

**Five-Year-Review Report
Title 2, Chapter 17, Article 1
Water Quality Appeals Board**

Introduction

The Water Quality Appeals Board (WQAB) has adopted rules as authorized by statute to conduct hearings regarding appeals and renders decisions between individuals and public or private entities that have been denied a permit by the Arizona Department of Environmental Quality. These rules were originally adopted effective January 8, 1998 and include Chapter 17 consisting of Article 1, Sections R2-17-101 through R2-17-128, inclusive.

The Board conducted a five-year-review of these rules that were approved by GRRC Council on March 3, 2009. That report indicated the Board's course of action was to amend the rules to update them as the rules had not been amended since they were originally adopted. As the Board proceeded with the rulemaking, the rule moratorium came into effect. After further discussion, the Board made the determination to place the rulemaking on hold indefinitely because the Board does not believe that the proposed amendments meet the criteria necessary for an exception to the rule moratorium. In January of 2011, two new members were appointed to the Board to replace the two outgoing members. The new Board reviewed the work completed by the previous Board and after thorough discussion, recommended that no action needed to be taken on the rules as they have been functioning as they were originally adopted to do. The Board has once again changed over two-thirds of its membership.

1. General and specific statutes authorizing the rules:

A.R.S. §49-322 (D) – Provides specific authority for the rules

2. Objective of the rules including the purpose for the existence of the rules:

R2-17-101 Scope of Article; General Considerations

The rules of procedure state the applicability of the rules to the Water Quality Appeals Board in order for the Board to govern all appeals taken under A.R.S. § 49-323. The rule also allows the Board to refer to the Arizona Rules of Civil Procedure for guidance in instances where a procedure is not established by law, but the Board or the parties are not bound by these procedures unless the Board issues an order to that effect.

R2-17-102 Definitions

This rule defines terms used in appeals. The definitions are necessary for understanding the terminology used throughout these rules.

R2-17-103 Commencement of an Appeal; Copies; Informal Settlement Conference

This rule discusses how to file an appeal and how to request an informal settlement conference. The rule is necessary so that individuals understand how to do and complete these two processes.

R2-17-104 Docket; Case Number; Information on Documents

This rule sets forth what information has to be contained in an appeal. The rule is necessary so that individuals understand what information they must provide on required documents for an appeal.

R2-17-105 Filing and Service of Pleadings, Motions, or Other Documents

This rule defines the procedures in which documents are filed. The rule is necessary so parties understand what they are required to follow for filing and service of pleadings, motions, or other documents.

R2-17-106 Computation of Time

This rule discusses the computation of additional time after service by mail.

R2-17-107 Contents of a Notice of Appeal

This rule sets forth what needs to be contained in the Notice of Appeal. Appendix A provides the form to use. The rule is necessary for parties to understand what must be included with a notice of appeal and provides the form for the party to use.

R2-17-108 Time for Filing an Answer to a Notice of Appeal

This rule sets forth the amount of days within which a party shall file an answer to the Notice of Appeal. The rule is necessary so individuals know how many days they have to file an answer to the notice of appeal.

R2-17-109 Content of an Answer to a Notice of Appeal

This rule sets forth the information that should be in an answer of a Notice of Appeal. The rule is necessary so that parties understand what information is required to be provided in an answer to a notice of appeal.

R2-17-110 Prehearing Disclosure

This rule discusses what each party shall disclose in writing to every other party. The rule is necessary so parties disclose the required information to every other party and within the timeframe set forth within the rule prior to the hearing.

R2-17-111 Depositions

This rule gives the Board the right to allow a deposition of a witness who cannot be subpoenaed or is unable to attend the hearing as well as designating the responsible party for the deposition expense. The rule is necessary so the Board may allow for a deposition of a party who can't attend the hearing and requires the party requesting the deposition to pay for the expenses of it.

R2-17-112 Motions

This rule discusses how a motion is made, and how a response is filed to the motion. The rule is necessary so a party understands how to make a motion and how to file a response to that motion.

R2-17-113 Duties of the Board During a Hearing

This rule distinguishes what the Board is required to do during a hearing and what actions the Board may do during a hearing. The rule is necessary so the Board has clear guidelines on their duties and actions they make take during the course of a hearing.

