

EPA's Action Development Process

Administrative Records Guidance



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What is the purpose of this document?

This document describes EPA's practices for compiling administrative records for use in litigation challenging EPA decisions. The principles outlined below are intended to help inform EPA personnel about basic principles for record compilation, provide information to the public on how EPA compiles records, and to contribute to an orderly process for judicial review based on a complete record. This document is consistent with the US Department of Justice recommendation that agencies develop guidance on the compilation and contents of the administrative record. (Memorandum from Ronald J. Tenpas, Assistant Attorney General, to Selected Agency Counsel, December 23, 2008.)

Filing a complete administrative record is critical to defending EPA decisions in court. Where litigation is likely, it is also very important to focus on record development through the entire process of decision-making. This document reflects both case law and long-standing Agency practice in compiling and defending administrative records for EPA decisions.¹

Specifically, this document is intended to:

- Clarify EPA's practice regarding which documents would generally be included and which documents would generally not be included in the administrative record for an EPA decision that has been or will be challenged in Court and is reviewable under the Administrative Procedure Act (APA).
- Provide assistance to EPA personnel in assembling these administrative records. While decisions about what to include in an administrative record depend upon many factors that will be specific to each statutory mandate and decision-making process, there are some general principles that should aid this process and reduce the time, effort and transaction costs in assembling administrative records in response to a court challenge and in addressing the potential consequences of having an inadequate record.
- Enhance the defensibility of EPA decisions by ensuring that the underlying administrative record includes all relevant information that EPA considered and any necessary responses to that information.

The development of administrative records is a highly case-specific endeavor and these recommendations do not address all questions concerning these administrative records. However, this document should provide clarity and assistance for the most often-asked questions pertaining to administrative records. Questions that are not addressed in this document should be

¹ Note that some Agency programs have developed specific guidance for their programs or have statutory or regulatory provision that govern record compilation; for example, Comprehensive Environmental Response Compensation and Liability Act (CERCLA) response actions and Clean Water Act (CWA) State water quality standards (WQS) approval decisions. While this guidance is intended to be consistent with those programs, those more specific provisions or guidance concerning record compilation govern.

referred to the Office of General Counsel (OGC) or Regional attorney working on a particular matter. We may update this document as necessary to address additional issues.²

What is the “administrative record”?

The administrative record filed with a court is the set of non-deliberative documents that the decision-maker considered, directly or indirectly (e.g., through staff), in making the final decision.³ The record should include all the factual, technical, and scientific material or data considered in making the decision, whether or not those materials or data support the decision.

- If the decision-making process included one or more public comment periods, the administrative record will include all public comments submitted to EPA as part of those comment periods, whether or not those comments support EPA.
- Note that the “administrative record” for an action does not necessarily include all documents related to a matter that are official government records under the Federal Records Act. For example, official internal memoranda related to an action may be agency records but not part of the “administrative record” because they are deliberative, as discussed below.

Why are administrative records important?

EPA’s decisions are generally subject to court review under the Administrative Procedure Act (APA). The APA provides that review of agency actions is based on the “whole record.” When an EPA final action is challenged, EPA generally is required by the Court to file its administrative record with the Court and make the record available to the litigating parties.

- The administrative record is the “whole record” under the APA; it is where the courts look to determine whether the agency action was reasonable and consistent with applicable legal requirements. (For the leading Supreme Court case on judicial review of agency actions under the APA, please see *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971)).

The standard of review courts use when reviewing an agency action under the APA is whether an agency action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” One frequently cited standard for making this determination is whether

² Please note that this guidance is intended to address compilation of “administrative records” for purposes of litigation challenging an Agency decision. It does not address record compilation and retention requirements pursuant to discovery orders or litigation hold memoranda; such compilations may be far broader than the administrative record for the Agency action at issue.

³ A number of different phrases with the same meaning may be used interchangeably to describe the contents of the administrative record. For example, the administrative record may be referred to as the set of documents that “provides the basis” or “forms the basis” for an action; that the agency or decision-maker “considered”; that the decision-maker “considered either directly or indirectly”; or that the agency or the agency decision-maker “relied on.”

the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *Overton Park* at 416. Filing a complete record with the court helps the Agency demonstrate that it considered the relevant factors in making its decision and made a reasonable judgment in light of all the relevant facts.

