



# ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

## Memorandum

To: Committee on Judicial Review

From: Stephanie Tatham, Staff Counsel

Date: April ~~18~~22, 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



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

6 whether challenged agency action is lawful.<sup>1</sup> This statutory language was originally understood  
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.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> 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

---

<sup>1</sup> 5 U.S.C. § 706.

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

<sup>3</sup> 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].

<sup>4</sup> 5 U.S.C. § 553(b)-(d). It may also have application to “hybrid” rulemaking statutes that require additional procedures beyond those in § 553 but less than those in formal rulemaking under 5 U.S.C. §§ 556-57.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

26 applicability.<sup>5</sup> 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.”<sup>6</sup> A number of Administrative Conference recommendations also have examined the  
32 use of technology in acquiring, releasing, and managing agency records.<sup>7</sup> Most recently, the  
33 Conference examined legal considerations associated with the use of digital technologies in the  
34 development and implementation of informal rulemakings.<sup>8</sup>

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~~ a review of  
38 existing agency guidance.<sup>9</sup> The Conference has identified and recommends best practices for  
39 all rulemaking agencies in the areas of record compilation, preservation, and certification. The  
40 ~~Conference~~ recommendation also advises agencies to develop guidance to aid agency

---

<sup>5</sup> 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).

<sup>6</sup> 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).

<sup>7</sup> 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).

<sup>8</sup> Recommendation 2011-1, *supra* note 7.

<sup>9</sup> *Beck Report*, *supra* note 3, at Section III.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

41 personnel as they compile rulemaking and administrative records and to increase public  
42 understanding of agency recordkeeping.<sup>10</sup>

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.<sup>11</sup> 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.<sup>12</sup> The Conference contemplates that, in  
55 addition to materials required by law to be included in the rulemaking record, as well as all

---

<sup>10</sup> 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).

<sup>11</sup> 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).

<sup>12</sup> 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).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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

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 to which~~ the agency and others may ~~use~~refer 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 t~~The Conference ~~in this~~  
75 ~~recommendational~~also 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

---

<sup>13</sup> 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).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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.<sup>14</sup> Administrative  
85 records should also include an index itemizing their contents.<sup>15</sup> Parties often rely on this index  
86 in designating portions of the administrative record for inclusion in a joint appendix that will be  
87 presented to the court. The joint appendix then typically serves as the basis for the court’s  
88 review, as provided in the Administrative Procedure Act and as appropriate under the rules of  
89 the reviewing court.<sup>16</sup> ~~Under the Administrative Procedure Act, and as appropriate under the~~  
90 ~~rules of the reviewing court, the record on review may consist of those parts of the~~  
91 ~~administrative record that are cited by a party.~~<sup>17</sup> ~~These materials are often presented to the~~  
92 ~~court in the form of a joint appendix, preparation of which may be reliant on the index of~~  
93 ~~administrative record contents.~~

94 Agency practices regarding the identification or inclusion of protected or privileged  
95 materials in administrative records and their accompanying indices vary.<sup>18</sup> Some agencies  
96 never include or identify privileged materials in administrative records for judicial review.<sup>19</sup>

---

<sup>14</sup> *Beck Report*, *supra* note 3, at Section IV.A.

<sup>15</sup> *Id.*

<sup>16</sup> 5 U.S.C. § 706 (“the court shall review the whole record or those parts of it cited by a party”).

<sup>17</sup> ~~5 U.S.C. § 706.~~

<sup>18</sup> The variety of agency practices is described at length in the *Beck Report*, *supra* note 3, at Section IV.A.

<sup>19</sup> 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*



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

97 Other agencies identify non-disclosed materials specifically in a privilege log provided with the  
98 index of the administrative record.<sup>20</sup> Agencies have also noted redactions of protected  
99 materials in the public administrative record and moved the court to permit filing of a summary  
100 of protected materials under seal. Many agencies do not have a policy on inclusion of  
101 protected or privileged materials in an administrative record for judicial review and manage  
102 such materials on a case-by-case basis. Case-by-case consideration may occasionally be  
103 necessary, such as when privileged materials are referenced as the basis of the agency's  
104 decision. Nonetheless, the Conference recommends that agencies develop a written policy for  
105 treatment of protected or privileged materials in certification of the administrative record for  
106 judicial review, and that agencies make this policy publicly available.<sup>21</sup>

107           Compilation and preparation of the administrative record for judicial review is properly  
108 within the province of the agency and this process should be accorded a presumption of  
109 regularity by the reviewing court.<sup>22</sup> Completion or supplementation of the administrative  
110 record may be appropriate where a strong showing has been made to overcome the  
111 presumption of regularity in compilation. For example, courts have permitted limited discovery

---

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).

<sup>20</sup> *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 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.").

<sup>21</sup> *Recommendation 71-3, supra* note 10.

<sup>22</sup> *See* Citizens for Alternatives to Radioactive Dumping v. U.S. Dep't of Energy, 485 F.3d 1091, 1097 (10<sup>th</sup> 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.").



112 on the basis of a “strong showing of bad faith or improper behavior” on the part of the agency  
113 decisionmaker.<sup>23</sup> Courts may also investigate allegations that the agency omitted information  
114 from the administrative record that should have been included.<sup>24</sup>

115 Completion or supplementation of the administrative record for judicial review may also  
116 be appropriate in other circumstances not addressed in this recommendation. In previous  
117 recommendations, the Conference has recognized that the reviewing court should not  
118 invariably be confined to the record on review in evaluating the factual basis of a generally  
119 applicable rule on preenforcement review.<sup>25</sup> The Conference has also acknowledged that, on  
120 direct review by courts of appeals, the record on review “can usually be supplemented, if  
121 necessary, by means other than an evidentiary trial in a district court.”<sup>26</sup>

## RECOMMENDATION

### 122 **Record Contents**

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

126 (a) notices pertaining to the rulemaking;

127 (b) comments and other materials submitted to the agency related to the  
128 rulemaking;

---

<sup>23</sup> Overton Park, 401 U.S. 402, 420 (1971).

<sup>24</sup> 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).

<sup>25</sup> Recommendation 74-4, *supra* note 5.

<sup>26</sup> 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).





## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 129 (c) factual materials not included in the foregoing;
- 130 (d) transcripts or recordings, if any, of oral presentations made in the course of a  
131 rulemaking;
- 132 (e) reports or recommendations of any relevant advisory committees;
- 133 (f) other materials required by statute, executive order, or agency rule to be  
134 considered or to be made public in connection with the rulemaking; and
- 135 (g) any other materials considered by the agency during the course of the  
136 proceeding.

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

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

### 149 **Rulemaking Recordkeeping**

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



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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

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

### 162   **Record Preservation**

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

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

### 172   **Administrative Record Certification**

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



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

180   **Agency Record Guidance**

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

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

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

194           (c) timing of compilation and indexing practices;

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

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

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



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 202 (g) preservation of rulemaking and administrative records and public rulemaking  
203 dockets;
- 204 (h) certification of the administrative record for judicial review, including the  
205 process for identifying the appropriate certifying official; and
- 206 (i) relevant capabilities and limitations of recordkeeping tools and technologies.

### 207 **Judicial Review**

208 12. A reviewing court should afford the administrative record a presumption of  
209 regularity.

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