




UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
Washington, D.C. 20230

OFFICE OF THE GENERAL COUNSEL

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MEMORANDUM FOR: Assistant Administrators  
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Director, NMFS Office of Sustainable Fisheries  
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FROM: Lois J. Schiffer   
General Counsel

SUBJECT: National Oceanic and Atmospheric Administration Guidelines for  
Compiling an Agency Administrative Record

The NOAA Office of General Counsel has prepared this guidance to provide NOAA-wide Guidelines for compiling “Administrative Records.” This guidance is intended to assist you and your employees when compiling Administrative Records and contains guiding principles for all NOAA Line Offices. This guidance supersedes and repeals the NOAA-wide guidance previously issued on January 16, 2009.

In addition, each NOAA Line Office may want to consider issuing further guidance and instruction to its staff, in conformance with this guidance and subject to the NOAA General Counsel’s final approval, detailing an office-specific, or subject-specific, process for compiling and producing an Administrative Record. That specific guidance may, for example: establish criteria for designating a “Custodian” for each decision-making process, or provide Line Office specific examples of the types of documents that must be included in the Administrative Record.<sup>1</sup>

This guidance applies specifically to any rulemaking or other action initiated on or after the date of the guidance. For each of those actions, the relevant NOAA component must identify an Administrative Record Custodian and compile an Administrative Record in accordance with this guidance. For rulemaking or other actions initiated prior to the date of this guidance, NOAA

<sup>1</sup> During the natural resource damage assessment and restoration planning (NRDA) process under the Oil Pollution Act and the Comprehensive Environmental Response, Compensation, and Liability Act, NOAA (or another trustee agency) maintains a publicly available set of decision documents called an “administrative record,” see 15 C.F.R. § 990.45 and 43 C.F.R. § 11, and will establish specific guidance applicable to those processes. These Guidelines do not apply to agency activities under the NRDA process.



components must consult with the assigned NOAA General Counsel's Office attorney about the scope of the Administrative Record, and must generally adhere to this guidance with respect to the key principles for inclusion of individual documents.

This guidance will be posted on the NOAA General Counsel public website. We note, however, that it is developed to provide internal guidance for the agency; it does not create binding norms or impose obligations on the public, and it is not enforceable against NOAA. If you have any questions about the contents of this guidance, please contact the NOAA General Counsel Section that provides support to your Line Office.

**National Oceanic and Atmospheric Administration Guidelines  
for Agency Administrative Records  
December 21, 2012**

**I. INTRODUCTION**

NOAA employees make decisions that are considered "agency action" under the Administrative Procedure Act, the law that governs procedures for agency decision-making. In general, the Administrative Procedure Act process is followed even when other procedural laws apply. Over the years courts have defined what must be in the "Administrative Record" that supports the agency decision. This includes a set of materials described in detail in these Guidelines. At NOAA, employees keep many files and documents either in hard copy or electronically that relate to these decisions, but do not generally compile these documents into an "Administrative Record" to support the decision unless the decision is challenged in court.

These Guidelines focus on requirements for developing an Administrative Record for judicial review that documents the agency decision-making process when the agency is sued or anticipates being sued. Following these Guidelines will ensure that NOAA produces reliable, complete, and consistent Administrative Records for the court that are relevant to the issues in litigation and reflect the basis for agency decisions.

The first step for any NOAA employee in assembling an Administrative Record is to identify and consult with a NOAA General Counsel's Office attorney to develop a plan for that Administrative Record. That plan will be based on these Guidelines and any more detailed, line-office-specific, guidance that is developed. Attached as Appendix A is a shorter "how to" paper for assembling an Administrative Record summarizing the key points of these Guidelines that should prove useful as a checklist for this process.

A few disclaimers at the outset: other laws that relate to records management may also arise in the course of working on Administrative Records, and we encourage NOAA employees to raise any such questions with appropriate agency attorneys. These include questions about general

records management practices, the Federal Records Act,<sup>2</sup> and the Freedom of Information Act (FOIA), as well as how these practices and statutes relate to an Administrative Record.

These Guidelines are for the agency and are not a set of mandatory obligations that must be adhered to in all cases. In specific circumstances, with a reason, deviation from these Guidelines may be appropriate; for example, NOAA may take joint action with another agency that utilizes a different approach to assembling Administrative Records, or controlling legal precedent or other litigation considerations may dictate a different, more inclusive approach.<sup>3</sup> In short, while NOAA is adopting these preferred procedures as an internal matter to improve its own processes, NOAA retains full discretion to deviate from these procedures in appropriate circumstances.

## **II. JUDICIAL REVIEW OF THE ADMINISTRATIVE RECORD**

In the context of agency decision-making, the agency assembles and maintains documents<sup>4</sup> relating to a specific “decision” or “action.”<sup>5</sup> When agency “action” or inaction is challenged in

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<sup>2</sup> Not every NOAA decision or action results in litigation. Nevertheless, it is essential that employees take care to preserve emails, documents, and other agency records as required by the Federal Records Act, regardless of whether litigation of a NOAA decision or action appears likely or imminent. If there is any question about a NOAA employee’s duties to preserve a particular federal record, please consult with an attorney in the NOAA General Counsel’s Office, who will in turn consult with the NOAA Records Officer. *See also* n.4 *infra*.

