

AASHTO PRACTITIONER'S GUIDES

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MAINTAINING A PROJECT FILE AND PREPARING AN ADMINISTRATIVE RECORD FOR A NEPA STUDY

IN THIS GUIDE:

Preparing the administrative record for a complex project can be a major challenge. This guidance provides a starting point for undertaking this important task, including:

Key issues for project managers to consider during NEPA and when litigation is imminent or under way.

Practical tips for project managers, including:

- What documents to prepare
- Process for compiling the record for the court
- Guidance for building a strong record
- Judgment calls about what documents to include
- Submitting the record to the court

The Practitioner's Guides are produced by the AASHTO Center for Environmental Excellence. The Guides provide practical advice on a range of environmental issues that arise during the planning, development, and operation of transportation projects.

The Guides are primarily intended for use by project managers and others who are responsible for coordinating compliance with a wide range of regulatory requirements. With their needs in mind, each Guide includes:

- key issues to consider;
- a background briefing;
- practical tips for achieving compliance.

In addition, key regulations, guidance materials, and sample documents for each Guide are posted on the Center's website at <http://environment.transportation.org/center/>.

This Guide was prepared by Akin Gump Strauss Hauer & Feld LLP with the assistance of Parsons Brinckerhoff and with input from a review team consisting of representatives from several State departments of transportation (DOTs) and the Federal Highway Administration (FHWA). The views expressed in this Guide are solely those of the authors and do not constitute official guidance or policy of any agency. This Guide should not be used as a substitute for reviewing applicable Federal, State, or local laws, regulations, guidance documents, or agreements, nor should it be used as a substitute for obtaining the advice of legal counsel where needed. The Guide does not constitute legal advice and should not be used as such.

AASHTO Center for Environmental Excellence



American Association of State Highway and Transportation Officials

Overview



This Guide provides recommendations for maintaining the **project file** during the NEPA process, and for compiling the **administrative record** if and when a lawsuit is filed challenging the decisions made in the NEPA process.

Maintaining an accurate and up-to-date project file is an important task in any NEPA study, regardless of whether litigation is anticipated. The project file allows the project team to locate important documents quickly, which reduces inefficiency and duplication of effort, while also reducing the risk of overlooking information. The project file also enables an agency to respond promptly and fully to document requests under the Freedom of Information Act (FOIA) and similar State public records laws.

If and when a lawsuit is filed, a project file provides a starting point for preparing the administrative record. The administrative record should include all of the materials that were considered by the agency in reaching its decision. The responsibility for compiling the administrative record rests with the federal agency (or, in some cases, state agency) whose decision is being challenged.¹ The administrative record is important because the court is required to base its review of the agency's decision on the information contained in the administrative record. A strong record greatly enhances an agency's ability to defend its decision; a weak or incomplete record increases the chances that the agency's decision will be overturned by a court.

Since the NEPA process itself is often lengthy and complex, it is not uncommon for the administrative record in a NEPA case to include tens of thousands of pages. For that reason, compiling the administrative record requires a substantial effort, which typically involves both program staff and attorneys from the agency or agencies involved. The best way to expedite the preparation of the administrative record during litigation is to maintain accurate and up-to-date project files during the NEPA process.

In this Guide, the term “project file” refers to the files maintained by the project team during the NEPA process, while the term “administrative record” refers to the documents that are actually submitted by an agency to the court in a NEPA lawsuit. The term “federal agency” includes not only federal agencies but also any state agency that has assumed the responsibilities of a federal agency for purposes of compliance with NEPA and related laws.

Key Issues to Consider

Maintaining the Project File

- Who is tasked with maintaining the project file?
- Are separate files being maintained by FHWA, the State DOT, and/or the project consultants? If so, who is responsible for maintaining key project documents?
- Is there a written filing protocol? What issues are addressed in the filing protocol?
- Will a database be used to manage the project file? If so, what are the strengths and limitations of the database?
- What method is being used for filing or archiving project-related e-mails? How will other electronic documents and data be stored (e.g., maps, modeling results, engineering drawings)?
- Who will identify and retain privileged materials?
- How are you handling oversize documents—for example, displays, maps, etc?
- How are you handling attachments? For example, if a document is sent to agencies for review, does the file include the attachment?
- What “checks” are in place to ensure that proper filing is taking place?

