



Memorandum

To: Committee on Judicial Review
From: Stephanie Tatham, Staff Counsel
Date: March 28, 2013
Re: Revised Draft Recommendation – Administrative Record project

The following draft recommendation is based on a draft report prepared by Leland E. Beck, Esq. entitled *Development, Compilation, and Judicial Review of Informal Agency Rulemaking Administrative Records* as well as discussions of the Committee on Judicial Review at its March 19, 2013 public meeting. This draft recommendation is intended to facilitate the Committee’s discussion at its April 03, 2013 public meeting, and not to preempt the Committee’s discussion and consideration of any proposed recommendations. In keeping with the Conference’s past practice, a draft preamble has also been included. The aim of the preamble is to explain the problem or issue the Recommendation is designed to address, and the Committee should feel free to revise it as appropriate.

The Administrative Record in Informal Rulemaking

Draft Preamble

1 The administrative record plays an essential role in informing the public of potential
2 agency action and in improving the public’s ability to understand and participate in agency
3 decisionmaking. As well, it can be essential to judicial review of agency decisionmaking under
4 the Administrative Procedure Act (APA), which directs courts to “review the whole record or
5 those parts of it cited by a party” to determine whether challenged agency action is lawful.¹
6 This statutory language was originally understood as referring to formal proceedings. However,
7 the Supreme Court has long interpreted this APA provision as also encompassing the

¹ 5 U.S.C. § 706.



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8 “administrative record” in informal agency proceedings whether reviewable by statute or as
9 final agency actions under 5 U.S.C. § 704.² This application to informal proceedings has given
10 rise to uncertainty and experimentation as agencies and courts have worked to implement the
11 administrative record concept—at times inconsistently. As a result, there may well be public
12 confusion about the distinctions between public rulemaking dockets, administrative records,
13 and certified administrative records for judicial review.

14 The Administrative Conference has therefore commissioned a study of federal agencies’
15 current practices in the development of public rulemaking dockets, administrative records, and
16 certified administrative records for purposes of judicial review.³ This recommendation and the
17 supporting Report address these concepts in the limited context of informal agency rulemaking
18 for legislative rules, adopted pursuant to procedures prescribed in 5 U.S.C. § 553.⁴ The
19 recommendation and the supporting Report do not address the record for agency decisions
20 made in other contexts, such as in adjudication, formal rulemaking, or guidance documents.

21 For the purposes of this recommendation, the administrative record, certified
22 administrative record, and public rulemaking docket are defined as follows:

23 “*Administrative Record*” means the full record of materials considered by the agency in
24 a rulemaking beginning no later than the date on which the agency publishes an advance notice
25 of proposed rulemaking, if there is one, or the notice of proposed rulemaking.⁵

² *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419 (1971).

³ Leland E. Beck, *Development, Compilation, and Judicial Review of Informal Agency Rulemaking Administrative Records* (DRAFT report to the Administrative Conference of the United States, forthcoming 2013) [hereinafter Beck Report].

⁴ 5 U.S.C. § 553(b)-(d).

⁵ The rulemaking process begins, according to a prior recommendation by the Administrative Conference, “no later than the date on which an agency publishes an advance notice of proposed rulemaking or notice of proposed rulemaking, whichever is earlier.” Administrative Conference of the United States, Recommendation 93-4, *Improving the Environment for Agency Rulemaking*, 59 Fed. Reg. 4670 (Feb. 1, 1994), *correction published*, 59 Fed. Reg. 8507 (Feb. 12, 1994).



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26 “*Certified Administrative Record*” means the informal rulemaking record certified to a
27 court as the record on review of the agency’s regulatory action. The Certified Administrative
28 Record will also include an affidavit, made by a certifying official, attesting to the contents and
29 accuracy of the record being certified.⁶ Certified Administrative Records should also include an
30 index itemizing their contents.⁷

31 The “*Public Rulemaking Docket*” means the public rulemaking file managed by the
32 agency, regardless of location, such as online at Regulations.gov or an agency website or
33 available for physical review in a docket room. The Public Rulemaking Docket includes all
34 information that the agency has made available for public viewing. The Conference in the
35 ensuing recommendation urges agencies to manage their Public Rulemaking Dockets to achieve
36 maximum disclosure to the public. An agency best practice is to include in the Public
37 Rulemaking Docket information considered even after the termination of public comment
38 periods.

