



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

MEMORANDUM

TO: Members of the Working Group on Compiling Administrative Records
FROM: Jeremy Graboyes, Staff Counsel
DATE: September 30, 2021
SUBJECT: Managing the Administrative Record for Judicial Review

NOTE: I provide the information in this memorandum for background purposes only. It does not necessarily represent the views of ACUS, the Working Group, or its members.

INTRODUCTION

When a party seeks judicial review of an agency’s final rule under the Administrative Procedure Act (APA), the reviewing court ordinarily considers the “whole record” to determine whether the rule is reasonable and lawful and whether the agency observed all legally mandated procedures when it promulgated the rule.¹ Other statutes and executive-branch rules and policies may impose alternative or supplementary requirements.

The “whole record” encompasses those materials that the decisionmaker (usually the agency head) directly or indirectly considered during the course of a rulemaking. As the Supreme Court found in *Citizens to Preserve Overton Park v. Volpe*, the whole record does not typically include materials that were not made available to the agency, that the agency did not consider, or that were prepared after the rule was issued.²

The core of the whole record is the administrative record for judicial review (AR), which the agency compiles, certifies, and files with the court, often in conjunction with the Department of Justice (DOJ). Although agencies only compile an AR in the event of litigation, agencies often compile an internal “rulemaking record” throughout the course of a rulemaking that can serve as the basis for the AR. The AR will also include materials compiled as part of the public rulemaking docket. The Working Group discussed the rulemaking record and public rulemaking docket at previous meetings.

Courts typically decide legal challenges to final rules on summary judgment, with the AR serving as most or all of the evidentiary record for decisionmaking. As a result, it is important that agencies compile an AR that adequately demonstrates to the reviewing court that the agency acted reasonably and lawfully and complied with all procedural requirements. Litigation frequently centers on the contents and completeness of the AR that the agency files with the court.³ An inadequate AR can have significant consequences for the agency, including costly and

¹ 5 U.S.C. § 706(2).

² 401 U.S. 402, 420 (1971); *see also* Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 743–44 (1985); *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

³ Aram A. Gavoor & Steven A. Platt, *Administrative Records and the Courts*, 67 KAN. L. REV. 1, 9 (2018).

protracted litigation, remand with or without vacatur, injunctive relief, record completion—even discovery, if the presumption of regularity is rebutted.⁴

ACUS recommends that agencies prepare and publish guidelines that explain to agency personnel how they should compile and manage ARs in informal rulemaking. ACUS specifically recommends that such guidelines address:

- essential components of the AR;
- management and segregation of privileged, sensitive, or protected materials;
- timing of compilation and indexing practices;
- certification of the AR, including the process for identifying the certifying official;
- preservation of the AR; and
- relevant capabilities and limitations of recordkeeping tools and technologies.⁵

This Memorandum addresses how existing agency guidelines explain these topics to agency personnel. It is based primarily on guidelines published by the Department of the Interior (DOI) in 2006,⁶ the Environmental Protection Agency (EPA) in 2011,⁷ and the National Oceanic & Atmospheric Administration (NOAA) in 2012.⁸

The principles in these guidelines appear to draw heavily on a 1999 memorandum from the Environmental and Natural Resources Division of DOJ and a 2000 article published in the *United States Attorneys' Bulletin*.⁹ That guidance was subsequently revisited in memoranda from DOJ to selected agency counsel in 2008 and 2017.¹⁰

What Is the AR, and Why Does the Agency Compile It?

DOI, EPA, and NOAA guidelines all begin by describing what the AR is. EPA guidelines, for example, state that the AR “is the set of non-deliberative documents that the decision-maker considered, directly or indirectly (e.g., through staff), in making the final

⁴ *Id.* at 43.

⁵ Admin. Conf. of the U.S., Recommendation 2013-4, *Administrative Record in Informal Rulemaking*, ¶ 11, 78 Fed. Reg. 41358, 41361 (July 10, 2013).

⁶ Dep't of the Interior, *Standardized Guidance on Compiling a Decision File and an Administrative Record* (June 27, 2006), <https://www.nps.gov/features/foia/Standardized-Guidance-on-Compiling-and-Administrative-Record.pdf> [hereinafter DOI Guidance].

