



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Memorandum

To: Committee on Judicial Review

From: Stephanie Tatham, Staff Counsel

Date: April 18, 2013

Re: Further 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 and April 3, 2013 public meetings and comments of Conference Members. The draft recommendation is intended to facilitate the Committee’s discussion at its April 22, 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

Preamble

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

¹ 5 U.S.C. § 706.



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7 as referring to formal proceedings. However, the Supreme Court has long interpreted this APA
8 provision as also encompassing the “administrative record” in informal agency proceedings,
9 whether reviewable by statute or as final agency actions under 5 U.S.C. § 704.² This application
10 to informal proceedings has given rise to uncertainty and experimentation as agencies and
11 courts have worked to implement the administrative record concept—at times inconsistently.
12 As a result, confusion has arisen about the distinctions between internal agency rulemaking
13 records, public rulemaking dockets, and administrative records for judicial review.

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

21 This recommendation builds upon earlier Administrative Conference work in the areas
22 of rulemaking, recordkeeping, and technological developments in managing records.
23 Administrative Conference Recommendation 74-4, *Preenforcement Judicial Review of Rules of*
24 *General Applicability*, identified the administrative materials that should be available to a court
25 that was evaluating, on preenforcement review, the factual basis for agency rules of general

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). It may also have application to “hybrid” rulemaking statutes that require additional procedures beyond those in § 553.



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26 applicability.⁵ That recommendation was receptive to judicial development of the concept of a
27 “record” on review of informal agency rulemakings. In Recommendation 93-4, *Improving the*
28 *Environment for Agency Rulemaking*, the Administrative Conference advised agencies to
29 establish and manage rulemaking files “so maximum disclosure to the public is achieved during
30 the comment period and so that a usable and reliable file is available for purposes of judicial
31 review.”⁶ A number of Administrative Conference recommendations also have examined the
32 use of technology in acquiring, releasing, and managing agency records.⁷ Most recently, the
33 Conference examined legal considerations associated with the use of digital technologies in the
34 development and implementation of informal rulemakings.⁸

35 This recommendation synthesizes and updates the Conference’s prior
36 recommendations in these areas. It is grounded in empirical research, supported by a survey
37 questionnaire on present agency recordkeeping practices as well as by the collection of existing
38 agency guidance.⁹ The Conference has identified and recommends best practices for all
39 rulemaking agencies in the areas of record compilation, preservation, and certification. The
40 Conference also advises agencies to develop guidance to aid agency personnel as they compile

⁵ 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), based on consultant’s report published as *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974).

⁶ 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).

⁷ 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).

⁸ Recommendation 2011-1, *supra* note 7.

⁹ *Beck Report*, *supra* note 3, at Section III.



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41 rulemaking and administrative records and to increase public understanding of agency
42 recordkeeping.¹⁰

43 Agencies engage in informal rulemaking with differing frequencies, resources, and
44 technological capabilities. Many agencies are in a period of transition, as they move from paper
45 to electronic recordkeeping.¹¹ Attention to the design of information technology resources that
46 is mindful of the principles and best practices set forth below can aid agencies in administrative
47 recordkeeping, as well as facilitate greater public understanding of agency decisionmaking and
48 more effective judicial review. For the purposes of this recommendation, the rulemaking
49 record, public rulemaking docket, and the administrative record for judicial review are defined
50 as follows:

51 “Rulemaking record” means the full record of materials before the agency in an
52 informal rulemaking, beginning no later than the date on which the agency publishes the notice
53 of proposed rulemaking or the advance notice of proposed rulemaking, if there is one, and
54 typically ending upon publication of the final rule.¹² The Conference contemplates that, in
55 addition to materials required by law to be included in the rulemaking record, as well as all

¹⁰ The Administrative Conference has generally recommended that agency policies affecting 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).

¹¹ The Office of Management and Budget and the National Archives have directed federal agencies to manage all permanent electronic records in an electronic format to the fullest extent possible by December 31, 2019, and to develop plans to do so by December 31, 2013. Memorandum from Jeffrey D. Zients, Acting Director, Office of Management and Budget, and David S. Ferriero, Archivist of the United States, National Archives and Records Administration, to the Heads of Executive Departments and Independent Agencies concerning “Managing Government Records Directive” M-12-18 (Aug. 24, 2012).