There can be significant costs to the Agency in compiling an inadequate record. An incomplete record may mean that the Agency action is overturned by a reviewing court or remanded for additional explanation. That in turn can require additional staff time and resources. In addition, some courts faced with an inadequate record will allow supplementation of the record by the opposing parties or will allow discovery, which can also be very time- and resource-intensive. Compilation of a complete administrative record will help the Agency avoid these adverse consequences in litigation.

What is the goal of the administrative record?

In assembling an administrative record for court review, the goal is to have an administrative record that:

(1) contains all non-deliberative⁴ information EPA is aware of that is relevant to the decision and that was considered directly or indirectly by the decision-maker, including information that supports or is contrary to the action taken by EPA; and

(2) explains why EPA's action is reasonable and consistent with statutory and regulatory requirements, and specifically how EPA reviewed any contrary information and why EPA came to the decision that it did notwithstanding that information.

The administrative record should, as a result, fairly represent all relevant factual information and contrary views provided to the Agency. As noted above, it is very important to have an adequate administrative record because the lack of an adequate record may result in an adverse court decision overturning the EPA decision or ordering supplementation of the record through, for example, written discovery or depositions of Agency employees.

Why are deliberative materials not part of the record?

The administrative record does not include materials that solely reflect the internal deliberative processes of decision-making within EPA or within the Executive Branch of the federal government. In its seminal *Overton Park* decision on court review of Agency action under the APA, the Supreme Court held that judicial inquiry into the deliberative process of

⁴ A note on “deliberative” documents as opposed to “deliberative process privileged” documents: this guidance discusses “deliberative” materials; while that term is also used in the Freedom of Information Act (FOIA) context to refer to documents subject to a “deliberative process privilege”, the use of the term “deliberative” in the administrative record context is not related to a privilege. As noted below under “publicly available deliberative documents”, the exclusion of deliberative documents from the record is based on relevance, not privilege. Most documents that are subject to a FOIA privilege (deliberative process, attorney-client, and work-product documents, for example) will also be excluded from the administrative record because they are internal and pre-decisional, and thus “deliberative”. However, a “deliberative” document does not need to be privileged in order to be excluded from the administrative record.

decision-makers is not permitted. Because the actual subjective motivation of Agency decision-makers is immaterial as a matter of law under *Overton Park*, documentation of the deliberations is also immaterial. See e.g. *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1324-26 (D.C. Cir. 1984) (noting weight of precedent and policy favoring exclusion of deliberative documents).

As a result, materials containing solely the policy advice, recommendations, or opinions of EPA or other federal government staff that were generated as part of the internal deliberative process for formulating the EPA decision are not generally part of the administrative record. These types of materials are generally excluded because they document the Agency's or Executive Branch's internal decision-making process and deliberations prior to the agency's final decision rather than providing or explaining the information that forms the basis for the decision.

Exclusion of deliberative materials is also important for practical reasons, including that revealing candid pre-decisional views and advice would chill internal discussion of important legal and policy matters, thereby reducing the quality of decision-making, that disclosure of internal deliberations may be misleading as to the actual basis for the decision, and that EPA does not generally keep or track all the internal pre-decisional material (e.g. every draft of the decision document) and to do so would be highly resource-intensive.

Because EPA's record will not generally include deliberative material, EPA should not refer to or rely on any of these materials in its decision documents. Where information in a deliberative document is needed to provide record support --- for example, where the document contains factual information or records policy decisions found nowhere else in the record, or where a relevant document, while labeled "draft," was not superseded by a final document --- the relevant information should be extracted and placed in a non-deliberative document (e.g. technical support document, memorandum to the record) before the final decision is issued. The non-deliberative document would be included in the administrative record; the deliberative document would not.

What kinds of documents are "deliberative"?

Deliberative documents are those that are prepared in order to assist an agency decision-maker in arriving at a decision and reflecting preliminary or candid internal views or advice of the kind that would be discouraged if the document were made part of the record for the decision. As discussed in more detail below, a "deliberative" document is one that is internal, that is pre-decisional, and that has deliberative content.