⁷ Env'tl. Protection Agency, *Administrative Records Guidance* (Sep. 2011), <https://www3.epa.gov/ogc/adminrecordsguidance09-00-11.pdf> [hereinafter EPA Guidance].

⁸ Nat'l Oceanic & Atmospheric Admin., *Guidelines for Compiling an Agency Administrative Record* (Dec. 21, 2012), https://www.gc.noaa.gov/documents/2012/AR_Guidelines_122112-Final.pdf [hereinafter NOAA Guidance].

⁹ Joan Goldfrank, *Guidance to Client Agencies on Compiling the Administrative Record*, U.S. Atty. Bull. 7 (Feb. 2000), <https://www.justice.gov/sites/default/files/usao/legacy/2006/06/30/usab4801.pdf>; U.S. DOJ, Env't. & Nat. Res. Div., *Guidance to Federal Agencies on Compiling the Administrative Record* (Jan. 1999), <https://perma.cc/UDB8-KA6K>.

¹⁰ Memorandum from Ronald J. Tenpas, Assistant Atty. Gen., to Selected Agency Counsel, *Guidance to Federal Agencies on Compiling the Administrative Record* (Dec. 23, 2008); Memorandum from Jeffrey H. Wood, Acting Assistant Atty. Gen., to Selected Agency Counsel, *Administrative Record Compilation in Light of In re Thomas E. Price*, Ninth Cir. No. 17-71121 (Oct. 20, 2017). See Kelly Dunbar et al., *Federal Agencies Need a Uniform Record-Keeping Process*, LAW360 (July 15, 2019).

decision.”¹¹ DOI guidelines state that the AR “is a compilation of documents that includes the decision-making documents, as well as relevant agency documents generated or received in the course of the decision-making process.”¹²

DOI, EPA, and NOAA guidelines also explain the process for judicial review under the APA, with reference to the “whole record” rule and in some cases mentioning *Citizens to Preserve Overton Park v. Volpe*,¹³ and the role of the AR in that process. DOI guidelines, for example, explain:

Under the Administrative Procedure Act (“APA”), a court reviews an agency’s action . . . to determine if it was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). In making this determination, a court evaluates the agency’s complete AR. Consequently, the agency must take great care in compiling a complete AR.¹⁴

NOAA guidelines stress that because “[m]ost cases challenging agency decisions are decided on motions for ‘summary judgment,’” courts often rely “solely on the agency’s [AR] to determine the legal adequacy of the particular agency action being challenged.”¹⁵

All three agencies emphasize the consequences that can result from an inadequate AR. DOI guidelines explain that “if the Department made a thorough and informed decision, but documentation supporting the decision is not contained in the AR, any deference a court may have given to the agency decision could be lost or diminished.”¹⁶ And EPA guidelines explain:

An inadequate 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.¹⁷

DOI and EPA also explain how the AR differs from other records, including the rulemaking record, the public rulemaking docket, and records compiled for other purposes.¹⁸

When Does the Agency Compile the AR?

¹¹ EPA Guidance, *supra* note 7, at 4.

¹² DOI Guidance, *supra* note 6, at 2.

¹³ 401 U.S. 402 (1971).

¹⁴ DOI Guidance, *supra* note 6, at 1.

¹⁵ NOAA Guidance, *supra* note 8, at 4.

¹⁶ DOI Guidance, *supra* note 6, at 1.

¹⁷ EPA Guidance, *supra* note 7, at 5.

¹⁸ DOI Guidance, *supra* note 6, at 3; EPA Guidance, *supra* note 7, at 10.

Agencies maintain a public rulemaking docket for each rulemaking, and many agencies routinely maintain an internal record of relevant materials, which ACUS calls the “rulemaking record,” throughout the course of the proceeding. However, agencies only compile an AR in the event of litigation to defend a final rule against a legal challenge.

Guidelines may include language clarifying that personnel only need to compile an AR in the event of litigation. For example, NOAA guidelines state that “employees keep many files and documents either in hard copy or electronically that relate to [agency] decisions, but do not generally compile these documents into an ‘Administrative Record’ to support the decision unless the decision is challenged in court.”¹⁹ EPA guidelines similarly note that the AR “is not officially compiled until a court orders the Agency to file the record in litigation” but emphasize that “it is important to focus on the record through the entire decision-making process.”²⁰

Who Compiles the AR?