R2-17-114 Location of Hearings

This rule requires that all hearings be held in Maricopa County, unless the Board determines the hearing should be held elsewhere. The rule is necessary so that parties know the location of the hearings.

R2-17-115 Notice of Hearing

This rule sets forth the time allowed to set a date for the hearing and the information that the notice of hearing must provide. The rule is necessary so that parties understand the timeframe allowed in setting a date for a hearing and the information required to be included in the notice of hearing.

R2-17-116 Consolidation

The rule provides the Board the ability to consolidate two or more appeals involving a common question of law.

R2-17-117 Continuances

This rule states when a party can move for a continuance of a hearing, with whom the motion is filed and the response time for an opposing party. The rule is necessary so that parties understand the process when a move for a continuance of a hearing is requested.

R2-17-118 Subpoenas

This rule states how a subpoena is requested, complying with a subpoena, and how to quash a subpoena. The rule is necessary so that all parties involved understand actions regarding subpoenas.

R2-17-119 Prehearing Conferences

This rule states who can request a Prehearing conference and the action required of the Board. The rule is necessary so that parties understand the process to request a prehearing conference and the role of the Board as it relates to that request.

R2-17-120 Hearing

This rule states how the Board shall conduct the hearing. The rule is necessary as it provides clear guidelines for the Board to follow in conducting a hearing and for parties to understand how the Board conducts a hearing.

R2-17-121 Evidence

The purpose of this rule is to inform the parties of the types of evidence permitted at the hearing, presentation of direct testimony, cross-examination of parties or witnesses, and how documentary evidence will be handled at the hearing. The rule is necessary so that parties understand the procedures during a hearing in regards to evidence.

R2-17-122 Recording Hearings

This rule states that the Board may tape record the hearing or have the hearing recorded by a court reporter. The rule is necessary so that the meeting or hearing is properly recorded and is available for review by interested parties.

R2-17-123 Ex Parte Communications

The purpose of this rule is to put all parties and the Board on notice that ex parte communications are prohibited. The rule also sets forth the proper procedure to be followed if an ex parte communication occurs.

R2-17-124 Notification of Decisions and Orders

The purpose of this rule is to require that the Clerk notify each party of all decisions and orders promptly, by either delivering or mailing copies of all decisions and orders. The rule is necessary so that parties are provided prompt notification of all decisions by the Board.

R2-17-125 Decision of the Board

If the Board chooses to use the Office of Administrative Hearings, the Board shall review the decision and accept, reject or modify it. The rule also sets forth the requirements for Board decisions. The rule is necessary so that the Board has actions they must follow in rendering decisions and parties understand the actions the Board can take in making their final decisions.

R2-17-126 Rehearing or Review of Decision

The purpose of this rule is to set forth a party's rehearing rights, the deadline for filing for rehearing and the Board's duties regarding petitions for rehearing. The rule is necessary so that parties understand their requirements and rights to a rehearing or a review of decision.

R2-17-127 Judicial Review

The purpose of this rule is to inform parties on notice of their right to judicial review. The rule is necessary so parties understand their right to a judicial review.

R2-17-128 Record

The purpose of this rule is to require the Board's Clerk to maintain a case record for at least five years. The rule is necessary in providing case history in the event information needs to be reviewed by the Board or interested parties.

Appendix A

Establishes the form to be used for filing an appeal. Appendix A is necessary so parties have a standard form for filing an appeal.

Appendix B

Establishes the form to be used for filing a notice of hearing. Appendix B is necessary so parties have a standard form for filing a notice of hearing.

3. Effectiveness of the rules in achieving the objective, including a summary of any available data supporting the conclusion reached:

The following rules effectively achieve their objectives.

4. Consistency of the rules with state and federal statutes and rules, and a listing of the statutes or rules used in determining the consistency:

The rules are consistent with other rules and statutes and are internally consistent.

5. Agency enforcement policy, including whether the rules are currently being enforced and, if so, whether there are any problems with enforcement:

The Water Quality Appeals Board enforces all the rules.