¹ There are several programs under which a State DOT can assume the responsibilities of the U.S. Department of Transportation (U.S. DOT) for purposes of compliance with NEPA and related laws. If a State DOT assumes those responsibilities for a project, the State DOT is treated as a federal agency in any NEPA litigation involving that project. In those cases, the State DOT would act as the federal agency for purposes of preparing the administrative record.

- What record-keeping requirements or policies must be considered? For example, does the State DOT have a policy regarding records management and disposition?
- Are potential administrative record documents identified or segregated in some manner in the project files? If so, how is this being done?

Preparing the Administrative Record

- Is there an existing index?
- Where are study documents located? One central file or multiple files?
- Is there a central repository of e-mails? If not, how will e-mails be located and compiled?
- What system was used for filing documents during the study? As a result of that system, are there any built-in gaps or omissions in the record-keeping?
- Will the record be electronically scanned and incorporated into a litigation database? If so, what technology (e.g., litigation database) will be used? If not, what is the best way to structure the administrative record?
- How will the administrative record be produced to the court and the other parties to the litigation?
- Does the court in which the case has been filed have any specific requirements with respect to the filing of administrative records?
- Aside from FHWA, are other federal agency approvals needed? If so, what coordination is needed regarding the preparation of their administrative records?

Background Briefing

Maintaining a Project File

Agencies have considerable discretion regarding the procedures to be used for maintaining project files during the NEPA process. These procedures vary greatly from agency to agency and even within the same agency. Nonetheless, most public agencies must follow some requirements regarding the handling of agency documents. These types of requirements apply to project files that are maintained by an agency during the NEPA process.

Records Management and Disposal Requirements. Most government agencies have requirements regarding the management of agency records. These requirements address issues such as the types of documents that must be filed and the process for disposing of old records. For FHWA, these requirements are established by an agency order.² State transportation departments generally have their own requirements, as do most other federal, state, and local governments. These types of requirements may affect the record-keeping procedures that are used in the NEPA process.

FOIA and Other Public Record Laws. Most government agencies are subject to public records laws, such as the federal Freedom of Information Act (FOIA) and similar State laws. The universe of documents that are subject to disclosure under FOIA and similar laws is quite broad. As a result, these laws may result in the release of documents well beyond those that would typically be included in an administrative record. For example, a request under a State public records law may result in disclosure of internal State agency or consultant documents. It also is important to note that a public records request can be received at any time, so it could result in the release of significant documents during the NEPA process, well before litigation begins (and even if there never is any litigation).

Preparing the Administrative Record for Litigation

The requirement to prepare an administrative record exists under the federal law that empowers courts to review federal agencies' decisions. The law itself does not prescribe what an administrative record must contain, and the courts have provided only general principles for determining the contents of the record. The best available guidance at this time is a U.S. Department of Justice (U.S. DOJ) memorandum, which provides general principles for preparing an administrative record.³ The following summary is based on case law, the U.S. DOJ memorandum, and typical agency practices.

² FHWA Order M 1324.1A, "Files Management and Records Disposition Manual" (Nov. 4, 1999). This order is available on the Center's website, <http://environment.transportation.org/center/>.

³ U.S. Department of Justice, Environment and Natural Resources Division, "Guidance to Federal Agencies on Compiling the Administrative Record" (January 1999). A copy of this memorandum is available on the Center's website, <http://environment.transportation.org/center/>.

Requirement to Prepare. Section 706 of the Administrative Procedure Act (APA) directs federal courts evaluating the final decision of a federal agency action to “review the whole record or those parts of it cited by a party.” A federal agency whose decision has been challenged in court under the APA must compile an administrative record and provide it to the court and to the opposing parties in the lawsuit.

Contents of Record. The general rule, as established by case law, is that the administrative record must contain “all documents and materials directly or indirectly considered by the agency” in making its decision. This is a broad and subjective standard, which leaves substantial room for interpretation. For more details, see “*Practical Tips*” below.

Deciding What to Include. The responsibility for preparing the administrative record rests with the federal agency whose decision is being challenged in litigation (for example, FHWA). Therefore, judgments about what documents to include in the record are made by that federal agency. When preparing the administrative record for the court, the federal agency typically consults with its own attorneys, the attorneys of any other federal agency involved in the litigation, and the attorneys at U.S. DOJ who are handling the case. The State DOT’s attorneys also may be involved in preparing the record.

