ▶ 9. The rule is not more stringent than a corresponding federal law unless there is statutory authority to exceed the requirements of that federal law.
  - ▶ 10. If a rule requires a permit, the permitting requirement complies with section 41-1037.