39 The Conference recognizes that agencies engage in informal rulemaking with differing
40 frequencies, resources, and technologies. Many agencies are in a period of transition, as they
41 move from paper to electronic recordkeeping. Attention to the design of information
42 technology resources that is mindful of the principles and best practices set forth below can aid
43 agencies in administrative recordkeeping and facilitate more effective judicial review. Similarly,
44 this guidance can aid agency personnel as they compile Administrative Records and increase
45 public understanding of agency decisionmaking.⁸

46 This recommendation builds upon important earlier Administrative Conference work in
47 the areas of rulemaking, recordkeeping, and technological developments in managing records.

⁶ *Beck Report*, *supra* note 3, at Section IV.A.

⁷ *Id.*

⁸ The Administrative Conference has generally recommended that agency policies that affect the public should be articulated and made known to the public to the greatest extent feasible. Administrative Conference of the United States, Recommendation 71-3, *Articulation of Agency Policies*, 38 Fed. Reg. 19,788 (July 23, 1973).



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48 Administrative Conference Recommendation 74-4, *Preenforcement Judicial Review of Rules of*
49 *General Applicability*, first identified the administrative materials that should be before a court
50 in evaluating, on preenforcement review, the factual basis for agency rules of general
51 applicability.⁹ The recommendation was directed, in part, at the judicial development of a
52 lexicon of administrative law terms, including “record” on review of informal agency
53 rulemakings.¹⁰ In Recommendation 93-4, *Improving the Environment for Agency Rulemaking*,
54 the Administrative Conference advised agencies to establish and manage rulemaking files “so
55 maximum disclosure to the public is achieved during the comment period and so that a usable
56 and reliable file is available for purposes of judicial review.”¹¹ A number of Administrative
57 Conference recommendations also have examined the use of technology in acquiring, releasing,
58 and managing agency records.¹² Most recently, the Conference examined legal considerations
59 associated with the use of digital technologies in the development and implementation of
60 informal rulemakings.¹³

61 The recommendation synthesizes and updates the Conference’s prior recommendations
62 in these areas based on a thorough review of present agency practice. It also defines and
63 clarifies key concepts. The recommendation is grounded in applied empirical research,
64 documented in the Report and supported by a survey questionnaire on agency recordkeeping

⁹ Administrative Conference of the United States, Recommendation 74-4, *Preenforcement Judicial Review of Rules of General Applicability*, 39 Fed. Reg. 23,044 (June 26, 1974).

¹⁰ See Paul Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974) (based on consultant report prepared for the Administrative Conference).

¹¹ Administrative Conference of the United States, Recommendation 93-4, *Improving the Environment for Agency Rulemaking*, 59 Fed. Reg. 4670 (Feb. 1, 1994), *correction published*, 59 Fed. Reg. 8507 (Feb. 12, 1994).

¹² Administrative Conference of the United States, Recommendation 2011-2, *Rulemaking Comments*, 76 Fed. Reg. 48,791 (Aug. 9, 2011); Administrative Conference of the United States, Recommendation 2011-1, *Legal Considerations in e-Rulemaking*, 76 Fed. Reg. 48,789 (Aug. 9, 2011); Administrative Conference of the United States, Recommendation 90-5, *Federal Agency Electronic Records Management and Archives*, 55 Fed. Reg. 53,270 (Dec. 28, 1990); Administrative Conference of the United States, Recommendation 88-10, *Federal Agency Use of Computers in Acquiring and Releasing Information*, 54 Fed. Reg. 5209 (Feb. 2, 1989).

¹³ Recommendation 2011-1, *supra*.



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65 procedures as well as by the collection of existing agency guidance.¹⁴ The Conference has
66 identified and recommends best practices for all agencies in the areas of record compilation,
67 preservation, and certification.

[DRAFT] RECOMMENDATION

68 1. *Administrative Record in Informal Rulemaking.* In the absence of a specific
69 statutory requirement to the contrary, the agency Administrative Record should contain all
70 materials considered by the agency during the informal rulemaking, including:

- 71 (a) notices pertaining to the rulemaking;
- 72 (b) comments and other documents submitted to the agency related to the
73 rulemaking;
- 74 (c) factual materials not included in the foregoing;
- 75 (d) transcripts of oral presentations made in the course of a rulemaking;
- 76 (e) reports or recommendations of any relevant advisory committees;
- 77 (f) other materials required by statute, executive order, or agency rule to be
78 considered or to be made public in connection with the rulemaking; and
- 79 (g) any other materials considered by the agency as pertinent to the rule.