There are many responsibilities associated with managing an AR. Depending on the agency and the rulemaking, these responsibilities may include:

- notifying relevant personnel of litigation and initiating the AR process;
- searching for materials that belong in the AR;
- requesting that personnel search for and provide materials that belong in the AR;
- answering questions from personnel about the scope or contents of the AR;
- identifying which materials contain protected or privileged information that should be excluded from the AR, redacting privileged or protected information, and preparing a privilege log that lists such materials;
- compiling, organizing, and indexing the AR;
- reviewing the AR for completeness;
- certifying the AR;
- filing the AR with the court and, as necessary, non-agency parties and counsel; and
- coordinating with DOJ, as relevant.

Agencies allocate these responsibilities differently depending on their internal organization, the frequency and complexity of rulemakings, recordkeeping practices during rulemaking, and other factors. Regardless of an agency’s approach, it is likely a best practice for its guidelines to describe how AR-related responsibilities are allocated among personnel.

One common practice, which ACUS has encouraged agencies to adopt,²¹ is to designate a single official, called a custodian, who is assigned primary responsibility for coordinating and overseeing the preparation of an AR. ACUS recommends that:

¹⁹ NOAA Guidance, *supra* note 8, at 2.

²⁰ EPA Guidance, *supra* note 7, at 11.

²¹ Recommendation 2013-4, *supra* note 5, ¶ 9.

Agencies should designate one or more custodians for rulemaking recordkeeping, either on a rulemaking-by-rulemaking basis or generally. Agencies should inform agency personnel of the custodian(s) and direct them to deposit rulemaking record materials with the custodian(s), excepting if necessary confidential information to which access is restricted.²²

Consistent with this recommendation, both DOI and NOAA guidelines note that a designated “AR Coordinator” or “Custodian” has primary responsibility for managing the AR process.²³ NOAA’s guidelines also include general principles for selecting an effective custodian.²⁴

What Materials Should Personnel Include in the AR?

Agency guidelines typically emphasize that the AR should, as NOAA’s guidelines put it, contain sufficient documentation to demonstrate to a reviewing court that “the agency followed required procedures, considered the record as a whole, and made a reasonable substantive decision supported by the information before the agency.”²⁵ DOI’s and NOAA’s guidelines emphasize that the AR should contain the complete “story” or “history” of the decisionmaking process.²⁶ All three agencies emphasize in their guidelines that, to tell the complete story, personnel should take care *not* to exclude materials that demonstrate consideration of opposing views, contrary facts, and regulatory alternatives that were not adopted.²⁷

In practice, this means that personnel should ordinarily include certain types of materials in the AR, including:

- notices pertaining to the rulemaking;
- comments and other materials submitted to the agency related to the rulemaking;
- transcripts or recordings, if any, of oral presentations made in the course of a rulemaking;
- reports or recommendations of any relevant advisory committees; and
- other materials required by statute, executive order, or agency rule to be considered or to be made public in connection with the rulemaking; and
- any other materials considered by the agency during the course of the rulemaking.²⁸

As the Working Group has previously discussed, materials “considered by the agency during the course of the rulemaking” typically includes materials that the agency cited in connection with the rulemaking (e.g., in the notice of proposed rulemaking or preamble to the final rule); important, substantive materials that the final decisionmaker considered; and important, substantive materials that were considered by or reasonably available to other personnel with substantive responsibilities in the rulemaking.

²² *Id.*

²³ DOI Guidance, *supra* note 6, at 5; NOAA Guidance, at 5–7.

²⁴ NOAA Guidance, *supra* note 8, at 5.

²⁵ NOAA Guidance, *supra* note 8, at 6; *see also* EPA Guidance, *supra* note 7, at 5.

²⁶ DOI Guidance, *supra* note 6, at 2; NOAA Guidance, *supra* note 8, at 6, 11.

²⁷ EPA Guidance, *supra* note 7, at 5; NOAA Guidance, *supra* note 8, at 6.

