

AASHTO PRACTITIONER'S HANDBOOK

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August 2016

MAINTAINING A PROJECT FILE AND PREPARING AN ADMINISTRATIVE RECORD FOR A NEPA STUDY

This Handbook provides advice on maintaining the project file during the National Environmental Policy Act (NEPA) process and preparing the administrative record if decisions made in the NEPA process are challenged in a lawsuit.

Issues covered in this Handbook include:

- Maintaining accurate project files during the NEPA process
- Using the NEPA process to build a strong administrative record
- Identifying potential administrative record documents in project files
- Making judgment calls about what documents to include in the record
- Submitting the administrative record to the court

The Practitioner's Handbooks are produced by the Center for Environmental Excellence by AASHTO. The Handbooks provide practical advice on a range of environmental issues that arise during the planning, development, and operation of transportation projects.

The Handbooks are primarily intended for use by project managers and others who are responsible for coordinating compliance with a wide range of regulatory requirements. With their needs in mind, each Handbook includes:

- key issues to consider;
- a background briefing;
- practical tips for achieving compliance; and
- a list of reference materials.

In addition, key regulations, guidance materials, and sample documents for each Handbook are posted on the Center's web site at <http://environment.transportation.org>



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This material is based upon work supported by the Federal Highway Administration under Cooperative Agreement No. DTFH61-07-H-00019. Any opinions, findings, and conclusions or recommendations expressed in this publication are those of the Author(s) and do not necessarily reflect the view of the Federal Highway Administration.

Overview



This Practitioner's Handbook provides advice for maintaining the project file during the National Environmental Policy Act (NEPA) process and for compiling the administrative record if and when a lawsuit is filed challenging the decisions made in the NEPA process.¹ The Handbook is intended primarily for projects in which the Federal lead agency is the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), or the Federal Railroad Administration (FRA), and the project sponsor is a state department of transportation (DOT), public transit agency, or other state or local public agency.

Maintaining an accurate and up-to-date project file is an important task in any NEPA study, regardless of whether litigation is anticipated. A well-maintained project file reduces inefficiency and duplication of effort, while also reducing the risk of overlooking information. It also enables an agency to respond promptly to document requests under the Freedom of Information Act (FOIA) and similar state public records laws.

When a lawsuit is filed challenging a Federal agency's decision, the agency must compile and submit its administrative record, which consists of all documents and materials that the agency "directly or indirectly" considered in making its decision. The court is required to base its review of the agency's decision on the information contained in the administrative record. A strong and complete record greatly enhances an agency's ability to defend its decision; a weak or incomplete record negatively affects the defensibility of the agency's decision.

Legally, the responsibility for compiling the administrative record rests with the Federal agency whose decision has been challenged.² If two or more Federal agencies granted approvals for the project, each of those agencies could be named as a defendant, and each agency would then need to prepare its own administrative record. The project sponsor typically works collaboratively with the Federal lead agency to prepare the record. When a state DOT has assumed the responsibilities of FHWA or another U.S. Department of Transportation (U.S. DOT) agency under an assignment program, the state DOT essentially is the Federal agency for purposes of the litigation and therefore is directly responsible for preparing the administrative record.

Since the NEPA process is often lengthy and complex, it is not uncommon for the administrative record in a NEPA case to include tens (or even hundreds) of thousands of pages. For that reason, compiling the administrative record requires a substantial effort by the agency's program staff and attorneys. The best way to expedite the preparation of the administrative record is to maintain an accurate and up-to-date project file throughout the NEPA process.

In this Handbook, the term "project file" refers to the files maintained by the project team during the NEPA process, while the term "administrative record" refers to the documents that are actually submitted by an agency to the court in a NEPA lawsuit.

Background Briefing

Maintaining a Project File

The agencies involved in preparing a NEPA study generally have wide discretion to determine how to manage their project files, as long as the procedures satisfy the agency's standard record-keeping requirements. Federal and state public-record laws may also have a bearing on the development of project filing procedures.