<sup>3</sup> For example, different federal Circuits take widely divergent approaches to the proper composition of an Administrative Record. District courts within the D.C. Circuit have taken the position that deliberative materials may be excluded from the Administrative Record as immaterial to the agency’s stated reasoning, while some district courts within the Ninth Circuit take the position that deliberative materials are properly part of the Administrative Record and may not be withheld absent a justified showing of privilege. Working with a NOAA General Counsel’s Office attorney at the beginning of assembling the Administrative Record will assure that these differences are identified and the process for assembling the Administrative Record in the particular matter takes them into account.

<sup>4</sup> The legal term for all agency materials is “records.” “Records” are defined in 44 U.S.C. § 3301 as:

All books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them. Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stocks of publications and processed documents are not included.

Whether a document should be retained for agency record-keeping pursuant to the Federal Records Act, 44 U.S.C. § 2901, *et seq.*, is a different consideration from whether it should be included in an Administrative Record. To avoid confusion of the term “record” with the term “Administrative Record,” these Guidelines use the word “documents” to refer to individual records.

<sup>5</sup> Under the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.*, “agency action” is defined to “include[] the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act . . . .” 5 U.S.C. § 551(13). As used herein, the terms agency “decision” or “action” refer to agency action that is subject to judicial review under the APA. Not all agency decisions or actions are subject to judicial review. For example, judicial review of an agency action is not available if such review is precluded by statute or committed to agency discretion by law. *See* 5 U.S.C. § 701(a). Nor is judicial review available unless the agency action is “made reviewable by statute” or “final agency action for which there is no other adequate remedy in court.” 5 U.S.C. § 704. In some circumstances, judicial review may be available to determine whether agency action that has *not* been taken has been “unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1).

court, the agency provides to the court and the parties a record of the agency's decision for those aspects of the decision addressed in the litigation. This material is the Administrative Record.

Under the Administrative Procedure Act (APA) the court is required to review the "whole record or those parts of it cited by a party."<sup>6</sup> The caselaw in this area derives from the principles first set forth in *Citizens to Preserve Overton Park v. Volpe*,<sup>7</sup> where the Secretary of the Department of Transportation sought to rely on affidavits containing after-the-fact ("post-hoc") rationalizations to justify the agency's decision authorizing use of federal highway funds to construct a highway through a public park. The court held that the "whole record" is the "full administrative record that was before the Secretary at the time he made his decision." Courts have subsequently interpreted the phrase "before the Secretary" or "before the agency" in a broad manner, finding that the "complete administrative record is not necessarily those documents that the agency has compiled and submitted as 'the' administrative record" but instead "consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's position."<sup>8</sup>

Neither the APA nor any of NOAA's statutes or directives provides any further guidance on the definition of "whole record," or the specific contents of the Administrative Record. In developing these Guidelines, we have relied on relevant caselaw and informal guidance provided by the Department of Justice.<sup>9</sup> Under general principles of administrative law, however, an agency must have a rational basis for any action it takes. Thus, an agency must develop a record of the basis for its decision. When an agency decision is challenged, the APA provides that a court must review an agency's action to determine if the decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Most cases challenging agency decisions are decided on motions for "summary judgment," that is, without a trial in which there is witness testimony. The Administrative Record is the "evidence" in the case. In general, the court therefore relies solely on the agency's Administrative Record to determine the legal adequacy of the particular agency action being challenged. Accordingly, the agency must present an Administrative Record that: i) demonstrates compliance (both procedural and

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<sup>6</sup> 5 U.S.C. § 706.

<sup>7</sup> *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

<sup>8</sup> *Thompson v. Dep't of Labor*, 885 F.2d 551, 555 (9<sup>th</sup> Cir. 1989); see also, *Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 196-97 (D.D.C. 2005) ("The agency may not skew the record by excluding unfavorable information but must produce the full record that was before the agency at the time the decision was made.").