²⁸ Admin. Conf. of the U.S., Recommendation 2013-4, *supra* note 5, ¶¶ 1, 3.

DOI, EPA, and NOAA guidelines all list categories of materials that ordinarily belong in the AR. Depending on the agency, rulemaking, and program, such materials can include:

- the final rule and all *Federal Register* notices related to the rulemaking;
- public comments and other submissions, along with any agency responses;
- records of communications with members of the public, including public hearings and ex parte communications;
- materials that have been released to the public;
- scientific, technical, and other background materials that the agency explicitly relied on or cited in a *Federal Register* notice; and
- required environmental, economic, and other regulatory assessments; and
- any other materials required by law or regulation to be included in the AR.²⁹

All three agencies also include general principles and helpful advice to help personnel determine whether certain other types of materials belong in the AR, such as:

- significant scientific, technical, and background materials that the agency considered but did not specifically rely on or cite in a *Federal Register* notice;
- materials incorporated by reference within relevant materials;
- materials associated with prior related decisions; and
- drafts, internal communications, and other deliberative or predecisional materials that are especially significant to the rulemaking.³⁰

Context is essential to determining whether materials of these types belong in the AR. EPA guidelines stress that “[t]he development of administrative records is a highly case-specific endeavor” and encourage personnel to refer questions to an assigned attorney.³¹ NOAA guidelines similarly emphasize that the Custodian must consult with the assigned NOAA General Counsel’s Office attorney” because “proper classification of these documents may be difficult.”³²

What Materials Should Personnel Exclude from the AR?

Certain materials clearly do not belong in the AR because they are irrelevant to judicial review. Because the focus of the reviewing court’s inquiry is the record before the final decisionmaker at the time the rule was finalized, materials that were not in the possession of or reasonably available to the decisionmaker at that time do not belong in the AR. This includes materials that the agency did not receive during the public comment period or otherwise consider during the rulemaking, as well as post hoc rationalizations and other materials that the agency prepared or consulted after the rule became final.

In addition to materials that are unrelated to the rulemaking, guidelines typically also advise personnel not to include materials that are unimportant or insignificant in telling the

²⁹ EPA Guidance, *supra* note 7, at 7–9; NOAA Guidance, *supra* note 8, at 7.

³⁰ NOAA Guidance, *supra* note 8, at 7.

³¹ EPA Guidance, *supra* note 7, at 3–4.

³² NOAA Guidance, *supra* note 8, at 7–8.

complete story of the rulemaking. For example, guidelines state that rough drafts, personal notes, and routine internal communications are rarely necessary to tell the complete story of the agency’s decisionmaking process.³³ However, there can be circumstances in which drafts, personal notes, and internal communications should be included in an AR; it may be helpful for agencies to explain those circumstances in their guidelines.³⁴

Agencies have some leeway to exclude otherwise relevant materials from the AR for reasons of administrative efficiency. For example, it can be time-consuming and costly to reproduce voluminous background materials for inclusion in the AR. Some of these materials, such as published books and article, may be publicly accessible elsewhere. NOAA guidelines advise: “The Custodian must use his or her judgment in deciding whether voluminous background materials should be physically inserted in the Administrative Record or incorporated by reference. The Custodian may consider inserting excerpts as appropriate, for example when materials are not readily available to the public.”³⁵ Many publicly available sources may be appropriate subjects for judicial notice, which may obviate the need to include them in the AR.³⁶

Some types of materials or information—such as personally identifiable information (PII), confidential business information (CBI), national security information, and copyrighted materials—are protected from public disclosure by law, at least absent consent. Although protected materials and information are often considered part of the AR, they are often excluded from the physical or electronic AR filed with the court to avoid public disclosure on PACER. Guidelines typically explain whether and how protected materials are made part of the AR. For example, DOI and NOAA guidelines emphasize that although protected materials are not included in the AR that is provided to the court and other parties, they are generally considered part of the AR and should be documented in a privilege log that is associated with the AR and filed with the court.³⁷ EPA guidelines explain that confidential business information (CBI) and copyrighted materials are considered part of the AR but may require special handling.³⁸

Similar considerations may pertain to materials subject to a claim of legal privilege (e.g., attorney work product privilege, attorney-client privilege, deliberative process privilege). But agencies should be aware that the law in this area is unsettled. Some courts have found that deliberative process materials, in particular, are part of the AR; others have held that they are not.³⁹ DOJ issued a 2017 memorandum advising that agency personnel ordinarily should not include deliberative process materials in the AR.⁴⁰ Agencies will need to craft careful guidelines after considering the relevant law, judicial opinions, and executive-branch interpretations. EPA guidelines, for example, state clearly that personnel should not include intra-agency, inter-agency, or publicly-available deliberative documents in the AR because they are not relevant to

³³ DOI Guidance, *supra* note 6, at 8.