Records Retention and Disposal Requirements. Most government agencies have requirements regarding the management of agency records. These requirements address issues such as the types of documents that must be filed and the process for disposing of old records. For example, FHWA's requirements are established by an agency order.³ State DOTs generally have their own requirements, as do most other Federal, state, and local governments. These types of requirements may affect the record-keeping procedures that are used in the NEPA process.

¹ The term "NEPA process" is used in this handbook to refer to a process that includes compliance with NEPA and other laws (not just NEPA itself).

² The term "Federal lead agency" is used in this handbook to refer to the Federal agency or agencies that act as lead or co-lead agencies in preparing a NEPA document. It also includes states that have assumed U.S. DOT responsibilities under a NEPA assignment program (23 USC 326 or 327).

³ FHWA Order 1324.1B, "FHWA Record Management" (July 29, 2013).

FOIA and Other Public Record Laws. FOIA and similar state laws require Federal and state agencies, respectively, to release a wide range of public records upon request. These laws may result in the release of documents well beyond those that would typically be included in an administrative record. For example, a request under a state public records law may result in disclosure of internal state agency documents that would not be part of the Federal agency's administrative record. A public records request can be received at any time during the NEPA process or afterward. Maintaining an orderly project file throughout the NEPA process facilitates prompt compliance with these public records laws.

Preparing the Administrative Record for Litigation

The requirement to prepare an administrative record exists under a Federal law, the Administrative Procedure Act (APA), which empowers courts to review Federal agencies' decisions. The courts have provided only general principles for determining what an administrative record must contain. This section provides a brief overview of the legal principles established in case law and through agency practice. Individual agencies may have more specific guidance documents and best practices.

Requirement to Prepare. Section 706 of the APA directs Federal courts evaluating the final decision of a Federal agency action to "review the whole record or those parts of it cited by a party."⁴ A Federal agency whose decision has been challenged in court under the APA must compile an administrative record and provide it to the court and to the opposing parties in the lawsuit.

Contents of Record. The general rule, as established by case law, is that the administrative record should contain "all documents and materials directly or indirectly considered by the agency" in making its decision. This is a broad and subjective standard. Nonetheless, it is well-settled that the record may include supporting documents located outside the files of the lead agency itself (e.g., documents maintained by the project sponsor on behalf of the Federal agency).

Deciding What to Include. The responsibility for preparing the administrative record rests with the Federal agency whose decision is being challenged in litigation. Therefore, judgments about what documents to include in the record are made by that Federal agency. When preparing the administrative record for the court, the Federal agency typically consults with its own attorneys, the attorneys of any other Federal agency involved in the litigation, and the attorneys at the U.S. Department of Justice who are handling the case. Attorneys for the project sponsor normally are also involved in preparing the record.

Disputes Over Completeness of the Record. In litigation, plaintiffs can dispute the completeness of the agency's record. For example, plaintiffs may contend that the agency omitted documents that tended to cast its decision in a negative light. Such disputes are ultimately decided by the court if the parties are unable to reach an agreement. If the court concludes that the agency showed bad faith in compiling the record, the court can allow discovery—that is, an opportunity for the plaintiffs to take sworn testimony from agency personnel or others involved in the process, such as the project sponsor or consultants. By compiling the record in a systematic manner and documenting the process used to compile the record, the Federal agency can help to avoid the need for discovery, which can be time-consuming, costly, and unpredictable.

Supplementing the Record. Any party to the litigation may request the court's permission to "supplement the record" with additional documents. It is not uncommon for those challenging a Federal agency's decision to make this type of request—for example, by seeking to introduce new evidence or testimony from expert witnesses. Federal agencies typically object to this type of request and urge courts to base their review on the administrative record compiled by the agency. Requests to supplement the record are generally disfavored by the courts, but courts may allow supplementation under some circumstances—for example, if there are unexplained gaps in the agency's own record. Because Federal agencies generally oppose plaintiffs' requests to supplement the record, Federal agencies themselves also are reluctant to ask courts to consider documents outside the administrative record.