Disputes Over Completeness of the Record. In litigation, plaintiffs can dispute the completeness of the agency’s record. For example, plaintiffs may contend that the agency omitted documents that tended to cast its decision in a negative light. These types of disputes are ultimately decided by the court. If the court concludes that the agency showed bad faith in compiling the record, the court can allow discovery—that is, an opportunity for the plaintiffs to take depositions (sworn testimony) from individual agency personnel. It is in the agency’s interest to avoid discovery by compiling the record in a systematic and objective manner.

Supplementing the Record. Any party to the litigation may request the court’s permission to “supplement the record” with additional documents. It is not uncommon for those challenging a federal agency’s decision to make this type of request—for example, by seeking to introduce new evidence or testimony from expert witnesses. Federal agencies, such as FHWA, typically object to this type of request and urge courts to base their review on the administrative record compiled by the agency. Requests to supplement the record are generally disfavored by the courts; however, courts may allow supplementation under some circumstances—for example, if there are unexplained gaps in the agency’s own record.

Cost of the Record. The federal agency, not the plaintiffs who filed the lawsuit, is responsible for the cost of preparing the record. If the plaintiffs request copies of the record (or seek paper copies in lieu of electronic), they may be asked to pay for those copies.

Multiple Federal Agency Records. For projects that require the approval of two or more federal agencies, there is a possibility that each federal agency’s decision will be challenged in court. For example, many highway projects require approval of both FHWA and the U.S. Army Corps of Engineers; each agency’s approval is a separate action, and each agency’s decision could be challenged in court. If a lawsuit is filed challenging both agencies’ decisions, each agency would be responsible for preparing its own administrative record. There may, of course, be substantial overlap between each agency’s administrative record, if each agency’s action involves the same project. The filing of a joint record by two or more agencies is allowed and is often the most efficient approach.

Timing of Record Preparation. For projects that are likely to face litigation, it is prudent to maintain the project record during the NEPA process rather than waiting until the process is completed and then attempting to locate the relevant documents. Maintaining an effective filing system during the NEPA process helps to ensure that all relevant documents are included when the administrative record is filed with the court; it also minimizes the time needed to submit the record, thus expediting the litigation.

Practical Tips

1 | Maintaining Accurate Project Files During the NEPA Process

The key to compiling a complete administrative record, with minimum delay, is effective record-keeping during the NEPA process. However, given the sheer volume of material generated within a NEPA project team, it can be challenging to determine which documents need to be filed. In addition, regardless of what approach is used, the task of maintaining an up-to-date filing system for a large project is likely to be time-consuming.

The following actions can facilitate the maintenance of the administrative record during the NEPA process:

Record-Keeping Responsibilities. It is important to establish clear responsibilities for record-keeping within the project team. For example, the EIS consultant can be tasked with maintaining a project file that can later provide the basis for the federal agency's administrative record. If that approach is used, it is helpful to distinguish the consultant's own project files—which encompass a great deal of consultant work product that may not need to be included in the record—from the project file that the consultant is maintaining on behalf of the federal agency.

Filing and Indexing Protocols. Regardless of who is responsible for filing, it is useful to establish a written filing protocol that designates the types of documents that should be filed and the information that should be included in the index or database about each document. In developing the protocol, it is useful to consider issues such as (1) how to handle drafts, some of which may be important to include in the administrative record in order to show the agency's thought process; and (2) how to handle sensitive or privileged items, such as communications with legal counsel, archaeological site locations, privileged tribal concerns, and the locations of threatened or endangered plant species. For more details, see *“Deciding What Documents to Include in the Administrative Record.”*

Clean Originals. The filing system should minimize the need for alteration of original documents. For filing purposes, it may be necessary to mark documents with a tracking number. If so, this marking should be clearly identifiable, should be done consistently, and should not obscure the text of the original document. Additional notations should not be made on the originals as part of the filing process.

Periodic Audits. Periodic audits can help to ensure that the filing protocol is being followed. The audits should include spot checks for key documents. For example, project management staff can develop a short list of important documents that clearly will need to be included in the record, and then check to see whether those documents have actually been included in the file.