³⁴ *See, e.g.*, DOI Guidance, *supra* note 6, at 8–10.

³⁵ NOAA Guidance, *supra* note 8, at 7–8.

³⁶ *See* Leland E. Beck, Agency Practices and Judicial Review of Administrative Records in Informal Rulemaking 74–76 (May 14, 2013) (report to the Admin. Conf. of the U.S.).

³⁷ NOAA Guidance, *supra* note 8, at 14; *see* DOI Guidance, at 13.

³⁸ EPA Guidance, *supra* note 7, at 9.

³⁹ Gavoor & Platt, *supra* note 3, at 37.

⁴⁰ Memorandum from Jeffrey H. Wood, *supra* note 10.

judicial review.⁴¹ EPA guidelines also include detailed instructions for identifying which materials are deliberative.⁴²

In addition to describing which categories of materials do not belong in the AR, it may be a best practice for guidelines to specify who (e.g., the custodian, an assigned attorney) determines whether specific materials should be excluded from the AR. For example, NOAA guidelines state that the Custodian, in consultation with an assigned attorney, is responsible for determining whether materials should be excluded from the AR because they contain protected or privileged information.⁴³ DOI guidelines direct the AR Coordinator to include all relevant materials in the initial compilation but work closely with agency and DOJ attorneys to identify which materials are privileged and protected.⁴⁴

Agency guidelines may include varying levels of detail regarding the identification of privileged and protected information depending on who is responsible for deciding which materials should not be disclosed. DOI guidelines, for example, provide only a brief explanation of which materials are privileged and emphasize that the AR Coordinator will make such determinations in consultation with agency and DOJ attorneys,⁴⁵ whereas EPA guidelines go into significant detail regarding the exclusion of deliberative materials.⁴⁶ NOAA guidelines are somewhere in the middle.⁴⁷

How Should Personnel Search for Materials to Include in the AR?

In addition to describing which types of materials belong and do not belong in the AR, guidelines typically include instructions for locating potentially relevant materials. Useful guidelines specify which personnel are responsible for searching for potential AR materials and where personnel should look for potential AR materials.

DOI and NOAA guidelines both specify that the AR Coordinator or Custodian has primary responsibility for searching or directing the search for relevant materials.⁴⁸ Depending how records are maintained during the rulemaking process, this person may need to seek assistance from other personnel who were involved in the rulemaking. Guidelines can address how to seek such assistance. For example, NOAA guidelines direct the Custodian to issue a memorandum that alerts appropriate personnel that an AR is being compiled and requests relevant materials. NOAA guidelines also make clear that it “is the duty of all agency personnel to search for and provide the documents requested by the Custodian.”⁴⁹ It may be helpful to include instructions for identifying which personnel were involved in the rulemaking and handling situations in which relevant personnel are no longer employed by the agency.⁵⁰

⁴¹ EPA Guidance, *supra* note 7, at 9–10.

⁴² EPA Guidance, *supra* note 7, at 9–10.

⁴³ NOAA Guidance, *supra* note 8, at 14.

⁴⁴ DOI Guidance, *supra* note 6, at 5, 11.

⁴⁵ DOI Guidance, *supra* note 6, at 11.

⁴⁶ EPA Guidance, *supra* note 7, at 5–7, 9–10.

⁴⁷ NOAA Guidance, *supra* note 8, at 9–11.

⁴⁸ DOI Guidance, *supra* note 6, at 5; NOAA Guidance

⁴⁹ NOAA Guidance, *supra* note 8.

⁵⁰ See NOAA Guidance, *supra* note 8, at 13.