- Internal documents generally are documents (including emails) that are shared only among EPA employees. There are a few exceptions: "internal" also includes documents shared with other federal agencies during deliberations over the agency decision (but not formal memos or comments from another agency); documents generated by or shared with contractors working for the Agency on the matter; documents shared with co-

regulators, such as States, where the co-regulator is acting solely as a consultant for EPA's decision-making.

- Pre-decisional means the document must have been created before the decision. Drafts are usually pre-decisional. Documents announcing a decision are not.
- Deliberative content means that the document must reflect internal deliberations over a pending Agency decision. Generally, documents expressing personal ideas, staff opinions, recommendations or advice are deliberative, as are options papers, issue papers, management briefing documents, edits or comments on draft documents, draft decision and supporting documents. Documents that are factual are rarely deliberative. Documents conveying or explaining decisions are usually not deliberative. If a "recommendations" document is treated as a decision document (e.g. it is signed by the decision-maker), it is not deliberative. Documents providing solely non-substantive or factual information, such as meeting location, logistics, planning documents and meeting agendas are not generally deliberative.
- Documents that include both deliberative material and non-deliberative material (e.g., technical analysis or factual or scientific information) should be discussed with OGC or Regional attorneys; to the extent practicable, the scientific or factual material should be copied into a non-deliberative document and placed in the record.

Because the administrative record does not include deliberative documents, it would not generally include materials such as staff notes, internal e-mails discussing or evaluating various policy options or decision drafts, briefing papers and other staff advice, draft decision documents, staff attorney opinions or work product, or emails exchanging preliminary opinions or recommendations. These materials are excluded as deliberative regardless of whether they evidence conflicting opinions on the merits of scientific, technical or policy issues, contain recommendations for options not ultimately adopted by the Agency, or document preliminary views of the decision-maker that differ from the agency's final decision.

- The administrative record should, however, include the scientific or technical literature, technical analysis, and other factual information considered by the decision-maker, including his/her staff, in developing the Agency's final position. Such factual material is not usually considered to be deliberative. OGC or Regional attorneys should be consulted if the status of a possible record document is unclear.

What documents should generally be in EPA's administrative record?

Following are the major categories of materials that should be in decision records filed in court challenges to those decisions⁵:

⁵ Note that some programs have regulations that require specific items to be in an administrative record for those programs. For example, 40 CFR 124 specifies certain materials to be included in the administrative record for draft and final National Pollutant Discharge Elimination System (NPDES), Resource Conservation and Recovery Act

- **EPA information** considered in connection with the decision, including: the proposed action (if the decision was preceded by a public proposal), supporting technical information and analyses, reports, data files, graphs, charts, guidance, manuals, policies and directives, official meeting notes or transcripts, and documents shared between EPA and outside parties. The record also includes documentation to support findings under relevant statutory authorities, regulatory authorities, or executive orders, such as the economic analysis prepared pursuant to Executive Order (EO) 12866, analyses of the economic impacts on small entities prepared under the Regulatory Flexibility Act, and records of consultations required by the Unfunded Mandates Reform Act and consultations undertaken pursuant to EPA’s tribal policy.
- **Public process materials** including: correspondence with members of the public, transcripts from hearings, public comments submitted to EPA, and the responses to those comments.
- **Information shared with States.** Except in the unusual case where a State is acting solely as EPA’s consultant during a decision-making process, documents generated by, with, or shared among EPA and State personnel that are considered by EPA in connection with the decision are not likely to be considered “deliberative.” As a result, these documents should be in the administrative record even if the document is draft or reflects preliminary discussions between EPA and State personnel. Consult with OGC or Regional attorneys to determine the status of documents from, or shared with, State officials.
- **Other material EPA personnel considered** in connection with the decision, including correspondence and emails from other federal agencies that provide factual, scientific or technical information related to the decision or that reflect the other agencies’ official views about the EPA decision (e.g., under the Endangered Species Act (ESA), final biological opinions or concurrence on effects determinations); documents generated by EPA that memorialize phone calls that provided relevant factual information or public comments not otherwise provided in written form; and hard copy printouts of any website information that is cited in the decision or relied on. As discussed below, some inter-agency correspondence may be both deliberative (for example, expressing staff opinions) and non-deliberative (for example, providing technical information or decisions). Only the non-deliberative information is part of the record.
- **References.** The record should also include the references cited in the decision, including court opinions and official EPA documents, as well as the important references that are cited in scientific papers upon which EPA relied. While cited references can also be considered part of the administrative record without being listed separately, it is best to separately include them to be clear about which documents EPA considered in its