<sup>9</sup> Agencies have adopted a variety of approaches for compilation of an AR. See e.g., *Department of the Interior Standardized Guidance on Compiling a Decision File and an Administrative Record*, U.S. Department of the Interior, Office of the Solicitor, June 27, 2006; Carrie Wehling, Marilyn Kuray, Mark Stein *Development and Management of Administrative Records*, May 19, 2005 (presentation at the Environmental Protection Agency's "OGC National Counseling Attorneys' Conference"); *National Resource Damage Assessment (NRDA) Administrative Record Procedures Manual*, NOAA Damage Assessment and Restoration Program, August 2001. The Department of Justice (DOJ) Environment and Natural Resources Division (ENRD) issued informal guidance for its client agencies in 1999, although that guidance does not represent a formal policy of the DOJ, or even an official directive of ENRD. DOJ advised that nothing in that guidance was intended to limit the "otherwise lawful prerogatives of the [DOJ] or any other federal agency." *Guidance to Federal Agencies on Compiling The Administrative Record*, U.S. Department of Justice, ENRD, January 1999. More recently, ENRD clarified its previous guidance and indicated that individual agencies may benefit from having their own internal guidance. See Assistant Attorney General Ronald J. Tenpas, *Memorandum re: "Guidance to Federal Agencies on Compiling the Administrative Record" (January 1999)*, U.S. Department of Justice, ENRD, December 23, 2008.

substantive) with applicable statutes and regulations; ii) documents the rationale for the agency's decision or position with respect to the issues in the case and; iii) contains all information relevant to judicial review. Finally, the Administrative Record must demonstrate that the agency considered opposing viewpoints, if any, and provide a thorough explanation as to why the preferred course of action was adopted.

Again, it is helpful in assembling an Administrative Record to remember that when a court looks at the agency action and the reasons for it, it has to find that the action was not arbitrary and capricious on the evidence in the record as a whole. It is perfectly understandable that an agency may have material in the Administrative Record that the agency disagrees with, thinks is wrong, or that goes the opposite way from the decision, but it is critical that the agency explain in the decision why it is not taking that position or relying on that material.

### **III. DESIGNATING A CUSTODIAN**

To effectively assemble an Administrative Record, either once litigation is anticipated or once NOAA is sued, the decision-maker must designate a "Custodian" who is responsible for compiling and maintaining the documents and materials that will comprise the Administrative Record.

The Custodian generally should be a program manager, project manager, or a staff person with significant drafting and analytical responsibility for the action, or a person who was otherwise substantially involved in the merits of the matter. Line Offices should consider providing specific guidance for identifying the agency employee who is likely to be the most well-suited to serve as Custodian for any given decision-making process.

Importantly, the Custodian must be able to identify which documents belong in the Administrative Record and, in the event of litigation, be prepared to provide a declaration about its preparation.

As soon as the Custodian is identified, the person should get in touch with the appropriate NOAA General Counsel's Office attorney assigned to work on the matter.

### **IV. CONTENTS OF THE ADMINISTRATIVE RECORD**

Again, an Administrative Record is the record of the agency's decision-making process. It must document the substance and procedure the agency used in reaching its final decision. For NOAA actions, procedural requirements may include, where applicable, the notice and comment provisions of the APA, provisions of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act),<sup>10</sup> the National Environmental Policy Act (NEPA),<sup>11</sup> the Regulatory Flexibility Act,<sup>12</sup> the Information Quality Act,<sup>13</sup> the Coastal Zone Management

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<sup>10</sup> 16 U.S.C. § 1801, *et seq.*

<sup>11</sup> 42 U.S.C. § 4341.

<sup>12</sup> 5 U.S.C. § 601 *et seq.*

<sup>13</sup> Pub. L. No. 106-554, § 515; 114 Stat. 2763A-153 (2000).

Act,<sup>14</sup> the Endangered Species Act (ESA),<sup>15</sup> the Marine Mammal Protection Act,<sup>16</sup> and the National Marine Sanctuaries Act,<sup>17</sup> among others. The Administrative Record must also demonstrate that the agency has complied with applicable procedural policies such as those in Executive Orders 12,866 and 13,132.

Moreover, the Administrative Record must:

- Rationally explain the agency's decisions. The APA requires that the agency consider and address all factors relevant to a particular agency action. Thus, the Administrative Record must contain those documents necessary to show the complete history of the agency decision-making process.
- Include substantive factual information and data that is relevant to the full range of concerns at issue in the decision, both in support of and contrary to the agency's position.
- Demonstrate consideration of opposing views of facts or data or alternative courses of action, if any, and provide a thorough explanation as to why the preferred course of action was adopted.
- Demonstrate that the agency has followed the required procedures and met the legal standards and criteria found in applicable laws, regulations, and relevant agency policies.

Different decision-making procedures and different types of decision documents are used depending on which substantive statute provides the framework for the decision. Thus, Administrative Records can differ, sometimes considerably, in the number and type of documents they contain. Still, the goals of the Administrative Record remain the same – to show the agency followed required procedures, considered the record as a whole, and made a reasonable substantive decision supported by the information before the agency.

#### **A. Key Principles for Inclusion or Exclusion of Documents in the Administrative Record**

There are three key principles for developing a record:

- The Administrative Record must include all documents that were directly or indirectly considered by the agency decision-maker.
- The Administrative Record must include all relevant documents. Under these Guidelines, a document is relevant if it relates (i.e., has a logical connection) to the

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<sup>14</sup> 16 U.S.C. § 1451 *et seq.*

<sup>15</sup> 16 U.S.C. § 1531 *et seq.*

<sup>16</sup> 16 U.S.C. § 1361 *et seq.*

<sup>17</sup> 16 U.S.C. § 1431 *et seq.*

action under consideration and informs, or has the potential to inform, the decision-maker.