¹² 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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56 comments and materials submitted to the agency during comment periods, any material that
57 the agency considered be part of that record.¹³

58 “*Consideration*” implies review by an individual with substantive responsibilities in
59 connection with the rulemaking; thus, a list of potentially helpful articles compiled by an intern
60 at the request of an agency lawyer would probably not qualify. Consideration also implies
61 some minimum degree of attention to the contents of a document. Thus, the rulemaking
62 record need not encompass every document that rulemaking personnel encountered while
63 rummaging through a file drawer, but it generally should include a document that was reviewed
64 in order to evaluate its possible significance for the proceeding, unless the review disclosed that
65 the document was completely nongermane to the subject matter of the proceeding. A
66 document should not be excluded from the rulemaking record on the basis that the reviewer
67 disagreed with the factual or other analysis in the document, or because the agency did not or
68 will not rely on it. Although the concept of consideration resists precise definition, it should be
69 broadly interpreted so as to fulfill its purpose of generating a body of materials by which the
70 rule can be evaluated and that the agency and others may use in the future.

71 “*Public rulemaking docket*” means the public version of the rulemaking record managed
72 by the agency, regardless of location, such as online at Regulations.gov or an agency website or
73 available for physical review in a docket room. The public rulemaking docket includes all
74 information that the agency has made available for public viewing and the Conference in this
75 recommendation urges agencies to manage their public rulemaking dockets to achieve
76 maximum disclosure to the public. However, the Conference recognizes that prudential
77 concerns may limit agencies from displaying some information online. It is best practice for

¹³ The Conference first recommended inclusion of materials considered by the agency in the administrative record for judicial review in Recommendation 74-4, *supra* note 5. Courts have also relied on the concept of consideration in defining the administrative record. *Pac. Shores Subdiv., Cal. Water Dist. v. U.S. Army Corps of Engineers*, 448 F. Supp. 2d 1, 4 (D.D.C. 2006) (citations omitted); *see also Nat’l Ass’n of Chain Drug Stores v. U.S. Dep’t of Health & Human Servs.*, 631 F. Supp. 2d 23, 26 (D.D.C. 2009) (citing Recommendation 74-4 in defining the administrative record); *cf. Sierra Club v. Costle*, 657 F.2d 298, 394 n. 469 (D.C. Cir. 1981) (discussing Recommendation 74-4 as an approach to defining the administrative record).



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78 agencies to describe and note online materials that are not displayed but are available for
79 physical inspection. Another agency best practice is to include in the public rulemaking docket
80 materials generated by the agency prior to issuance of the final rule.

81 “Administrative record” for judicial review means the materials tendered by the agency
82 and certified to a court as the record on review of the agency’s regulatory action. The
83 administrative record provided to the court will also include an affidavit, made by a certifying
84 official, attesting to the contents and accuracy of the record being certified.¹⁴ Administrative
85 records should also include an index itemizing their contents.¹⁵ Under the Administrative
86 Procedure Act, and as appropriate under the rules of the reviewing court, the record on review
87 may consist of those parts of the administrative record that are cited by a party.¹⁶ These
88 materials are often presented to the court in the form of a joint appendix, preparation of which
89 may be reliant on the index of administrative record contents.

90 Agency practices regarding the identification or inclusion of protected or privileged
91 materials in administrative records and their accompanying indices vary.¹⁷ Some agencies
92 never include or identify privileged materials in administrative records for judicial review.¹⁸
93 Other agencies identify non-disclosed materials specifically in a privilege log provided with the
94 index of the administrative record.¹⁹ Agencies have also noted redactions of protected

¹⁴ *Beck Report, supra* note 3, at Section IV.A.

¹⁵ *Id.*

¹⁶ 5 U.S.C. § 706.

¹⁷ The variety of agency practices is described at length in the *Beck Report, supra* note 3, at Section IV.A.

¹⁸ Absent a showing of bad faith or improper behavior, the agency practice of excluding pre-decisional materials from the administrative record on judicial review enjoys substantial judicial support. See *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 156 F.3d 1279 (D.C. Cir. 1998); *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm’n*, 789 F.2d 26, 44-45 (D. C. Cir. 1986) (en banc).