6. Clarity, conciseness, and understandability of the rules:

All of the rules are generally clear, concise, and understandable. In the Five Year Review Report approved by Council in March of 2009, the Board at that time indicated amending both R2-17-122 and R2-17-125 so that they are generally clear, concise, and understandable. The Board began a rulemaking, but made the decision to place it on hold indefinitely due to the rule moratorium that took effect. In January of 2011, two-thirds of that Board was replaced with new members. The new Board made the determination that the rules do not need to be amended and continue to be functional in addition to being clear, concise, and understandable.

7. Summary of the written criticisms of the rules received by the agency within the five years immediately preceding the five-year review report, including letters, memoranda, reports, written analysis submitted to agency questioning whether the rules are based on valid scientific or reliable principles or methods, and written allegations made in litigation or administrative proceedings in which the agency was a party that the rules are discriminatory, unfair, unclear, inconsistent with statute, or beyond the authority of the agency to enact, and the result of the litigation or administrative proceedings:

The Board has not received written criticisms regarding any of the rules during the last five years.

8. A comparison of the current economic, small business, and consumer impact of the rules with economic, small business, and consumer impact statement prepared on the last rulemaking of the rule or, if no economic, small business, and consumer impact statement was prepared on the last rulemaking of the rule, an assessment of the actual economic, small business, and consumer impact of the rules:

The information provided with the previous Five Year Review Report approved by Council in March 2009 indicated that the economic impact of the rules had not differed significantly from that projected in the economic impact statement submitted in March 1998, when these rules were last amended. At that time, the number of hearings heard each year varied and prior to 1998 there were a total of four hearings.

Under the current Board, hearing activity has remained somewhat consistent in that there were four hearings heard by this Board during the last year.

9. Any analysis submitted to the agency by another person regarding the rule's impact on this state's business competitiveness as compared to the competitiveness of businesses in other states:

None

10. If applicable, how the agency completed the course of action indicated in the agency's previous five-year review report:

Not applicable

11. A determination that the probable benefits of the rules outweigh within this state the probable costs of the rules, and the rules impose the least burden and costs to persons regulated by the rules, including paperwork and other compliance costs necessary to achieve the underlying regulatory objective:

The Board believes that the rules impose the least burden and costs to individuals, public and private entities regulated by these rules. The Board has made every effort to ensure that the rules of procedure to govern hearings before the Board are followed and provides a fair, impartial process for rendering decisions on appeals while maintaining a process that is efficient, cost effective and necessary to achieving the regulatory objectives for the Board.

12. A determination that the rules are not more stringent than a corresponding federal law unless there is statutory authority to exceed the requirements of that federal law, indicating whether:

- a. There is a similar regulatory framework governing the same subject matter under federal law,

Not applicable

- b. The rules are more restrictive than a similar requirement in federal law, and

Not applicable

- c. There is statutory authority for more restrictive requirements than those in federal law.

Not applicable

13. For a rule adopted after July 29, 2010, that requires issuance of a regulatory permit, license or agency authorization, whether the rule complies with A.R.S. §41-1037, indicating whether:

- a. The rule requires issuance of a regulatory permit, license, or agency authorization;

The Board indicates that the rules are not applicable to the requirements imposed by A.R.S. § 41-1037 as the rules were adopted prior to July 29, 2010.

- b. The permit, license, or agency authorization falls within the definition of “general permit” in A.R.S. §41-1001, if a permit, license or agency authorization is issued; or

Not applicable as answer was provided in 13(a).

- c. An exception applies under A.R.S. §41-1037, if a general permit is not issued.

Not applicable as answer was provided in 13(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.

The course of action noted in the previous Five-Year Review Report approved by Council in March of 2009 indicated action on Sections R2-17-101 through R2-17-128. Since the previous Five-Year Review Report, the Board has experienced three turnovers in membership and thus, has directly resulted in differentiating views as to whether the rules should be amended or not. In addition, the previous Board decided not to move forward on a draft rulemaking as they believed amendments did not meet the criteria for an exception to the rule moratorium.

This current Board is in the process of reviewing the rules. Once the review of the rules is completed, the Board will open a docket, if the Board deems it necessary, at the 18-month target date the Board has set upon Council approving this report. The 18-month period will allow the Board to review the rules and previous rulemaking activity, decide whether a new rulemaking is necessary, take stakeholder input, and prepare a draft rulemaking.