- Documents must be included in the Administrative Record regardless of the form they take: paper documents or other means of communication or ways of storing or presenting information. For example, electronic data files, graphs, charts, recordings, and photographs must also be included if they meet the standards for inclusion.

## **B. Key Documents & General Principles**

### **1. Key Documents**

The following documents must, to the extent applicable, be included in every agency Administrative Record:

- The final decision document (for example, a “decision memorandum”) signed by the agency official with delegated authority to make a decision on behalf of the agency.
- Technical and scientific information, such as stock assessments, surveys, modeling reports, etc. available for consideration by the decision-maker.
- Any materials submitted to the agency pertinent to the action, including all Federal Register Notices pertaining to a rulemaking (Advanced Notice of Proposed Rulemaking, Notice of Proposed Rulemaking, Final Rule, etc.).
- Comments the agency receives during any review process and any agency response to those comments.
- Transcripts, minutes, or summaries of meetings with members of the public to discuss the agency’s proposed action as well as any recorded minutes of those meetings. Other public-meeting documents for inclusion in the Administrative Record include, for example, power-point presentations, agendas, and other handouts, provided either by the agency or the public.
- Required analyses that support the final agency action, such as the Environmental Impact Statement or Environmental Assessment under NEPA, Biological Opinions (where NOAA is the action agency), or Regulatory Flexibility Analyses under the Regulatory Flexibility Act.

### **2. General Principles**

- When background documents (e.g., scientific literature such as journals or text books), directives, and manuals are important to the decision, they must be cited. The Custodian must use his or her judgment in deciding whether voluminous background materials should be physically inserted in the Administrative Record or incorporated by reference. The Custodian may consider inserting excerpts as appropriate, for

example when materials are not readily available to the public.

- The Custodian must use his or her best judgment, in consultation with a NOAA General Counsel's Office attorney if necessary, in deciding whether documents incorporated by reference within relevant documents (or relevant portions thereof) should be included in an Administrative Record. Generally, documents NOAA cites in its decision should be included in the Administrative Record; however, NOAA is not obligated to reproduce every document that someone else has cited.
- Sometimes a NOAA action builds on a prior related decision. In those cases, the Custodian must consider whether any prior related decision documents should be included in the current Administrative Record. If the prior related decision resulted in litigation, the Custodian must also consider whether material from any Administrative Record supporting the earlier decision should be included in the current Administrative Record. In such a situation, the agency must include the index of such an earlier Administrative Record, and then determine, in consultation with the NOAA General Counsel's Office attorney, whether to reproduce all, some, or none of the documents for inclusion in the later Administrative Record. Under most circumstances, reproduction of the earlier final decision documents should be sufficient.
- When NOAA takes information contained on websites into account in making the decision, the Administrative Record must contain a hard copy of the information presented on the relevant web pages, including the internet address (URL) and date that it was downloaded, to ensure that the information relied on is preserved in the event that the web site content changes.
- When materials considered in the decision-making process are attorney-client privileged, deliberative process privileged (see below), 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 prepared for the Court. NOAA General Counsel's Office attorneys will assist in the implementation of this step.

### **C. Documents and Materials Meriting Special Attention**

Generally speaking, the documents described in this section of the Guidelines are created or used by agency personnel during the development of the decision. Some of these documents (e.g., personal notes and working drafts) will be excluded from the Administrative Record entirely while other documents (e.g., drafts and internal briefing materials) will be identified for inclusion in the Administrative Record but flagged for potential listing on a "Privilege Log." Documents listed on the agency's Privilege Log are considered part of the Administrative Record – they were considered by the agency in reaching the decision – but are not provided to the opposing party absent a court order to do so. Because proper classification of these documents may be difficult, the Custodian must consult with the assigned NOAA General Counsel's Office



attorney.

### **1. Personal notes**

Personal notes or journals developed by an individual for his or her own use are generally excluded from the Administrative Record.<sup>18</sup> However, memorializations of telephone conversations and meetings that are placed in official agency files or otherwise circulated or retained for others to review must be included in the Administrative Record.

### **2. Working Documents**

Working documents, such as those that relate to routine administrative operations (e.g., fax cover sheets or materials related to scheduling meetings), are generally excluded from the Administrative Record.

### **3. Internal Deliberative, Predecisional Material<sup>19</sup>**

Documents that reflect internal agency or interagency communications, discussions, and deliberations are generally characterized as “deliberative process privileged.” The courts have recognized a “deliberative process” privilege for these communications when they are both predecisional and deliberative. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975). The policies underlying the deliberative process privilege are to avoid both public confusion and the chilling effect on candid discussions within the agency and among federal agencies that could result from disclosure of such communications. *See Russell v. Dep’t of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982). Under these Guidelines, relevant internal communications are considered to be part of the Administrative Record because they are directly or indirectly considered by agency decision-makers. The decision whether to assert the deliberative process privilege is discussed in further detail below. All such documents must be identified for inclusion in the Administrative Record but flagged for potential listing, in whole or in part, on the agency’s Privilege Log.