¹⁹ *E.g.*, Memorandum from Lois J. Schiffer, General Counsel, National Oceanic and Atmospheric Administration, to Administrators and Directors, National Oceanic and Atmospheric Administration, concerning “National Oceanic and Atmospheric Administration Guidelines for Compiling an Agency Administrative Record,” 6-7 (Dec. 21, 2012) (“When materials considered in the decision-making process are attorney-client privileged, deliberative process



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95 materials in the public administrative record and moved the court to permit filing of a summary
96 of protected materials under seal. Many agencies do not have a policy on inclusion of
97 protected or privileged materials in an administrative record for judicial review and manage
98 such materials on a case-by-case basis. Case-by-case consideration may occasionally be
99 necessary, such as when privileged materials are referenced as the basis of the agency's
100 decision. Nonetheless, the Conference recommends that agencies develop a written policy for
101 treatment of protected or privileged materials in certification of the administrative record for
102 judicial review, and that agencies make this policy publicly available.²⁰

103 Compilation and preparation of the administrative record for judicial review is properly
104 within the province of the agency and this process should be accorded a presumption of
105 regularity by the reviewing court.²¹ Completion or supplementation of the administrative
106 record may be appropriate where a strong showing has been made to overcome the
107 presumption of regularity in compilation. For example, courts have permitted limited discovery
108 on the basis of a “strong showing of bad faith or improper behavior” on the part of the agency
109 decisionmaker.²² Courts may also investigate allegations²² that the agency omitted information
110 from the administrative record that should have been included.²³

privileged . . . or otherwise protected by statutory or other legal principles of confidentiality or non-disclosure,
they must be identified for the Administrative Record and listed on a Privilege Log. The Privilege Log, but not the
documents, are then included in the Administrative Record for the Court.”).

²⁰ *Recommendation 71-3, supra* note 10.

²¹ *See* *Citizens for Alternatives to Radioactive Dumping v. U.S. Dep’t of Energy*, 485 F.3d 1091, 1097 (10th Cir. 1985) (“designation of the Administrative Record, like any established administrative procedure, is entitled to a presumption of administrative regularity”) (citation omitted); *Amfac Resorts, LLC v. U.S. Dep’t of Interior*, 143 F.Supp. 2d 7, 12 (D.D.C. 2001); *see also* *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926) (“The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.”).

²² *Overton Park*, 401 U.S. 402, 420 (1971).

²³ *See, e.g.,* *Cape Cod Hospital v. Sebelius*, 630 F.3d 203, 211-12 (D.C. Cir. 2011); *Ad Hoc Metals Coalition v. Whitman*, 227 F. Supp. 2d 134, 139-40 (D.D.C. 2002).



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111 Completion or supplementation of the administrative record for judicial review may also
112 be appropriate in other circumstances not addressed in this recommendation. In previous
113 recommendations, the Conference has recognized that the reviewing court should not
114 invariably be confined to the record on review in evaluating the factual basis of a generally
115 applicable rule on preenforcement review.²⁴ The Conference has also acknowledged that, on
116 direct review by courts of appeals, the record on review “can usually be supplemented, if
117 necessary, by means other than an evidentiary trial in a district court.”²⁵

RECOMMENDATION

118 **Record Contents**

119 1. *The Rulemaking Record.* In the absence of a specific statutory requirement to
120 the contrary, the agency rulemaking record in an informal rulemaking proceeding should
121 include:

- 122 (a) notices pertaining to the rulemaking;
- 123 (b) comments and other materials submitted to the agency related to the
124 rulemaking;
- 125 (c) factual materials not included in the foregoing;
- 126 (d) transcripts or recordings, if any, of oral presentations made in the course of a
127 rulemaking;
- 128 (e) reports or recommendations of any relevant advisory committees;

²⁴ Recommendation 74-4, *supra* note 5.

²⁵ Administrative Conference of the United States, Recommendation 75-3, *The Choice of Forum for Judicial Review of Administrative Action* ¶ 5(a), 40 Fed. Reg. 27,926 (July 2, 1975).



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129 (f) other materials required by statute, executive order, or agency rule to be
130 considered or to be made public in connection with the rulemaking; and

131 (g) any other materials considered by the agency during the course of the
132 proceeding.

133 2. *The Public Rulemaking Docket.* Agencies should manage their public rulemaking
134 dockets to achieve maximum public disclosure. Insofar as feasible, the public rulemaking
135 docket should include all materials in the rulemaking record, subject to legal limitations on
136 disclosure and prudential concerns that might suggest not including some sensitive or
137 confidential information online and instead noting that this material is available for physical
138 review in a reading room.