Where personnel should look for potential AR materials will also depend on how records are maintained during the rulemaking process. ACUS recommends that agencies maintain a contemporaneous compilation of rulemaking materials, called a “rulemaking record,” throughout the rulemaking process. If the agency maintains a good contemporaneous rulemaking record, the custodian should be able to locate the majority of materials needed to compile the AR in the rulemaking record. Consistent with this principle, DOI guidelines advise the AR Coordinator to “begin by examining the [rulemaking record], if any, because most, if not at all, of the documents that go into an AR should be in a properly maintained [rulemaking record].”⁵¹

It is likely a best practice to also include instructions for locating potentially relevant materials outside the rulemaking record. DOI, for example, instructs the AR Coordinator to “also direct an additional and thorough search in order to collect other relevant documents, including all primary and supporting documents, which may not be included in the [rulemaking record].” And NOAA guidelines direct the Custodian to conduct a “thorough search” for relevant materials following principles set forth in the guidelines.

ACUS recommends that custodians “document the record compilation process.”⁵² Consistent with this recommendation, DOI guidelines direct the AR Coordinate to “maintain a written record detailing where he or she searched for documents and who was consulted in the process of compiling the AR.”⁵³ NOAA guidelines similarly direct the Custodian to “keep careful track of who has been asked to submit materials, what materials the person has been asked to submit and has submitted, where the person searched for documents, who was consulted in the process, and how the Administrative Record has been assembled.”⁵⁴

What Is the Format of the AR, and How Is It Organized?

Although existing guidelines refer to the AR as a collection of documents, they say little about the systems and technologies that agency personnel use to compile, manage, review, certify, and file the AR. As a practical matter, the end product must be a single PDF or multiple PDF files that can be submitted through court electronic filing systems (“CM/ECF”).⁵⁵ (In some cases, courts may accept ARs that are especially large in an alternative format.⁵⁶)

Some guidelines contain principles for organizing the AR, for example:

- Organize materials logically (e.g., chronologically, topically).
- Label, number, attribute, and date materials and pages as appropriate (e.g., Bates stamping, electronic process).
- Omit duplicate materials.

⁵¹ DOI Guidance, *supra* note 6, at 5. DOI guidelines refer to the rulemaking record as the “Decision File.”

⁵² Admin. Conf. of the U.S., Recommendation 2013-4, *supra* note 5, ¶ 5.

⁵³ DOI Guidance, *supra* note 6, at 5.

⁵⁴ NOAA Guidance, *supra* note 8, at 12.

⁵⁵ Beck, *supra* note 36, at 58.

⁵⁶ *Id.*

- Comply with any practices required by court rules or agreed to as part of the litigation.⁵⁷

Guidelines also give some hints as to categories of materials that may require special handling. EPA guidelines, for example, note that CBI materials may be “placed in a secured (not publicly accessible) portion of the record” and that “copyright may affect how we make referenced material available, but does not affect whether it is part of an administrative record.”⁵⁸

ACUS recommends that agencies prepare an “index of contents” of the AR.⁵⁹ Consistent with this recommendation, existing agency guidelines tend to contain instructions for preparing an index and privilege log to accompany the AR.

How Does the Agency Certify the AR to the Court?

ACUS recommends that agency guidelines describe the procedure for certifying an AR to a reviewing court and for identifying the appropriate certifying official, who may or may not be the custodian.⁶⁰ DOI guidelines contain the following description:

The AR must be certified to the court by the AR Coordinator, or in rare cases, another federal employee who is familiar with the manner in which the AR has been compiled. The certification is signed under penalty of perjury, and the AR Coordinator should work closely with the Office of the Solicitor to develop appropriate language. The certification typically explains that the AR Coordinator was responsible for compiling the AR, has personal knowledge of its assembly, and states that the AR is full and complete. The certification also may describe the AR, such as the number of documents or the number of privileged or protected documents, or it may clarify that certain categories of documents are not included in the AR (such as transmittal memoranda, fax cover sheets, privileged and protected documents, internal working drafts, voluminous publicly available scientific reports, copyrighted protected books, etc.) . . . The certification is often sworn and notarized or in the form of a declaration with a Departmental and/or Bureau or Office seal.⁶¹

EPA guidelines state:

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.⁶²

⁵⁷ NOAA Guidance, *supra* note 8, at 13; DOI Guidance, *supra* note 6, at 12–13.