(RCRA), Underground Injection Control (UIC) and Prevention of Significant Deterioration (PSD) permits, and 40 CFR Section 300.810 specifies the contents of the administrative record for a CERCLA response action.

decision-making process. Note that copyright may affect how we make referenced material available, but does not affect whether it is part of an administrative record.

- **Confidential business information (CBI).** The administrative record should include CBI if that information was considered during the decision-making process. CBI materials are listed in the index to the record, but the documents are generally either redacted or placed in a secured (not publicly accessible) portion of the record. As much of the CBI material as possible should be made available through redaction or some other technique that shields the confidential information. This approach protects the CBI information while making the general information available to the public and the courts.⁶
- **EPA's final decision document.** The final decision document is the document signed by the Agency official authorized to make the decision, such as the final rule signed by the Administrator, or the final determination or approval/disapproval document.

What documents should generally not be in EPA's administrative record?

Following are the principal types of documents that should not be included in decision records.

- **Intra-agency deliberative documents.** As discussed above, these are documents and emails generated prior to the decision and containing solely internal pre-decisional deliberations related to the decision, such as emails between EPA program staff and attorneys related to the decision, options papers, personal notes documenting internal meetings, and drafts of the decision document and comments by EPA personnel on that document. Deliberative information contained in a non-deliberative document should be extracted; only the non-deliberative portions of the document should be included in the record.
- **Inter-agency deliberative documents.** Deliberative materials shared between EPA and other federal government agencies that EPA is consulting with as part of the decision-making process (for example, the Office of Management and Budget (OMB)) are treated the same as internal EPA documents. Factual, scientific, and technical information is part of the record; staff advisory opinions or advice made as part of the decision-making process are not part of the record. Note that comments from OMB are deliberative and are not part of the administrative record whether or not they were made available in the docket.
 - However, official memoranda from another federal agency are not deliberative, and should be included in the administrative record, if they were sent as part of consultations required by statute or regulation and if they express the other agency's final views on the EPA decision or a particular stage of the decision (such as a final biological opinion from the US Fish and Wildlife Service or the

⁶ CBI status is governed by EPA regulations found at 40 CFR Part 2, Subpart B. Always consult with your OGC or Regional attorney when handling any CBI material.

National Marine Fisheries Service). OGC or Regional attorneys should be consulted on whether correspondence or a document from another federal agency is deliberative; EPA staff may also need to contact the other agency to determine what their intent was. Note that some transmittals from other agencies may contain both factual information and deliberative material, such as a deliberative cover memorandum attaching a non-deliberative report or study. In such case, the report or study would be in the record but the cover memorandum would not be in the administrative record.

- **Publicly available deliberative documents.** For purposes of compiling administrative records, a document remains “deliberative” even if it has been made public; decisions regarding what documents are part of EPA’s administrative record do not depend on whether the documents are “privileged” or have been released to the public as part of a docket or in response to a FOIA request.
- **Documents generated after signature.** The administrative record for a decision is complete upon signature by the decision-maker. Documents generated or altered after signature are not part of the administrative record for that decision.⁷ Similarly, FOIA requests about a decision are not part of the record of the decision itself.

How is the administrative record different from a docket or other publicly available viewing file?

Unless a statute or regulation provides otherwise, the docket and the administrative record may contain slightly different sets of documents. A docket is a collection of documents that are made available for public viewing. Under some circumstances, some of the documents placed in the docket would not be included in the administrative record. For example, if the docket contains late comments received after the comment period, the administrative record would only include those comments if the Agency in fact considered them.