Filing or Archiving E-Mails. Maintaining a filing system that captures project-related e-mails can be a major challenge, given the number of e-mails generated. One way to handle this task is to establish a “project file” e-mail address, so that e-mails can be sent to the project file simply by forwarding them to that e-mail address. Another possible approach is to designate a single point of contact for filing e-mails, and direct team members to include that person on all messages that should be filed. If these approaches are not used, project-related e-mails should at least be archived so that relevant e-mails can be retrieved when the administrative record is prepared.

2 | Using the NEPA Process to Build a Strong Administrative Record

The administrative record for a NEPA study will always include the NEPA documents themselves—for example, the draft environmental impact statement (DEIS), final environmental impact statement (FEIS), and record of decision (ROD). It goes without saying that the thoroughness and quality of these documents will play a vital role in determining the outcome of the litigation.

The following additional types of documents can help to complement the NEPA documents by providing supporting information and explaining how they were developed:

Technical Reports. Technical reports (prepared by the project team) provide an efficient means for compiling the supporting data for major topics included in the NEPA documents. Technical reports ideally should include a description of the methodology used to generate the data, as well as key supporting data and other back-up materials. If the technical report involves a specialized expertise, it is also helpful to include the qualifications of the experts involved in preparing it.

Meeting Summaries. Meeting summaries can be used to document coordination with resource agencies and stakeholders. It is beneficial to establish a consistent practice of preparing meeting summaries, and using a standard format for those summaries (specifying basic information to be included in the summary, such as the meeting date, participants, agencies or organizations represented, etc.). It is important to review meeting summaries for accuracy; providing draft summaries to all participants for review can help to ensure accuracy. It also is helpful to include copies of meeting handouts and sign-in sheets along with the meeting summary.

Telephone Memos. Telephone conversations should be documented if the conversation is being used to gather substantive information for the NEPA study. For example, if an EIS includes a reference to a “personal communication” on a particular date, the record should include a telephone memo or meeting summary documenting that communication.

Correspondence with Agencies and Stakeholders. Correspondence (including significant e-mails) from resource agencies and key stakeholders should be addressed in some manner in the record. This can be done in the EIS itself, in a written response

sent directly to the agency, or in a meeting summary that shows how the issues raised in the correspondence were resolved. The key is to demonstrate in the record that the agency preparing the EIS has “closed the loop,” particularly on sensitive matters raised by regulatory agencies. To the extent possible, the response should itemize the relevant issues and respond to them individually.

Comment/Response Matrices. Close collaboration with resource agencies can result in a large number of comments being received from agencies before the DEIS is even released. Often, these preliminary comments from agencies are highly technical in nature. When faced with a large volume of such comments, it can be useful to prepare comment/response matrices that track all of the comments and demonstrate how they have been addressed. These types of matrices can strengthen the record by documenting both the extent of the resource agencies’ involvement and the responsiveness of the lead agencies to their concerns.

3 | Reviewing Project Files and Compiling the Administrative Record

When litigation has been filed, or appears imminent, agency personnel must begin the task of compiling the administrative record. Even when files have been well maintained, this effort is likely to be time-consuming. A methodical approach, combined with the effective use of technology, can help to minimize the time and cost of compiling the record, while also assuring that the record submitted to the court is complete.

General Considerations

- The process for compiling the record is itself important, and should be documented. A systematic, well-documented process for compiling the record helps to assure the court that the record submitted is accurate and complete.
- The process for compiling the record should be designed to minimize the need for multiple parties to handle original documents. Every effort should be made to maintain the integrity of originals, which minimizes the risk of documents being lost, altered, or damaged.
- The process for compiling the record should focus on avoiding both over-inclusiveness and under-inclusiveness. Over-inclusiveness occurs if the record is cluttered with extraneous items that are not needed for the court’s review. Under-inclusiveness occurs if the record omits substantive documents that were directly or indirectly considered by the agency in reaching its decision.
- Electronically scanning the documents in the record can provide many efficiencies. One of the main benefits is that the entire record can be provided to the parties and the court on a series of CD-ROMs, avoiding the cost of producing paper copies. In addition, the electronic copies can be linked to a litigation database, which makes it easier to located documents in the record.
- If the decision is made to scan the documents, it is important to ensure that the electronic images are legible and fully reflect the hard-copy originals. Special consideration may be needed for color documents, oversize documents, documents with attachments, and damaged documents. If electronic scanning is used, the originals should be maintained in a secure location for the duration of the litigation.