#### **a. Drafts**

Development of an agency action will often result in many iterations or drafts of various documents, many of which may not contain unique information or significant changes from other versions. The practice of revising or commenting on draft documents is now done largely via electronic “redline and strikeout” edits and electronic comment “balloons.” Including every version of a document, whether edited electronically or by hand, in an Administrative Record could be burdensome

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<sup>18</sup> As a general matter, personal notes are maintained by agency personnel for their own use and are not made part of the agency filing system. A few courts have defined personal notes as those “that are used solely by the employee who created them and are not available to other agency employees.” *See e.g., Sibille v. Fed. Reserve Bank of New York*, 770 F. Supp. 134, 137 (S.D.N.Y. 1991).

<sup>19</sup> *See also* Section VI, below (“Best Practices” for creating and handling e-mail and other deliberative materials).

and impractical; however, determining which drafts to include can be challenging. The following principles must be applied in close consultation with the appropriate NOAA General Counsel's Office attorney:

**“Significant” Drafts** – Significant drafts must be included in the Administrative Record *if* ideas in the draft reflect significant input into the decision-making process. Significant input may exist, for example, if the document reflects alternative approaches, grounded in fact, science, or law, to resolving a particular issue or alternative interpretations of factual, scientific, or legal inputs. Significant drafts must be identified for inclusion in the Administrative Record, but flagged for potential listing, in whole or in part, on the agency's Privilege Log.

**Working Drafts** – Working drafts (preliminary, interim, rough) are to be excluded from the Administrative Record.<sup>20</sup> Working drafts do not reflect significant input into the decision-making process. Working drafts are also any drafts that contain only stylistic, typographical or grammatical edits, or other purely editorial suggestions in comment bubbles.

**Drafts with Independent Legal Significance** – Final draft documents with independent legal significance, such as final draft environmental impact statements, are to be included in the Administrative Record and will not be flagged for potential listing on the agency's Privilege Log.

**b. Internal Communications and Discussions**

Development of an agency action will often result in communications, sometimes extensive, among agency personnel. These internal communications will be comprised, in large part, of electronic mail messages (email) or informal memoranda, and must be identified for inclusion in the record if they are relevant and directly or indirectly considered. In many cases, these communications will contain predecisional and deliberative content that must be flagged for potential listing, in whole or in part, on the agency's Privilege Log. To the extent that internal communications contain factual or analytical information or directions from management not otherwise captured in the record, they should be included in the record and disclosed.

**c. Internal Briefing Materials**

Development of an agency action will also often produce internal briefing materials such as power-point presentations and briefing papers used to inform agency officials of issues regarding agency actions. In many cases, these materials will contain predecisional and deliberative content that must be flagged for potential listing, in whole or in part, on the agency's Privilege Log. To the extent that internal

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<sup>20</sup> As previously stated, whether a document should be included in the Administrative Record is a different consideration from whether it should be retained for agency record-keeping pursuant to the Federal Records Act. To be clear, documents or materials not included in the Administrative Record must nevertheless be retained, as necessary, in accordance with NOAA's general records management practices.

communications contain factual or analytical information or directions from management not otherwise captured in the record, they should be included in the record and disclosed.

#### **4. Other Privileged or Protected Documents and Materials**

In addition to the deliberative process privilege, other relevant privileges and protections against disclosure include, but are not limited to, the attorney-client privilege (including legal memoranda prepared by agency counsel),<sup>21</sup> the attorney work product doctrine, and the confidential business information privilege. Protected documents are those the government is prohibited from disclosing, including those containing information protected by the Privacy Act or other statutes, and those documents that are confidential as a result of a court order. All such privileged and protected documents must be identified for inclusion in the Administrative Record but flagged for potential listing, in whole or in part, on the agency's Privilege Log, as explained in Section V.D. below.

### **V. PROCESS OF COMPILING THE ADMINISTRATIVE RECORD**

This section of the Guidelines describes the key steps the Custodian must take and highlights important considerations in the process of physically compiling the Administrative Record. Having a complete, well-organized, Administrative Record greatly enhances NOAA's ability to defend the challenged decision successfully. A properly compiled Administrative Record contains all the documents necessary to tell the complete "story" of the agency action and will provide a thorough explanation as to why the preferred course of action was adopted. Careful adherence to the following steps should help to ensure that NOAA's Administrative Records are properly compiled – reliable, complete and relevant to the issues in litigation – and reflective of the basis for agency decisions.

#### **A. Determining when "Agency Action" Begins and Ends**

The decision-making process is initiated when the agency begins to consider a concrete proposal for action. This may vary from case to case; the process is typically initiated when the agency begins to move forward on a specific course of action. For example, in the case of a petition for rulemaking, the decision-making process begins when the agency receives a written request for specific action from the public. The Custodian should consult with the assigned NOAA General Counsel's Office attorney to identify the point at which the decision-making process was initiated.

Agency action ends when the decision-maker makes a final decision. It is important to assure that the Administrative Record includes sufficient material to support the decision. A deficient record cannot generally be cured by creating new supporting documents after the decision-maker has signed the decision. In short, any documents created after the decision-maker has made a final decision will generally be excluded from the Administrative Record.

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<sup>21</sup> In particular, NOAA General Counsel's Office "Attorney Review" memos will be identified for inclusion in the Administrative Record but flagged as privileged for listing on the agency's Privilege Log.

## **B. Gathering the Pertinent Documents and Materials<sup>22</sup>**

Once the agency has been notified that litigation seeking judicial review of the agency decision is commencing or has commenced, the Custodian must begin compiling the Administrative Record, and where needed generating a Privilege Log, unless notified otherwise by the assigned NOAA General Counsel's Office attorney.<sup>23</sup>

In order to facilitate the process of compiling the Administrative Record, the Custodian should issue a memorandum alerting appropriate agency personnel that an Administrative Record for a specified action is being assembled.<sup>24</sup> The memorandum should request that agency personnel compile and submit all documents and materials associated with the agency decision to the Custodian for possible inclusion in the Administrative Record.

The Custodian must gather the documents comprising the Administrative Record consistent with these Guidelines, and any Line Office specific guidance as described above. It is the duty of all agency personnel to search for and provide the documents requested by the Custodian.

The Custodian should keep careful track of who has been asked to submit materials, what materials the person has been asked to submit and has submitted, where the person searched for documents, who was consulted in the process and how the Administrative Record has been assembled.

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<sup>22</sup> At present, the vast majority of documents and materials gathered for inclusion in NOAA Administrative Records are in hard-copy, paper format. Document management systems and software (such as "Clearwell") currently exist and are increasingly being used for compiling, processing and maintaining electronic records. Indeed, some NOAA components are currently utilizing these systems. These Guidelines support and are compatible with the use of document management systems or software to generate Administrative Records. Indeed, given the President's recent directive ordering all federal agencies to "develop a 21<sup>st</sup>-Century framework for the management of Government records," use of document management software to compile and produce electronic Administrative Records is encouraged. *See* Memorandum of November 28, 2011, Managing Government Records, Memorandum for the Heads of Executive Departments and Agencies, 76 Fed. Reg. 75,423 (December 1, 2011); *see also* Memorandum of August 24, 2012, Managing Government Records Directive Memorandum for the Heads of Executive Departments and Agencies and Independent Agencies, (requiring federal agencies "to commit immediately to the transition to a digital government"). NOAA personnel should consult with the assigned NOAA General Counsel's Office attorney about the use of document management software to compile and generate an electronic Administrative Record before filing an electronic Administrative Record with the court.

<sup>23</sup> For any decision likely to be controversial or the subject of litigation, as a "best practice" the Custodian should strive to compile and organize documents contemporaneously with the agency decision-making process, rather than wait until litigation is initiated to begin compiling the Administrative Record. On the other hand, there may be circumstances – for example, where the agency expects to advance a jurisdictional defense – where it may be appropriate to defer assembly of the Administrative Record.

<sup>24</sup> The Custodian should confer with the assigned NOAA General Counsel's Office attorney in developing the memorandum to determine whether there are any specific or unique instructions associated with the compilation of the particular Administrative Record.

A thorough search for the purpose of compiling the Administrative Record will, at a minimum, include:

- Contacting all agency personnel, including program personnel and attorneys, in all relevant offices including field offices and headquarters, involved in the agency action and asking them to search their files and agency files for documents related to the agency decision.
- Contacting relevant agency units in addition to program offices, such as congressional and correspondence components.
- Where personnel involved in the final agency action are no longer employed by the agency, searching the archives for documents related to the agency decision. The Custodian may want to contact a former employee for guidance as to where to search.
- Consulting with the decision-maker to determine whether he or she considered any other documents that have not otherwise been gathered for inclusion in the Administrative Record.

### **C. Organizing and Indexing the Administrative Record**

The process of organizing and indexing the Administrative Record includes the following steps:

- Ensuring that documents and materials contained in the Administrative Record are organized in a logical manner, such as chronologically or by topic.
- Ensuring that documents and materials contained in the Administrative Record are appropriately labeled, attributed and dated. The Custodian must do so if the submitter has not.
- Omitting from the Administrative Record documents that appear in duplicate to avoid the waste of time and resources. But see material in Section IV., C., 3., a., above about drafts.
- Determining, in consultation with the assigned NOAA General Counsel's Office attorney, whether a privilege or protection applies to any documents and if so generating a Privilege Log (discussed in greater detail, below).
- Omitting any documents not in existence at the time of the final agency decision because such documents could not have been directly or indirectly considered by the decision-maker.<sup>25</sup> Documents that reflect how the Administrative Record was prepared, including a certification of the Administrative Record, may be included.

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<sup>25</sup> The Custodian should consult with the assigned NOAA General Counsel's Office attorney if there are subsequent documents that nevertheless may be relevant to a lawsuit, as in the case of a legal challenge to an ongoing agency action, or failure to act.

- Generating an index for the complete Administrative Record including any Privilege Log.

#### **D. Determining what Documents are Privileged or Protected and Creating a Privilege Log**

When the Custodian in consultation with the assigned NOAA General Counsel's Office attorney determines to withhold a directly or indirectly considered document under claims of privilege or protection, the Custodian must produce a "Privilege Log" (or index). Documents on the Privilege Log are considered part of the Administrative Record even though they are not produced to the court or other parties,<sup>26</sup> and the Privilege Log is part of the Administrative Record. The primary purpose of a Privilege Log is to provide written justification for the withholding of documents, and to enable attorneys for each side and the Court to resolve any disputes about whether such documents must be made available. The Privilege Log must identify the documents and materials, reflect that they are being withheld, and state on what basis (e.g., "attorney-client privilege") they are being withheld. The Privilege Log must provide sufficient detail for each document withheld to substantiate the claim of privilege or protection. The Custodian should consult with the assigned attorney about specific requirements for the Privilege Log.

The determination about whether a document will be produced or withheld on the basis of privilege or protection will take into account, in addition to law related to privileged and protected materials, applicable policies including those set forth in the January 21, 2009 memorandum from President Obama regarding FOIA materials. Determinations to withhold a document on the basis of privilege or protection and list it on the Privilege Log will be made by the Custodian in consultation with the assigned NOAA General Counsel's Office attorney. In making these determinations, the Custodian will take into account any disclosure determinations made in connection with FOIA requests for that document.

### **VI. BEST PRACTICES**

NOAA employees involved in NOAA decision-making must ensure that the facts or data contained in deliberative materials (which may include emails and significant drafts), and points of view that are relevant to the decision-maker's consideration of the decision, are addressed in one or more of the following formats: 1) the decision documents themselves; 2) ancillary documents accompanying the final decision; or 3) a signed and dated memorandum to the file. To the extent that NOAA employees elect to draft a memorandum to the file, best practice is to provide any such memorandum to an agency manager within the decision-making chain to ensure that the facts, analysis, or points of view contained in the memorandum are properly considered during the decision-making process.

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<sup>26</sup> Note that the court may still require or be given an opportunity to review these documents under seal, or order that they be disclosed.

Because of the extensive use of email now, email deserves special attention. Email is an important means of communication. However, email itself is merely a medium, and it is not the best way to document agency decisionmaking. Often an email will contain only the personal opinion or analysis of an individual employee that may or may not accurately reflect the position or analysis of the agency. An email may also contain preliminary conclusions, thoughts, and opinions based on incomplete information. For these reasons, agency employees should give careful consideration to the content of emails they draft and send.

To be clear, relevant email messages are part of the agency decision-making process and will be included in the Administrative Record as appropriate. Nevertheless, a best practice is that if an internal email is the exclusive source of particular facts or data that are relevant to the decision, the sender of the email should incorporate the information in a signed and dated memorandum to be placed in the file. And, generally, if an internal email contains factual information or analysis that is relevant to the agency decision, the substance of that email should be included in the final decision document, or supplemental memoranda relied on by the decision-maker (or incorporated by reference in documents relied on by the decision-maker).

In short, agency personnel should ensure that any important facts, data, analytical information, or any other points of view) contained in email or other internal documents that are relevant to the decision-maker's consideration of the decision, are reflected in one or more of the proper formal documents listed above. When this practice is followed, the proper formal documents will be included in the Administrative Record and made available, while the predecisional deliberative documents themselves will be identified for inclusion in the Administrative Record but flagged for potential listing on a Privilege Log.

While these practices may in some instances require additional work, consistent use of these practices will lead to clearer and more comprehensible documentation of agency decision-making. This, in turn, should result in greater public understanding of the bases for our decisions, and enhance the successful defense of those actions in litigation. NOAA employees are strongly encouraged to use these best practices. Since these are "best practices" and not mandates, deviation from these practices may be appropriate in limited circumstances. In considering whether deviation is appropriate, please consult with the assigned NOAA General Counsel's Office attorney.

## **VII. CONCLUSION**

A complete, well-organized Administrative Record enhances NOAA's ability to defend challenged agency actions successfully. Complying with the process and standards in these Guidelines and any further Line Office guidance will help assure that NOAA produces reliable, complete, and consistent Administrative Records that are relevant to the issues in litigation, include all the material the decision-maker considered directly and indirectly, and reflect the basis for the agency action.

**APPENDIX A**  
**SUMMARY OF KEY POINTS & CHECKLIST**

**Overview**

The first step for any NOAA employee in assembling an Administrative Record is to identify and consult with a NOAA General Counsel's Office attorney to develop a plan for that Administrative Record. The designated employee (Custodian) should consult with the assigned attorney as often as possible throughout this entire process.

A properly compiled Administrative Record contains all the documents necessary to tell the complete "story" of the agency action and will provide a thorough explanation as to why the preferred course of action was adopted. It must:

- Rationally explain the agency's decisions.
- Include substantive factual information and data that is relevant to the full range of concerns at issue in the decision, both in support of and contrary to the agency's position.
- Demonstrate consideration of opposing views of facts or data or alternative courses of action, if any, and provide a sound explanation as to why the preferred course of action was adopted.
- Demonstrate that the agency has followed the required procedures and met the legal standards and criteria found in applicable laws, regulations, and relevant agency policies.

**Key Documents**

The following documents must, to the extent applicable, be included in every agency Administrative Record:

- The final decision document (for example, a "decision memorandum").
- Technical and scientific information, such as stock assessments and surveys.
- Comments the agency receives during any review process and the agency's responses to those comments.
- Transcripts, minutes, or summaries of meetings with members of the public to discuss the agency's proposed action.
- Required analyses that support the final agency action, such as the Environmental Impact Statement under NEPA.
- The Privilege Log, if one is needed.

**Documents and Materials Meriting Special Attention**

The following documents may be subject to exclusion or withholding:

- Personal notes or journals developed by an individual for his or her own use are generally excluded.
- Working documents, such as those that relate to routine administrative operations (e.g., fax cover sheets or materials related to scheduling meetings), are generally excluded.
- Drafts & Other Deliberative Materials
  - Drafts
    - "Significant" Drafts – Must be included in the Administrative Record *if* ideas in the draft reflect significant input into the decision-making process.
    - Working Drafts – Do not reflect significant input into the decision making process, and are also any drafts that contain only stylistic, typographical or grammatical edits, or other purely editorial suggestions in comment bubbles. Are generally excluded.



- Drafts with Independent Legal Significance – Documents such as final draft environmental impact statements are to be included in the Administrative Record and will not be flagged for potential listing on the agency’s Privilege Log.
- Internal Communications and Discussions. Comprised, in large part, of electronic mail messages (email) or informal memoranda.
- Internal Briefing Materials. For example, power-point presentations and briefing papers used to inform agency officials of issues and decision points regarding agency actions.
- Other Privileged or Protected Documents and Materials. For example, documents that are subject to the attorney-client privilege and the attorney work product doctrine. Also includes protected documents such as those containing information protected by the Privacy Act or other statutes, and those documents that are confidential as a result of a court order. Should be flagged for potential listing, in whole or in part, on the agency’s Privilege Log.

### CHECKLIST

The Custodian’s first step is to consult with a NOAA General Counsel’s Office attorney to develop a plan for the Administrative Record. This checklist will then help guide the next steps in the process:

#### **1. Initial Considerations**

- Read the Guidelines in full.
- Maintain a detailed record of actions taken throughout this process, such as agency personnel contacted, places searched for documents, and dates bounding the search.
- Determine when the agency action began and ended, or will end. Any documents created after the decision-maker has made a final decision will generally be excluded from the Administrative Record.

#### **2. Gather the Pertinent Documents and Materials**

- Contact all agency personnel in all relevant offices involved in the agency action and asking them to search their files and agency files for documents and materials related to the final agency action. This should include program staff, attorneys and other relevant agency units (e.g., congressional and correspondence components).
- Where personnel involved in the final agency action are no longer employed by the agency, search the archives. Consider contacting a former employee for guidance as to where to search.
- Determine whether there are agency files relating to the final agency action.
- Consult with the decision-maker to determine whether he or she considered any other documents that have not otherwise been gathered.

#### **3. Organize and Index the Administrative Record**

- Ensure that documents and materials are organized in a logical manner, such as chronologically or by topic.
- Ensure that documents and materials are appropriately labeled, attributed and dated.
- Omit documents that appear in duplicate.
- Determine whether a privilege or protection applies to any documents. If so, generate a Privilege Log (see next section).
- Omit any documents not in existence at the time of the final agency decision.
- Generate an index for the complete Administrative Record including any Privilege Log.

#### **4. Determine what Documents are Privileged or Protected and Create a Privilege Log**

- Identify the documents and materials being withheld and state on what basis (e.g., “attorney-client privilege”) they are being withheld.
- The Privilege Log must provide sufficient detail for each document withheld to substantiate the claim of privilege or protection.
- In making decisions about documents to include on the Privilege Log, take into account, in addition to law related to privileged and protected materials, applicable policies including those set forth in the January 21, 2009 memorandum from President Obama regarding FOIA materials.
- Take into account any withholding or disclosure determinations made in connection with FOIA requests for the same document.
- Make a final determination whether to withhold a document on the basis of privilege or protection and list it on the Privilege Log in accordance with these guidelines (see Section V., D.).