

Stephanie Tatham

From: Alan Morrison <abmorrison@law.gwu.edu>
Sent: Saturday, March 30, 2013 11:57 AM
To: Stephanie Tatham
Cc: Gretchen Jacobs; Leland E. Beck
Subject: Re: 04/03 meeting and Administrative Record revised materials

Stephanie, Gretchen & Lee:

As I think you know, I was away when the report and first recommendation arrived and the first meeting took place. Today is the first time I read the report and considered the revised draft recommendation. I regret that the comments I am making below were not made before, but I am providing them now so that they can at least be considered before the meeting by you and, if you decide to send them out, by committee members and others.

1. The word "considered" in the context of agency rulemaking (Rec 1) is beset with uncertainty for two reasons. An agency is not a human being and is staffed by many human beings. Therefore, the first question is, who is the agency for these purposes? Second, to be counted as having "considered" a published study, what level of scrutiny must a human being examine that study for it to count? These questions have consequences because all materials that were "considered" by the agency in a rulemaking have to be included in the admin record.

My suggestion is not to define "considered" in the recommendation, but to discuss it in the preamble, including the definitional problems discussed in the prior paragraph. I would add something like this: It includes all materials relied on by the agency to support the rule, as well as materials reviewed but rejected by the agency, regardless of the reason for the rejection. If the agency performed a literature review at a preliminary stage of the rulemaking, it should include all articles, studies etc that were responsive to the literature search. When in doubt, "considered" should be interpreted broadly, and, to avoid confusion, the agency can make clear those materials on which it relied.

2. The description of the three kinds of Admin records in the preamble partly overlaps with the descriptions in the recommendations. I would revise the preamble discussion to make it clear that the Administrative Record is the most complete and includes everything in any way related to the rulemaking; the Certified Record is the next most complete and it only excludes materials that are either precluded from public disclosure by law or are deliberative or otherwise privileged internal agency documents; and the Public Rulemaking Docket which contains a more limited subset (describe it). I thought that the diagram on page 16 of Lee's report was especially helpful to me as background. The actual definitions and what goes in and comes out, can be part of the recommendation. I would also reverse the order of 2 & 3, so that we go from most inclusive to least inclusive.

3. Regarding the certified record, should we say something about who the certifying officer should/can be? I would include a person who can certify based on his personal knowledge or based on the personal knowledge of agency personnel who are under his or her direct supervision. This may not be the legally correct standard, but we should state the standard or at least the better way of describing who can certify a record.

4. On indexing, I believe that the Certified Record should describe in sufficient detail to be able to identify the relevance and basis for non-inclusion of all omitted materials, either individually or by categories. It need not be a full privilege log or Vaughn index, but it should enable interested persons (and not just litigants) to see what else is there and not public. Rec 9.

5. The recommendation focuses on the need for the record for judicial review, although it does urge that these records be sent to NARA (I would say for more than their "legal value" - line 108). In my view, at least the Certified Record should be maintained for use in future rulemaking by this or other agencies, as well as for the basis of research by other interested persons.

6. I would also consider re-organizing the preamble, to put the discussion (as shortened and modified above) at the end, rather than close to the beginning, and also move the paragraph on prior ACUS work after the second paragraph.

I have some other stylistic changes, but will hold them for later.

Alan

On Thu, Mar 28, 2013 at 3:43 PM, Stephanie Tatham <STatham@acus.gov> wrote:

Dear Members of the Committee on Judicial Review:

Our next committee meeting is scheduled for Wednesday April 3, 2013 at 2:00pm here at the Administrative Conference (1120 20th St. NW, Washington, DC 20036). The committee will meet to consider the Administrative Record project. If you have not yet RSVP'd please let me know if you will join us in person, remotely, or not at all.

Attached for your consideration please find: 1) a revised draft recommendation; 2) a revised draft recommendation in redline version, showing the changes from the last version circulated; 3) a revised draft report from the consultant, Lee Beck; 4) a revised draft report in redline version. These materials will soon be posted on the ACUS project page at: www.acus.gov/administrative-record. They will also be circulated for comment to interested parties, including survey respondents, as well as to the Conference members at agencies that did not return surveys.

By early next week I will distribute a meeting agenda, call-in and remote participation information, and draft minutes from the meeting on March 19th.

Best wishes,

Stephanie

Stephanie J. Tatham | Attorney Advisor



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