139 3. *The Administrative Record for Judicial Review.* The administrative record
140 provided to the court on judicial review of informal rulemaking should contain all of the
141 materials in the rulemaking record as set forth in Recommendation 1 except for: a) materials
142 protected from disclosure by law, and that are not presented under seal, and b) materials that
143 the agency has determined are subject to withholding on the basis of legal privilege in the
144 forum for review, and that it sees fit to withhold.

145 **Rulemaking Recordkeeping**

146 4. Agencies should begin compiling rulemaking records no later than the date on
147 which an agency publishes the notice of proposed rulemaking, or an advance notice of
148 proposed rulemaking, if there is one. Agencies should typically close the rulemaking record
149 upon publication of the final rule.

150 5. Agencies should index rulemaking records for informal rulemaking on an ongoing
151 basis, at an appropriate level of detail, and consistent with legal privileges and the Freedom of
152 Information Act, 5 U.S.C. § 552.



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153 6. Agencies should designate one or more custodians for rulemaking
154 recordkeeping, either on a rulemaking-by-rulemaking basis or generally. Agencies should
155 inform agency personnel of the custodian(s) and direct them to deposit rulemaking record
156 materials with the custodian(s), **excepting if necessary confidential information to which access**
157 **is restricted**. The custodian(s) should document the record compilation process.

158 **Record Preservation**

159 7. The National Archives and Records Administration (NARA) should consider
160 amending its agency guidance to specifically indicate the official status and legal value of
161 records relating to informal rulemaking, particularly administrative records for judicial review.

162 8. Agencies using electronic records management systems to manage rulemaking
163 records, such as the Federal Document Management System or agency specific systems, should
164 work with NARA to ensure the adequacy of such systems for archival purposes and the
165 transferability of permanent records to the National Archives. Agencies should consider
166 whether revision of their records schedules is appropriate in light of developments in electronic
167 records management.

168 **Administrative Record Certification**

169 9. Agencies should develop procedures for designating appropriate individuals,
170 who may or may not be record custodians, to certify administrative records to the court in case
171 of judicial review of agency action. Agency certifications should include an index of contents of
172 the administrative record.

173 **10. Agencies should develop a general policy regarding treatment of protected or**
174 **privileged materials in certification of the administrative record to the reviewing court, and**
175 **make this policy publicly available.**



176 **Agency Record Guidance**

177 11. Agencies that engage in informal rulemaking should issue guidance to aid
178 personnel in implementing the above best practices. Agencies should make their guidance on
179 informal rulemaking and administrative recordkeeping available to the public and to the
180 Department of Justice, if the Department represents the agency in litigation. The level of detail
181 and contents of such guidance will naturally vary based on factors such as: the size of typical
182 agency rulemaking records; institutional experience, or the lack thereof, with record
183 compilation and informal rulemaking litigation; the need for consistency across agency
184 components in the development and maintenance of rulemaking records; and agency
185 resources. However, agencies should ensure that guidance addresses at least the following:

186 (a) essential components of the rulemaking record, public rulemaking docket, and
187 the administrative record for judicial review;

188 (b) appropriate exclusions from the rulemaking record, including guidance on
189 whether and when to exclude files such as personal notes or draft documents;

190 (c) timing of compilation and indexing practices;

191 (d) management and segregation of privileged materials, *e.g.*, attorney work
192 product or pre-decisional deliberative materials;

193 (e) management and segregation of sensitive or protected materials, *e.g.*,
194 copyrighted, classified, protected personal, or confidential business information;

195 (f) policies and procedures, if any, for the protection of sensitive information
196 submitted by the public during the process of rulemaking or otherwise contained in the
197 rulemaking record;

198 (g) preservation of rulemaking and administrative records and public rulemaking
199 dockets;



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200 (h) certification of the administrative record for judicial review, including the
201 process for identifying the appropriate certifying official; and

202 (i) relevant capabilities and limitations of recordkeeping tools and technologies.

203 **Judicial Review**

204 12. A reviewing court should afford the administrative record a presumption of
205 regularity.

206 13. In appropriate circumstances, a reviewing court should permit or require
207 completion or supplementation of the record on review. Supplementation or completion may
208 be appropriate when the presumption of regularity has been rebutted, such as in cases where
209 there is a strong showing that an agency has acted improperly or in bad faith or there are
210 credible allegations that the administrative record for judicial review is incomplete.