80 2. *Public Rulemaking Docket.* Agencies should manage their Public Rulemaking
81 Dockets to achieve maximum public disclosure. Insofar as feasible, but subject to legal
82 limitations on disclosure, the Public Rulemaking Docket should include all materials in the
83 Administrative Record.

¹⁴ *Beck Report, supra* note 3, at Section III.



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84 3. *Certified Administrative Record.* The Certified Administrative Record provided to
85 the court on judicial review of informal rulemaking should contain all of the materials in the
86 Administrative Record as set forth in Recommendation 1, except: materials for which disclosure
87 is prohibited or that are otherwise protected from disclosure by law and which are not
88 presented under seal; and materials that the agency has determined are subject to withholding
89 on the basis of legal privilege in the forum for review, and that it sees fit to withhold. However,
90 the reviewing court should not invariably be confined to the foregoing materials in evaluating
91 the factual basis for the rule. The record on review may—consistent with the Administrative
92 Procedure Act, 5 U.S.C. § 706, and as appropriate under the rules of the reviewing court—also
93 consist of those parts of the Certified Administrative Record cited by a party.

94 **Compiling and Indexing the Administrative Record**

95 4. Agencies should begin compiling Administrative Records no later than the date
96 on which an agency publishes an advance notice of proposed rulemaking, if there is one, or a
97 notice of proposed rulemaking.

98 5. Agencies should maximize opportunities to index Administrative Records for
99 informal rulemaking on an ongoing basis, at an appropriate level of detail, and consistent with
100 privilege and Freedom of Information Act indexing practices.

101 6. Agencies should designate a custodian or custodians for administrative
102 recordkeeping, either on a rulemaking by rulemaking basis or generally. Agencies should
103 inform agency personnel of the custodian(s) and direct them to deposit materials considered
104 during the rulemaking with the custodian(s). The custodian(s) should document the record
105 compilation process.

106 **Preserving Administrative Records**

107 7. The National Archives and Records Administration (NARA) should consider
108 amending its agency guidance to specifically indicate the legal value of records relating to the
109 promulgation of legislative rules, particularly Certified Administrative Records.



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110 8. Agencies using electronic records management systems to manage rulemaking
111 records, such as the Federal Document Management System or agency specific systems, should
112 work with NARA to ensure the adequacy of such systems for archival purposes and the
113 transferability of permanent records to the National Archives. Agencies should consider
114 whether revision of their records schedules is appropriate in light of developments in electronic
115 records management.

116 **Certifying Administrative Records**

117 9. Agencies should develop procedures for designating appropriate individuals,
118 who may or may not be record custodians, to certify Certified Administrative Records to the
119 court in case of judicial review of agency action. Agency certifications should include an index
120 of content. Agency certifications should briefly describe exclusions of Administrative Record
121 material from the Certified Administrative Record, if any.

122 **Agency Guidance on Informal Rulemaking Administrative Records**

123 10. Agencies that engage in informal rulemaking should issue guidance to aid
124 personnel in implementing the above best practices. Agencies should make their guidance on
125 informal rulemaking administrative recordkeeping available to the public and to the
126 Department of Justice, if the Department represents them in litigation. The level of detail and
127 contents of such guidance will naturally vary based on factors such as: the size of typical agency
128 rulemaking records; institutional experience, or the lack thereof, with record compilation and
129 informal rulemaking litigation; the need for consistency across agency components in the
130 development and maintenance of rulemaking records; and agency resources. However,
131 agencies should ensure that guidance addresses at least the following:

132 (a) essential components of the Public Rulemaking Docket, the Administrative
133 Record, and the Certified Administrative Record;

134 (b) appropriate exclusions from the Administrative Record, including guidance on
135 whether and when to exclude files such as personal notes or draft documents;



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- 136 (c) timing of Administrative Record compilation and indexing practices;
- 137 (d) management and segregation of sensitive or protected materials, *e.g.*,
138 copyrighted, classified, protected personal, or confidential business information;
- 139 (e) management and segregation of privileged materials, *e.g.*, attorney work
140 product, or pre-decisional deliberative materials;
- 141 (f) preservation of Administrative Records; and
- 142 (g) certification of the record on review, including the process for identifying the
143 appropriate certifying official.
- 144 If relevant, agency guidance should include:
- 145 (h) capabilities and limitations of recordkeeping tools and technologies; and
- 146 (i) policies and procedures for the protection of sensitive information submitted by
147 the public during the process of rulemaking or otherwise contained in the
148 Administrative Record.