

## **THE SCOPE OF THE ADMINISTRATIVE RECORD IN ENVIRONMENTAL LITIGATION**

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### **I. Introduction**

This session focuses on the Administrative Record in environmental litigation. There are many kinds of environmental litigation, so, unless someone wants to address other issues, we're going to focus on environmental challenges to government decisions to move ahead with transportation construction projects upon completion of the NEPA process, similar state requirements, or the issuance of some federal or state approval or permit. These legal challenges are typically based on the record the agency compiled in the course of its consideration of the project with no witness testimony. Key to the outcome of these cases is the Government's paper record that supports the decision made to proceed with the project. This paper record, submitted to the court, is the Administrative Record.

There are longstanding disagreements as what documents should be in the Administrative Record. Recent guidance by FHWA, made in accord with USDOT guidance, has resulted in changes as to what should be in the Record. This guidance reflects current policies of the Department of Justice. This panel will discuss this guidance and what attorneys working on these cases should expect.

- II. The compilation of the Administrative Record is made from the project record (or project file).

In the section of the discussion the panel will cover what constitutes the Administrative Record and the legal requirements, including case law, for the Record. We will also discuss how the Administrative Record is drawn from the project file or project record. The project record consists a large number of documents, emails, and other material in the files of the project sponsor, such as the state department of transportation, but also includes many documents in the files of the responsible federal agency, such as the Federal Highway or Federal Transit Administration. Assembling and organizing the project record can be a huge task, as for a large transportation project, it can run into several hundred thousands of pages.

- A. What is an Administrative Record and its relationship to the project record
- B. Preparation of the project record. When done, how?
- C. Who has the project record? Federal agency (FHWA/FTA)? State DOJ or local project sponsor?
- D. What is role of state and federal agencies in preparing this record and the Administrative Record?

- III. U.S. DOJ Statements Regarding the Administrative Record

Because of the Justice Department's overall litigation responsibilities, it has sometimes provided government-wide guidance on the scope and content of Administrative Records. In addition, it has frequently explained the appropriate scope of the Administrative Record in briefs. In 2017 several DOJ filings set forth its view of the appropriate scope of the record and the panel will discuss these filings and recent guidance and how the new guidance should be applied in particular cases. We will also address some specific issues that have arisen regarding privileged materials and whether they should even be included in the Record. Finally, we will discuss a couple of other issues such as dealing with extra record material and requests for discovery in the face of the Administrative Record.

- A. Background
- B. Current policy

1. What is it?
2. What is the change?
3. What are the benefits?
4. How is it applied/flexibility?

C. Handling privileged material.

1. What kinds of materials are privileged?
2. How are they dealt with in NEPA cases?

D. Other issues

1. Extra record material – how do these materials enter a case?
2. Discovery in administrative record cases

IV. DOT Implementation

The government agencies and their grantees that are the defendants in NEPA litigation are generally responsible for actually preparing the Administrative Record. Thus, for transportation cases, guidance issued by the Department of Transportation or its Administrations, following the DOJ guidance, controls what the record will look like. We will discuss this guidance, and how federal, state and local transportation agencies work together in preparing the Record.

- A. Specific Guidance
- B. Interaction between FHWA (FTA)/State DOT/U.S. DOJ
- C. FHWA/FTA was final say – it is their action

V. State law issues

States often have environmental laws that also lead to litigation. While these cases are typically litigated separately in state court, both the state and federal cases require an Administrative Record. State and federal standards may differ. We will explore the issues that arise in the context of California law, the state with the strongest and most heavily litigated environmental review law - the California Environmental Quality Act (CEQA). Finally, under federal highway law, a number of state departments of transportation, including the California Department of Transportation, have been delegated the duties of the U.S. Secretary of

Transportation for complying with NEPA and related federal laws. This assumption of federal responsibility includes agreeing to waive the immunity from suit and to the jurisdiction of the federal courts when legal challenges are made to the state's actions under the assumption. We will discuss the Administrative Record practices in these states.

- A. California – toughest of state environmental law
- B. California Administrative Record practice
- C. Possible conflict between State and Federal practice
- D. Resolution
- E. Administrative record practice in states which carry out NEPA responsibilities for USDOT (NEPA assignment).

#### VI. Preparing the Administrative Record

In this section we will discuss how the Record is actually prepared. In complex cases, these Records are typically prepared by specialized contractors. Working with and overseeing these contractors is a critical part of ensuring the production of a proper Record. Finally, we will review best practices, the costs and delays resulting of an untimely Administrative Record and the tactical advantages of being able to file the Record soon after litigation starts.

- A. Current practice – electronic records
  - 1. How Records are prepared (working with companies that produce the Record)
  - 2. Cost, time and manpower issues
- B. Best practices
  - 1. Problems with delays in preparation of the Administrative Record – e.g., project delays, cost of preparing the record, etc.
  - 2. Strategic advantage in litigation of quick completion of the Record
- C. Working with FHWA/FTA/DOJ

## VII. Litigation Issues

Issues regarding the scope and content of the Administrative Record often arise in the context of environmental litigation. Indeed, the scope and content of Administrative Records in general is largely the product of a long line of court decisions. We will discuss current litigation, including cases that have arisen since the 2015 change in DOJ's guidance on Administrative Records. Often project related documents are public or in the possession of the plaintiffs. This can be the result of documents obtained pursuant to the Freedom of Information Act, state public records acts, or simply because they have been made public by the agencies involved. Should all of these documents be made part of the Record, or should only documents following DOJ and agency guidance be included? What issues can arise when the DOT or DOJ policy results in the exclusion of these documents.

### A. Court's view of what should be in record

1. Consequence of omissions
2. Benefits/Costs of smaller records
3. Appellate issues?

### B. Interaction between Administrative Records, FOIA, State Public Records

Acts. May or should the Record be more limited than the documents released under these laws? Treatment of other publicly available documents that plaintiffs may wish to use in litigation.

## VIII. Conclusion

Each panel member will be given the opportunity to provide closing thoughts.