⁵⁸ EPA Guidance, *supra* note 7, at 9; *see also* Gavoor & Platt, *supra* note 3, at 41–52.

⁵⁹ Admin. Conf. of the U.S., Recommendation 2013-4, *supra* note 5, ¶ 9.

⁶⁰ Admin. Conf. of the U.S., Recommendation 2013-4, *supra* note 5, ¶¶ 9, 11(h).

⁶¹ DOI Guidance, *supra* note 6, at 13.

⁶² EPA Guidance, *supra* note 7, at 12.

How Does the Agency File the AR with the Court?

The exact process for filing an AR may depend on the specific rules of the court in which the litigation takes place.⁶³ This obviously complicates the development of guidance for personnel. DOI guidelines simply note: “Different courts have different rules for filing an AR. The Office of the Solicitor will work with the Department of Justice, the court, and the opposing party and will provide specific instructions to the AR Coordinator.”⁶⁴

How Does the Agency Preserve the AR?

Existing guidelines contain little by way of instructions for preserving the AR. It may be a best practice, as ACUS recommends,⁶⁵ for agencies to include such instructions in their guidelines.

QUESTIONS FOR THE WORKING GROUP

What Is the AR, and Why Does the Agency Compile It?

- (1) How should agencies define the AR for rulemaking personnel?
- (2) How much information, if any, should agencies include in their guidelines about the APA and *Citizens to Preserve Overton Park*?
- (3) What potential consequences of an inadequate AR, if any, should agencies highlight for personnel in their guidelines?
- (4) Are there any other matters on this topic that agency guidelines should address?

When Does the Agency Compile the AR?

- (5) What information should agencies include in their guidelines about the timing of AR compilation practices?

Who Compiles the AR?

- (6) How much detail should agencies provide in their guidelines about the various rules associated with compiling ARs and who performs them?
- (7) What information, if any, should agencies provide in their guidelines about selecting an appropriate custodian?

What Materials Should Personnel Include in the AR?

- (8) How should agencies describe, at a high level, what materials belong in the AR?

⁶³ Beck, *supra* note 36, at 61–65.

⁶⁴ DOI Guidance, *supra* note 6, at 13.

⁶⁵ Admin. Conf. of the U.S., Recommendation 2013-4, *supra* note 5, ¶ 11(g).

- (9) What types of materials, if any, should agencies advise personnel to ordinarily add to the AR?
- (10) When, if ever, should agencies include more detailed explanations for specific categories of materials to help personnel determine whether specific records belong in the AR?

What Materials Should Personnel Exclude from the AR?

- (11) What information should agencies include in their guidelines to help personnel manage information or materials that are protected by law?
- (12) What information should agencies include in their guidelines to help personnel manage information or materials that are subject to claims of legal privilege, especially deliberative process materials?
- (13) What information should agencies include in their guidelines to help personnel manage information that should be excluded from the AR because they are irrelevant or for reasons of administrative efficiency?

How Should Personnel Search for Materials to Include in the AR?

- (14) What information should agencies include in their guidelines to help personnel search for and identify materials that may belong in the AR?

What Is the Format of the AR, and How Is It Organized?

- (15) What information should agencies include in their guidelines about the format and electronic management of AR materials, and about how to prepare the AR for filing with the court?
- (16) What information should agencies include in their guidelines about organizing the AR?
- (17) What information should agencies include in their guidelines about indexing the AR or preparing a privilege log?

How Does the Agency Certify the AR to the Court?

- (18) What information should agencies include in their guidelines about selecting the appropriate official to certify the AR to the court?
- (19) What information should agencies include in their guidelines about the process for reviewing and certifying the AR?

How Does the Agency File the AR with the Court?

- (20) What information, if any, should agencies include in their guidelines to help personnel file the AR with the court?

How Does the Agency Preserve the AR?

- (21) What information, if any, should agencies include in their guidelines to help personnel preserve the AR consistent with federal recordkeeping policies?

Anything Else?

- (22) Are there any other matters related to the AR that agencies should address in their guidelines?