Suggested Steps for Preparing an Administrative Record in Electronic Format

The following step-by-step process provides one possible approach to compiling the administrative record. This process assumes that electronic scanning is used. Other approaches also are viable, such as compiling the record in traditional “hard copy” format.

Step 1: Compiling the Documents. This step involves physically locating the full range of documents that need to be considered for potential inclusion in the administrative record. For example, potential administrative record documents may be located at FHWA headquarters, the FHWA Division Office, the State DOT, and consultants’ offices. In addition, voluminous documents may have been archived in off-site locations. Electronic documents also must be considered; they may be stored on various computer networks, on individual hard drives, and on CD-ROMs or stand-alone storage devices. An exhaustive effort is needed to identify and gather all potential administrative record documents.

Step 2: Initial Review. This step involves reviewing the documents and deciding which documents to scan. Scanning a document does not mean that it will necessarily be included in the administrative record; final decisions on exactly what to include

can be made at a later stage. The decision to scan the documents means that the documents are potential record documents and, at a minimum, require further review. Depending on the process used for scanning, this initial review may also involve creation of an initial index containing basic identifying information for each document.

Step 3: Scanning and Coding. This step involves the technical task of converting paper documents into electronic images (scanning) and the creation of database entries linked to each image (coding). This task can be accomplished by the use of a vendor. The cost of scanning on a per-page basis is comparable to the cost of photocopying, but will depend greatly on the quality of the originals. The cost of coding will depend on the level of detail; the more information captured in the database about each document, the more time-consuming and expensive the task will be. It is particularly important to provide clear instructions to the vendor about the specifications for scanning and coding. For example, if documents are scanned at a low resolution, the result may be poor-quality electronic images—which may mean that the scanning needs to be done all over again, at considerable additional cost. (Note: Many documents may already exist in electronic format. If the format is compatible with the database, these documents would not need to be scanned.)

Step 4: Creating the Database. Once the documents have been scanned, the electronic images can be imported into a database. There are many litigation databases available. (Legal counsel should be consulted in selecting the database.) Ideally, the database will provide a robust search capability and will be linked to the electronic images of the administrative record documents. Databases with more limited capabilities also can be used, depending on available resources. It also is possible to prepare a traditional index instead of a database.

Step 5: Additional Review and Indexing. With the assistance of the database, it is possible for the federal agency to conduct the final review of the record to (a) ensure its completeness, (b) ensure that any duplicative or extraneous materials are removed, and (c) ensure that any privileged documents are appropriately redacted or removed. This is the step at which most of the difficult judgment calls will be made about which documents to include or exclude. This is an important point in the process to seek legal advice if legal counsel have not been involved up to this point.

Step 6: Final Production. The final step in the process involves production of the administrative record for the other parties to the litigation and for the court. In some cases, if the record has been scanned, it is provided solely in electronic format on CD-ROMs. It also may be necessary to provide the record in paper format. See Section 5 (“*Submitting the Administrative Record to the Court*”) for further information about production of the administrative record.

4 | Deciding What Documents to Include in the Administrative Record

Even if project files have been well-maintained throughout the course of the NEPA process, federal agency officials charged with compiling the administrative record will still face a multitude of judgment calls.

The following guidelines provide a framework for making those judgment calls. As noted earlier, judgments about specific documents will require advice from legal counsel.

General Considerations

- The administrative record should include only documents that were in existence on the date of the decision (e.g., the date of FHWA’s Record of Decision). Documents created after the fact to justify or explain the decision generally cannot be included in the record.
- The administrative record should include documents that were directly or indirectly considered by the decision-maker. For example, documents that were indirectly considered may include memoranda, reports, data, manuals, and other materials that support the materials that were actually reviewed by the agency’s decision-maker.
- The administrative record should not be limited to documents that support the agency’s decision. Documents that criticize the agency’s decision, raise doubts about the decision, or otherwise cast the decision in a negative light, should be included if they were directly or indirectly considered. For example, comments from groups opposed to the agency’s action typically would be included in the record.
- The administrative record should not be limited solely to documents that happen to exist in paper format. Documents that exist solely in electronic form—such as e-mails, databases, modeling inputs—may need to be included in the record. In deciding what to include, the key factor to consider is the substantive content of the document, not the medium (paper vs. electronic) in which the document is maintained.

