

# FIVE-YEAR-REVIEW REPORTS

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# Purpose of the Council

- ▣ “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 are we doing this, again?

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  - Determine “whether any rule should be amended or repealed” – A.R.S. § 41-1056(A);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

Determine

Discover

Assemble & Preserve

Prevent

# Which rules are we to review?

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

# GRRC's 2013 Rulemaking

- ▣ In response to amendments to 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, include, 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.

# What does a report contain?

- Assessing the wisdom of the rules is no longer required as part of the five-year-review report.
- 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).
    - Any rule not reviewed because the Council rescheduled the review under A.R.S. 41-1056(H).

# What does a report contain?

- Concise analysis of the following for each rule:
  - Are the rules effective in achieving their objectives?
  - Have any written criticisms of the rules been received during the past five years?
  - What is the statutory authority for the rules?
  - Are the rules consistent with statutes and other rules?
  - Are the rules being enforced as written?
  - Are the rules clear, concise, and understandable?
  - What is the current economic impact of the rules?
    - Was an EIS prepared?
  - Was a business competitiveness analysis submitted?
  - What did the previous five-year-review report say?
  - Does the rule impose the least burden and costs to persons regulated by the rule?
  - Are the rules more stringent than federal law?
  - Are the rules in compliance with A.R.S. § 41-1037 [General Permits]?

# 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.
  - For example, a five-year-review report that states the objective of a rule is to “list the definitions related to...” would be insufficient, not only for stating the objective, but also for analyzing whether the rule is achieving its intended purpose.
  - A better objective statement would say something like “this rule was adopted to prevent \_\_\_\_\_ by \_\_\_\_\_.”
- 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!
    - ▣ Let's party.
  - 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.

# 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 making of the rule or,
  - **IF AN EIS WAS NOT PREPARED:** An assessment of the actual economic, small business, and consumer impact of the rule.

# Economic Analysis, Part Deux

- ▣ GRRC is still seeking to fill the Economist position.
  - This does not mean that your economic analysis should be taken for granted.
  - The vacancy will likely cause Council members to look at economic questions even more closely than before.

# 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 for a particular rule, a simple statement to that effect should be included for that rule.
- ▣ 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 a there is statutory authority to exceed the requirements of federal law. A.R.S. § 41-1056(A)(12).
- ▣ Do no federal laws apply? Simply say so.
- ▣ Does federal law apply? If so, 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.

# 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)
  - “ [A] regulatory permit, license or agency authorization that is for facilities, activities or practices in a class that are substantially similar in nature and that is issued or granted by an agency to a qualified applicant to conduct identified operations or activities if the applicant meets the applicable requirements of the general permit, that requires less information than an individual or traditional permit, license or authorization and that does not require a public hearing.”

# A.R.S. § 41-1037

- Analysis under this section should analyze applicable rules to ensure that they either:
  - Issues general permits under A.R.S. § 41-1001(10), or
  - Fall within an exception under A.R.S. § 41-1037(A).
- The A.R.S. § 41-1037(A) Exceptions are:
  1. A general permit is prohibited by federal law.
  2. The issuance of an alternative type of permit, license or authorization is specifically authorized by state statute.
  3. The issuance of a general permit is not technically feasible or would not meet the applicable statutory requirements.
  4. The issuance of a general permit would result in additional regulatory requirements or costs being placed on the permit applicant.
  5. The permit, license or authorization is issued pursuant to section 8-126, 8-503, 8-505, 23-504, 36-592, 36-594.01, 36-595, 36-595.03, 36-596, 36-596.54, 41-1967.01 or 46-807.
  6. The permit, license or authorization is issued pursuant to title V of the clean air act.

# Formatting the Report

- ▣ There is no precise formula or template for how an agency structures its five-year-review report, but certain elements must be contained under R1-6-301(A).
- ▣ Summarizing Tables are not allowed, as stated in R1-6-301(B).
  - Tables have allowed agencies to forgo analysis.

# Formatting the Report

- R1-6-301(B) states: “If the analysis for a category is identical for all of the rules in a report, the agency shall specify that the analysis within that category applies to all of the rules in the report.”
- Most categories of analysis under R1-6-301(A) may be analyzed together.
  - Certain categories, such as objectives, need to be analyzed separately, as each rule should have at least a slightly different objective.
- R1-6-301 requires an agency to provide a copy of the rules being reviewed and attach a cover letter signed by agency head containing:
  - Person to contact for information regarding the report;
  - Any rule not renewed with the intention that it expire;
  - Any rule not reviewed because the Council rescheduled review under A.R.S. § 41-1056(H); and
  - Certification that the agency is in compliance with A.R.S. § 41-1091.

# The Role of Council Staff

- ▣ A.R.S. § 41-1056(L): “Not less than ninety days before the due date of a report, the council shall send a written notice to the head of the agency whose report is due. The notice shall list the rules to be reviewed and the date the report is due.”
  - A list of agencies and their respective report due dates can be found on the GRRC website, which indicates the month and year by which the report shall be filed with GRRC 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.”

# The Role of Council Staff

- ❑ Once any necessary changes are made, the agency shall then submit a final electronic and hard copy of the entire report.
- ❑ 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.
  - If an agency desires an extension of more than 120 days but less than 181 days, it must, under R1-6-303, send a written request to the Chair at least 40 days prior to 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.

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.

MY CONTACT INFORMATION:

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**THANK YOU!**