Adding Inadvertently Omitted or Incomplete Documents. After the agency has submitted the record, the agency may identify additional documents that were inadvertently omitted (in whole or in part) when the record was compiled. When this occurs, the agency normally has an opportunity to submit the additional documents or parts of documents to the court and the other parties, along with an updated index and an explanation of the inadvertent omission. As long as these inadvertent omissions are identified early and are limited in number, they are unlikely to raise concerns. However, repeated requests to submit inadvertently omitted documents could call into question the completeness of the record as a whole. For this reason, it is in the agency's interest to file a complete record in the first instance.

⁴ 5 USC 706.

Cost of the Record. The Federal agency, not the plaintiffs who filed the lawsuit, is responsible for the cost of preparing the record. If the plaintiffs request additional copies of the record or seek paper copies in lieu of an electronic one, they may be asked to pay for those copies. Costs incurred by the project sponsor in helping to prepare the administrative record may be reimbursable by the Federal agency as an eligible project cost.

Multiple Federal Agency Records. For projects that require the approval of two or more Federal agencies, each Federal agency's decision could be challenged in court. For example, many transportation projects require approval of both a U.S. DOT agency and the U.S. Army Corps of Engineers; each agency's approval is a separate action, and each agency's decision could be challenged in court. If a lawsuit is filed challenging both agencies' decisions, each agency is responsible for preparing its own administrative record. There may, of course, be substantial overlap between the agencies' administrative records. The filing of a joint record by two or more agencies is allowed and is often the most efficient approach, but in some cases each agency chooses to file a separate record.

Timing of Record Preparation. The deadline for filing the administrative record is set by the court after the litigation begins. The litigation begins with the filing of a complaint, and Federal defendants normally have 60 days or longer to file an answer to the complaint. After the answer is filed, the court typically will set a schedule for the case. In most cases, the court will allow the agencies several months or longer to submit the record unless there are time-sensitive issues. The record must be filed before the court can issue a final decision on the merits of the case. To avoid delays, agencies that anticipate litigation often begin work on preparing the administrative record even before litigation is actually filed.

Key Issues to Consider

Maintaining a Project File

- Is there a central project file, and if so, who is responsible for maintaining it?
- If separate files are being maintained by the U.S. DOT agency, the project sponsor, and/or consultants, is there a common understanding about what documents will be kept in each file?
- Is there a written filing protocol? If so, is it being followed consistently? Does it need to be updated?
- What method is being used for preserving project-related emails?
- Where will electronic project documents and data be stored?
- Who will identify and retain privileged materials? Will privileged materials be segregated?
- How are oversize documents being filed (e.g., plans, displays, and maps)?
- How are attachments to correspondence being preserved (including those transmitted electronically)?
- What safeguards are in place to ensure that proper filing is taking place (e.g., periodic audits)?
- Do the lead agencies have specific record-retention requirements that must be met?

Preparing the Administrative Record for Litigation

- What is the Federal action or decision for which the administrative record is being compiled?
- What is the time period during which the decision-making process took place?
- What procedures were used for filing documents during the study?
- Where are the study documents located? In particular, is there a central project file? And if so, are there additional repositories of documents outside the main project files?
- Are there any important documents that are stored only in paper format? If so, where are they?
- Is there a central repository of project-related e-mails? If not, how will e-mails be located and compiled?
- Are there any known gaps or omissions in the record-keeping? For example, was there a period of time during which records were not well-maintained? Were records lost for any reason?
- Will the record be incorporated into a litigation database? If so, what database software will be used? If not, what system will be used in lieu of a litigation database as the means of preparing the administrative record?
- Does the court have any specific requirements with respect to the filing of administrative records?
- If two or more Federal agencies' decisions have been challenged in the same case, what coordination is needed regarding the preparation of the administrative records for those agencies?