Common Types of Documents

Drafts. Generally, working drafts circulated within the project team are not included. However, in some cases, draft documents may need to be included (along with comments on those drafts) in order to document the reasoning that led to the federal agency's decision.

Privileged Documents. Privileged documents that were considered by the decision-maker are considered part of the administrative record, but can be removed or redacted (i.e., portions blacked out) when the record is submitted to the court. When documents are considered part of the record but are withheld on the basis of privilege, the federal agency will typically submit a list of those documents and describe the basis on which they are being withheld. Decisions regarding the treatment of privileged or potentially privileged documents should be made with the advice of legal counsel.

Attachments. In general, letters or e-mails should be included in the administrative record along with any attachments. The attachments are important because they help to show what information was actually transmitted; without the attachment, the transmittal letter or e-mail may lack context and may not be particularly meaningful in the administrative record. If the same attachment was sent to multiple recipients, it is only necessary to include the attachment in the record once (as long as it can be clearly correlated to the relevant transmittal letters).

E-Mail Messages. E-mail messages present perhaps the most complex and difficult judgment calls in compiling the administrative record. A single large EIS may generate many thousands—perhaps tens of thousands—of e-mails. A single e-mail chain may involve multiple forwards and replies, many of which include numerous attachments—and the attachments themselves may all include slightly different versions of the same documents. A single e-mail may include both substantive project-related information and entirely extraneous personal matters. Given these characteristics, it can be extremely difficult to determine which e-mail messages should be included in an administrative record. This effort is likely to be time-consuming and will require input from agency attorneys.

Communication Among Consultants. The consultant team for an EIS can be extensive. It often includes a single prime consultant and a team of specialized sub-consultants. Communications that are entirely internal to the consultant team generally are not included in the administrative record. Nonetheless, it is important for consultants to understand that communications within the consultant team may be included in the administrative record, particularly if those communications (e.g., e-mail messages) involved the lead agency or in some manner were considered by the lead agency.

Modeling Results. The development of an EIS often involves the use of computer models—for example, to develop traffic and air quality forecasts. When modeling is relied upon as the basis for conclusions presented in an EIS, the administrative record should include sufficient information to document the methodology, assumptions, and results. If these supporting materials are voluminous, they may be included in electronic formats (for example, on CD-ROM). If supporting material is included in electronic format, it should be accompanied by a report or other document explaining what information is included and how it can be retrieved.

Maps, Drawings, and Displays. Visual materials can be an extremely important element of the administrative record. To the extent that these materials are included in the EIS and technical reports, it is not necessary to include them separately in the record. However, there may be instances in which a large map or display played an important role in the study, but was not incorporated into the EIS or any other report—for example, displays presented at a public hearing. In addition, large visual displays can be helpful to the court in gaining an understanding of the project. It is helpful to include these types of materials in the record.

Manuals and Guidance Documents. Manuals and guidance documents that are pertinent to the agency's decision are appropriate for inclusion in the administrative record, even though they were not generated as part of the NEPA process. For example, FHWA's Section 4(f) Policy Paper is an important guidance document that is likely to be relevant in any litigation involving a Section 4(f) issue. This type of guidance document should be included in the record. By contrast, statutes and regulations generally are not directly included in the record; they are available to the court even without being included in the record.

Secondary Sources. Secondary sources (for example, published research papers) are often cited in NEPA documents. For ease of reference, it is helpful to include copies of these materials in the administrative record, particularly if they relate to a key issue in the litigation. However, duplicating these materials may raise copyright issues, which must be considered by legal counsel. In addition, the cited materials often are voluminous and may have marginal relevance to the litigation. Therefore, it may be appropriate to incorporate some of these materials by reference in the record, with the understanding that copies will be provided to the court and other parties if requested.

Field Notes. Notes prepared by consultants or other personnel in the field (for example, notes from a visit to a potential wetland or archeological site) should be considered on a case-by-case basis. In some cases, field notes are analogous to personal notes from a meeting: they are prepared by an individual for his or her own use, and do not serve a record-keeping function. In other cases, field notes serve as the primary means of recording data collected in the field (for example, a handwritten form containing records of noise monitoring data or traffic counts). In the latter situation, there is a much stronger basis for including the field notes in the administrative record.

Personal Notes. Personal notes often raise particularly difficult judgment calls. In general, personal notes (for example, handwritten notes of a meeting) are considered part of the notetaker's individual files and would not be included in the administrative record. However, there are situations where personal notes are included in the project file and comprise the agency's record of a meeting. In addition, there are instances in which personal notes are released in response to a public-record request. In these types of situations, it may be appropriate to include the personal notes in the administrative record.

Consultant Invoices, Contracts, and Scopes of Work. Consultant contracts and invoices generally are not included in the administrative record. However, it is important to be aware that these documents may be subject to disclosure under federal or state public records laws. In addition, there have been instances in which a consultant's scope of work for a NEPA study has become an issue in litigation, and thus needs to be included in the record (for example, where a plaintiff alleges that the scope of work reflects a bias toward a particular conclusion). Care should be taken in drafting scopes of work to recognize that decisions regarding the work to be performed in NEPA will be made by the lead agency as part of the NEPA process and may differ from the assumptions made in drafting the scope of work.

5 | Submitting the Administrative Record to the Court

Once the administrative record has been compiled, it must be submitted to the court and all parties to the litigation. This seemingly technical task can have important consequences in litigation. If the record is compiled accurately, and is submitted in an easy-to-use format, it communicates a message of competence to the court. If the record is not compiled with care, it can have a negative impact on the court's view of the agency.

There is no standard format for submitting an administrative record. As a result, the federal agency has considerable latitude in deciding how to produce the record. The following general guidelines can help contribute to an orderly, accurate, and easy-to-use administrative record:

Index. As a general rule, the index should list the documents in chronological order. (Exceptions are sometimes made to this rule, but chronological order is customary.) The index generally should contain a unique identification number for each document. It also should contain a brief description of the document. If the document is being withheld based on privilege, the index should indicate that the document is privileged and describe the basis for the privilege.

Page Numbering. It is important for the pages of the record to be numbered in a consistent manner, from beginning to end—a practice commonly referred to as “bates numbering.” This practice has been adopted to ensure that there is a unique identification number for each page of each document in the administrative record. Various page-numbering conventions can be used—for example, a prefix that identifies the volume of the record, followed by a number indicating the page within that volume. Also, if the entire record is scanned and incorporated into litigation software, the software can be used to generate page numbers electronically, which avoids the need to hand-stamp numbers on each page.

Format. If the record has been scanned, it is typically provided to the court and the parties to the litigation on a series of CD-ROMs. The index may also be provided in paper format for ease of reference.

Local Rules. Some courts have adopted rules regarding the format to be used for filing an administrative record. Therefore, if a lawsuit has been filed, it is prudent to check the local rules to determine whether there are any requirements regarding the filing of the record. It also is important to find out whether the individual judge hearing the case has any rules or preferences on this issue.

Coordination with Plaintiffs. Prior to filing the record with the court, it is prudent to share the record with the plaintiffs and attempt to resolve any differences regarding the contents of the record by mutual agreement. If all issues can be resolved by agreement among the parties, it avoids the delay associated with a court ruling on disputes regarding the record.

Certification. The federal agency submitting the administrative record is responsible for certifying to the court that the record is complete. For FHWA projects, the certification is typically signed by an official in the FHWA Division Office. It is important to note that while agency attorneys provide advice on the compilation of the record, the attorneys do not sign the certification; the certification is signed by the FHWA program staff. (The same approach is followed by other federal agencies.) Standard language for the certification can be obtained from the U.S. Department of Justice attorneys handling the case.

Reference Materials

Statutes, regulations, and guidance documents cited in this Guide, along with additional materials and sample documents, are available on the AASHTO Center for Environmental Excellence website, <http://environment.transportation.org/center/>.

ADDITIONAL RESOURCES

PRACTITIONER'S GUIDES AVAILABLE FROM AASHTO CENTER FOR ENVIRONMENTAL EXCELLENCE:

- 01 Maintaining a Project File and Preparing an Administrative Record for a NEPA Study
- 02 Responding to Comments on an Environmental Impact Statement
- 03 Managing the NEPA Process for Toll Lanes and Toll Roads
- 04 Consulting Under Section 106 of the National Historic Preservation Act
- 05 Utilizing Community Advisory Committees for NEPA Studies
- 06 Tracking Compliance with Environmental Commitments/Use of Environmental Monitors

For additional Practitioner's Guides, please visit the AASHTO Center for Environmental Excellence website at: <http://environment.transportation.org>

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