At the same time, because the administrative record is the compilation of all non-deliberative materials considered by the Agency during a decision-making process, a non-deliberative document that was considered by the Agency is part of the record regardless of whether it was in the docket or other publicly-available file. For example, a document classified as CBI would generally not be placed in the docket but would be part of the administrative record. In addition, some Agency decisions subject to litigation (such as a guidance document or a variance decision) may not have a public docket at all.

⁷ Under Agency policy for rulemakings signed by the Administrator, clerical errors that do not affect the substance of the rule can be corrected without review and approval by the Administrator but substantive changes must be approved by the Administrator. See <http://intranet.epa.gov/adplibrary/documents/rulechanges-postsig07-25-06.pdf>. Such post-signature changes are not generally part of the administrative record for the original decision; rather, they should be considered part of a supplemental record.

- Note that if an action has a docket, it is a good practice to make the docket and record as much the same as possible to reduce confusion and the need to explain the difference between the two compilations.
- Also note that under Clean Air Act (CAA) Section 307(d) and Toxic Substances Control Act (TSCA) Section 411, a promulgated rule may not be based on any information which has not been placed in the docket. Generally, this means that as of the date a CAA 307(d) or TSCA 411 final rule is signed, all materials that make up the administrative record for the rule must be in the docket.

See EPA's *Creating and Managing Dockets: Frequently Asked Questions for EPA Action Developers* for more information (<http://intranet.epa.gov/adplibrary/adp-milestones/docketing.htm>).

When is the administrative record developed?

While the record is not officially compiled until a court orders the Agency to file the record in litigation, it is important to focus on the record through the entire decision-making process.⁸ A deficient record cannot generally be cured by creating new supporting documents after the decision-maker has signed the decision. For example, it is important to have written responses in the record to scientific, technical or policy criticisms of the decision that are in the record. These responses, and all record documents, must be completed before the decision-maker has signed the decision document.

Note also that a compilation of materials in a docket or other publicly available viewing file does not dictate what is or is not in the final administrative record. A docket or viewing file is compiled during a decision-making process to provide the public with access to relevant Agency materials for comment or transparency. While that compilation may be similar to the administrative record, the record is not formally certified until litigation. There may be materials in the final administrative record that were not in the public file (e.g. CBI, physical items), and there may be documents in the public file (e.g. comments received too late for consideration, OMB changes) that are not part of the record.

Who should develop and maintain the record?

Responsibility for development and maintenance of the administrative record varies by type of decision and program office. At EPA Headquarters, developing and maintaining the record is usually the responsibility of the lead program office for the action in question. In some Regional offices, there is a central record coordinator who manages administrative records for the entire Regional office. Either structure is acceptable. Where an action involves multiple offices, the lead office should make sure that necessary record documents are obtained from all

⁸ As a matter of efficiency, some offices choose to compile the record at the time of decision rather than waiting for litigation.

persons who participated in the decision-making process. For example, if a Region is compiling an administrative record to support a regional CAA action, they may also need to obtain relevant documents from the Office of Enforcement and Compliance Assurance (OECA) and the Office of Air Quality Planning and Standards (OAQPS).

Unless otherwise provided for in a particular Agency program, the person who certifies the record for litigation should generally be the highest level career manager with oversight responsibility for the action for which the record is developed; at Headquarters, that would generally be the relevant office director. For Regional offices, this would generally be the relevant division director.⁹

What other Agency guidance is available relating to administrative records?

- CERCLA records guidance: Revised Guidance on Compiling Administrative Records for CERCLA Response Actions (September 2010).
<http://www.epa.gov/compliance/resources/policies/cleanup/superfund/admin-record-mem-rev.pdf>
- CWA WQS guidance: “Development of Administrative Records for Court Review of EPA Decisions on State and Tribal Water Quality Standards under CWA Section 303(c).” Memorandum from Steven M. Neugeboren, OGC, to Regional Counsels and Regional Water Division Directors, July 30, 2008.
- Agency dockets guidance: “Creating and Managing Dockets: Frequently Asked Questions for EPA Action Developers” (September 2010).
<http://intranet.epa.gov/adplibrary/adp-milestones/docketing.htm>

⁹ Some Agency programs have specific requirements or designated personnel to sign administrative records. Those designations apply rather than the general guidance provided here.