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Practical Tips

1 | Maintaining Accurate Project Files During the NEPA Process

The key to compiling a complete administrative record, with minimum delay, is effective record-keeping during the NEPA process. However, given the sheer volume of material generated within a NEPA project team, it can be challenging to determine which documents need to be filed, and the task of maintaining an up-to-date filing system for a large project is likely to be time-consuming. The following actions can facilitate the maintenance of the project file during the NEPA process.

Establishing Record-Keeping Responsibilities. It is important to establish clear responsibilities for record-keeping within the project team. For example, the NEPA consultant can be tasked with maintaining a project file that can later provide the basis for the Federal agency's administrative record. If that approach is used, it is helpful to distinguish the consultant's own project files—which encompass a great deal of internal consultant work product that may not need to be included in the record—from the project file that the consultant is maintaining on behalf of the Federal agency.

Filing Protocols. Regardless of who is responsible for filing, it is useful to establish a written filing protocol that designates the types of documents that should be filed and where they should be filed, as well as the information that should be included in an index or database identifying the filed documents. In developing the protocol, consider issues such as (1) how to handle drafts and e-mails; (2) how to handle attorney–client privileged or other confidential items; and (3) how to ensure that final versions of project documents are preserved in a distinct, readily identifiable location.

Creating and Preserving “File Copies” of Documents. When paper files were the norm, it was common to make a photocopy of a final document—for example, a signed letter—and send that paper copy to a central project file. With electronic filing systems, multiple versions of the same document may be saved to the same folder, and it may not be clear which (if any) of those versions is the final one. In addition, the electronic file may include only the unsigned version of a letter, without any copy being kept of the final, signed document. These problems can be avoided by setting up an electronic filing system in which final, complete versions of project documents are saved in standard format (e.g., Adobe PDF) and are segregated from draft documents. If paper files are maintained, clean originals should be preserved with their attachments.

Filing or Archiving E-mails. Maintaining a filing system that captures project-related e-mails can be a major challenge, given the number of e-mails generated and the involvement of project team members working at different agencies and companies. No system is perfect; some useful methods for retaining important emails include:

- Encourage key project team members to maintain a separate folder in their inboxes for important project-related e-mails (both sent and received); periodically copy e-mails from that folder to a separate archive folder.
- Encourage project team members to include a specific person—for example, a project manager—as a “cc” or “bcc” on all important email messages.
- Ensure that, when a key team member leaves the project, all of that person's project-related e-mails are archived and sent to the project file so that they are available when the administrative record is prepared.

Preserving Copies of Public-Record Requests and Responses. Agencies involved in preparing NEPA documents often receive requests for project-related documents under both FOIA and state public-record laws. Often, these requests are received and handled by separate offices within the agency, outside the NEPA project team. While public-record requests and responses are not automatically included in the administrative record, there are circumstances where they should be included. (See Practical Tips, Part 4, “Deciding What Documents to Include in the Administrative Record.”) Therefore, the filing system should ensure that copies of public-record requests and responses—including the documents transmitted as part of the response—are preserved even after the NEPA process is completed, so that they can be reviewed when the administrative record is prepared.

Periodic Audits. Periodic audits can help to ensure that the filing protocol is being followed. The audits should include spot checks for key documents. For example, project management staff can develop a short list of important documents that clearly will need to be included in the record and then check to see whether those documents have actually been included in the file.

Training in Good Communication Practices. Project team members should receive training on good communication practices, and if possible, the training should occur before the NEPA process begins. This training should provide all team members with a basic understanding of what types of documents are included in an administrative record and what types of documents could be disclosed in response to public record requests. The training also should remind the team members of good practices that should be followed for all written communications, even for internal communications. It is especially important to provide reminders regarding the proper use of e-mail communication, including: