Creating and Maintaining the Administrative Record

NEPA requires federal agencies to make environmental information available to public officials and citizens before decisions are made regarding proposed actions. To allow public officials and citizens to fully understand how an EIS is prepared, the EIS project manager must create and maintain an administrative record for the EIS.

Further, an administrative record is important if litigation ensues as a result of the federal agency's eventual decision. In a court challenge, the court usually determines the lawfulness of the agency's decision based exclusively upon a review of the documents contained in the administrative record for the contested decision. If the court finds that the record fails to demonstrate the basis for the decision, the court can enjoin agency action until the agency supplements the record for the court, thereby delaying the proposed action.

The administrative record is a compilation of all materials that were before the federal agency at the time it made its final decision in the NEPA review process. The record should demonstrate the path that the agency followed in making its decision and should include all of the documents that were directly and indirectly considered by the agency's decision makers. The administrative record is also important because it memorializes the manner in which the agency made its decision, thereby fostering and preserving the agency's institutional memory and environmental values.

The creation and maintenance of the record is the responsibility of the EIS project manager. Every person involved in the NEPA review process, however, must be aware of the need to preserve key documents for the record.

The documents to be included in the administrative record are (1) those required by the agency's NEPA regulations and the regulations of the Council on Environmental Quality (40 CFR Parts 1500-1508), and (2) other documents, in either draft or final form, which are prepared or referred to by the agency (and its contractors) as it develops the facts and issues that culminate in the final agency decision. Taken together, these documents address the evolution of the agency's analysis, including any facts, ideas or arguments that run counter to the decision ultimately reached.

Preparation of the administrative record should be guided by the following principles, which will be distributed to all staff involved in the preparation of the EIS:

> Interpret the term "document" broadly. Note that documents can exist on computer discs, microfilm, microfiche, photographs, and electronic mail as well as on paper. Also, written and pictorial presentations, such as graphs and charts, are documents for administrative record purposes. Other examples include minutes of meetings, technical reports, public comments, viewgraph presentations and comments on the draft and final EIS or EA. Where any page within a document is referred to, the entire document should ordinarily be included in the record. Note, however, that the record should not contain every scrap of paper or electronic entry produced during the project, even though they might technically be Adocuments.@ As discussed immediately below, the administrative record should be limited to documents that were considered for the NEPA decision in

question.

Include all documents that were prepared, reviewed, or received by agency personnel and that were available to the decisionmakers, even those documents not actually reviewed by or known to the ultimate decisionmaker, for example, the head of the agency or an assistant secretary. Examples could include technical reports, data calls, Presidential Decision Directives, and Congressional testimony.

Include drafts that demonstrate significant departures from the analyses in previous drafts, especially those that demonstrate developments in the proposed action or alternatives. Drafts reflecting only editorial changes or restructuring of content generally do not need to be included.

Include relevant communications that the federal agency received from other agencies and from the public, including responses to those communications. Examples include public comments and statements made before a Congressional committee.

Include relevant notes prepared by individual agency employees if those notes were available to or made known to the decisionmakers. Examples include meeting minutes, response to comments and conference call notes.

Include documents that meet the above guidelines even if they contain information that contradicts, conflicts, or questions the agency's analysis. Examples include public comments, technical reports, responses to data calls, or internally-generated dissenting views. An administrative record should contain any documents that are critical of the approach the federal agency has taken, as well as documents that reflect how that criticism was addressed.

Exclude documents that did not exist at the time the agency made its decision. An administrative record is the record that was before the agency at the time it made its decision, not documents generated after the fact. For example, studies prepared after the record of decision should not be included.

At a minimum, the administrative record for an EIS should the following:

1. Notice of Intent to prepare an EIS.

2. Comments from scoping meetings.

3. Departmental responses to comments from scoping meetings (if prepared).

4. Concurrence comments on the Draft EIS.

5. Draft EIS and any supporting appendices.

6. Comments by states, tribes, federal agencies or members of the public on Draft EIS.

7. Responses to comments on the Draft EIS.

8. Concurrence comments on the Final EIS.

9. Final EIS and any supporting appendices.

10. Record of Decision.

11. All references listed in the EIS (one copy of each reference document in its entirety will be included in the record).

12. Action memoranda and other documents on issues related to the EIS that are prepared prior to the issuance of the Record of Decision.

13. All materials such as data, reports, studies, maps, etc., that directly support analyses in the EIS and that are not generally available to the public.

14. Internal memoranda from program offices regarding issues related to the EIS that are prepared prior to the issuance of the Record of Decision.

15. Correspondence outside of the public comment periods to the agency from the public and federal and state officials and tribes during the NEPA process, and the agency's responses.

The task of gathering documents for the record will begin with the start of the NEPA process and continue until its conclusion. One of the most important elements in the preparation of an administrative record is the maintenance of an orderly and thorough central filing system for the project. The project manager should establish a system for receiving, indexing, organizing and preserving these documents for inclusion into the administrative record. Documents will be forwarded to this filing system as they are identified by the participants in the NEPA process, together with a note explaining why the documents should be included in the record. The project manager will organize the documents in chronological order in order to best explain the path of the agency's decision.

If the use of classified information is anticipated, any such information must be handled according to appropriate procedures. In addition, any documents reflecting communications between agency attorneys and the NEPA team must be identified and reviewed by agency counsel to determine whether they are eligible for the attorney-client privilege.

At the conclusion of the EIS process (after the Record of Decision is submitted to the *Federal Register* for publication), the project manager should a copy of the Administrative Record and an index. For ease of use, the index should be searchable and all electronic files should be provided on a CD/DVD.