



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

OFFICE OF THE GENERAL COUNSEL

January 16, 2009

**Memorandum**

**To:** Assistant Administrators

**From:** Jane C. Luxton *JCL*  
General Counsel

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

The NOAA Office of the General Counsel (NOAA GC) has prepared this document to provide NOAA-wide guidance for compiling agency "Decision Files" and "Administrative Records." This document is intended to assist you and your employees when compiling Decision Files and Administrative Records, and contains guiding principles for all NOAA line offices.

This guidance is not, however, intended to serve as an instruction manual. Each NOAA line office should consider issuing further guidance and instruction to its staff, in conformance with the attached memorandum, detailing an office-specific process for compiling and producing an administrative record. Such office-specific guidance should, for example: establish criteria for designating a custodian for each decision-making process, explain how the custodian will compile and maintain a Decision File and administrative record, explain how an administrative record should be organized and indexed for litigation, and provide line-office specific examples of the kinds of documents that should be included in the Decision File and administrative record.

This guidance is consistent with applicable legal requirements for assembling an administrative record. NOAA components generally should adhere to the guidance described below. However, staff should confer with NOAA GC attorneys regarding specific circumstances where deviation from the guidance may be appropriate, such as, for example, situations involving joint action with another agency that utilizes a different approach to assembling administrative records or where controlling legal precedent or other litigation considerations dictate otherwise. In short, while NOAA is adopting these preferred procedures as an internal matter to improve its own processes, NOAA retains full discretion to choose the appropriate means for compliance with the Administrative Procedure Act.

NOAA components should identify a custodian and open a decision file, as described in the guidance, for actions initiated after the date of issuance of this memorandum. For ongoing actions initiated prior to the date of this memorandum, NOAA components should generally adhere to the principles of the attached guidance with respect to the materiality of individual documents, but should consult with NOAA GC about the scope of particular administrative records.



This memorandum has been approved for public disclosure, but it is strictly for the purpose of providing internal guidance for the agency; it does not create binding norms or impose obligations on the public, and it is not enforceable against the agency. If you have any questions about the contents of this memorandum, please contact the NOAA GC office that provides support to your Line Office.

cc: NOAA GC Offices

Attachment

# National Oceanic and Atmospheric Administration Guidelines for Agency Administrative Record

## I. INTRODUCTION

Federal agencies, such as the National Oceanic and Atmospheric Administration (NOAA), keep records for many different purposes. This guidance document focuses solely on requirements for documenting an agency decision-making process. Questions concerning general records management practices, the Federal Records Act, and FOIA, as well as how these practices and statutes relate to an Administrative Record should be brought to the attention of appropriate agency attorneys.

In the context of agency decision-making, the agency assembles and maintains documents<sup>1</sup> relating to a specific "decision" or "action."<sup>2</sup> When agency "action" or inaction is challenged in court, the agency provides to the court and the parties a record of the agency's decision or position with respect to the issues in the litigation. The record that is presented to the court is called the "Administrative Record." In essence, the "Administrative Record" (AR) is the legal term used in judicial litigation to refer to the documents assembled and maintained with respect to a particular agency action or position in litigation that provide the basis for judicial review in that case.<sup>3</sup>

---

<sup>1</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 of 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>2</sup> Under the Administrative Procedure Act (APA), "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 action is "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).

<sup>3</sup> As discussed below, some documents, such as those containing attorney-client protected information, may need to be removed from the Decision File before it is filed with the court as the AR. Likewise, in limited circumstances,

The purpose of this memorandum is to provide NOAA program managers and record officers with guiding principles for compiling a "Decision File" for the records that contemporaneously document NOAA decisions and, if necessary, an AR for judicial review. Adherence to these Guidelines will ensure that decision-makers have access to the documents essential to their consideration of particular actions, and that NOAA produces for the court accurate, reliable, complete, and consistent ARs that include documents available to the decision-maker that are relevant to the issues in litigation and reflect the basis for agency decisions.

Agency personnel involved in compiling a Decision File or AR should consult any more detailed, line-office specific guidance for further information on compiling a Decision File or AR for judicial review. Finally, agency personnel should consult the NOAA Office of General Counsel (NOAA GC) when questions arise concerning the composition of the Decision File and throughout the process of preparing an AR to ensure that they are properly compiled. In specific circumstances, deviation from this guidance may be appropriate, such as, for example, situations involving joint action with another agency that utilizes a different approach to assembling AR's or where controlling legal precedent or other litigation considerations dictate otherwise. In short, while NOAA is adopting these preferred procedures as an internal matter to improve its own processes, NOAA retains full discretion to choose the appropriate means for compliance with the Administrative Procedure Act.

## II. BACKGROUND

The Administrative Record (AR) is a compilation of documents that the agency assembles during its decision-making process and produces to a court and the parties, with certain exceptions, during litigation to document the decision-making process and the basis for a final agency action. The law governing ARs is complex; the following is a general summary.

Under administrative law, 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 Administrative Procedure Act (APA)<sup>4</sup> provides that a court 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 summary judgment, that is, without a trial in which there is witness testimony. The AR is the "evidence" in the case. In general, the court therefore relies solely on the agency's AR to determine the legal adequacy of the particular agency action being challenged. Accordingly, the agency should present an AR that demonstrates compliance (both procedural and substantive) with applicable statutes and regulations that documents the full rationale for the agency's decision or position with respect to the issues in the case, and contains all information material to

---

documents may need to be added to the Decision File before it is filed with the court as the AR. Thus, while the Decision File and AR are not always mirror images of one another, in most cases they contain the same or nearly the same set of documents.

<sup>4</sup> Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*

judicial review. Finally, the AR should demonstrate that the agency considered opposing viewpoints, if any, and provide a thorough explanation as to why the preferred course of action was adopted.

Neither the APA nor any of NOAA's statutes or directives provides further guidance on the specific contents of the AR. The content of the AR has been addressed, however, in numerous court decisions. These Guidelines have been developed after consideration of those decisions as well as upon informal guidance provided by the Department of Justice.<sup>5</sup> Ultimately, NOAA has authority to adopt the means it finds appropriate for complying with the APA and developing an AR.

### **III. STARTING AND MAINTAINING THE DECISION FILE**

In order to ensure the AR provides adequate documentation of the agency's decision-making process (and to avoid misplacement of documents), a "custodian" should create a Decision File once consideration of a decision begins. The custodian should compile and organize documents as they are generated or received, and begin to identify which of those documents belong in the Decision File to be available for decision-maker review. Creating and maintaining a Decision File ensures that materials are assembled contemporaneously with the decision-making process and that issues raised and relevant factors identified during the process are addressed in the decision documents. Thus, agency personnel should not wait until litigation is filed to begin compiling a Decision File for the decision.

#### **A. Designating a Custodian**

At the initiation of each decision-making process, the decision-maker should designate a "custodian" who is responsible for compiling and maintaining a Decision File for the decision-making process. The custodian is also responsible for ensuring that the entire Decision File is available to the decision-maker upon request. Finally, in the event of litigation, the custodian prepares the AR for submission to the court and, if necessary, provides a declaration about the preparation of the AR.

---

<sup>5</sup> There is no formal or binding government-wide guidance addressing the compilation and content of an agency AR. To the contrary, consistent with their discretion to choose appropriate procedures for compilation of an AR, agencies have adopted a variety of approaches. See e.g., Department of the Interior Standardized Guidance on Compiling a Decision File and an Administrative Record, Department of the Interior, Office of the Solicitor, June 27, 2006; Development and Management of Administrative Records, Carrie Wehling, Marilyn Kuray, Mark Stein, May 2002, presentation at EPA'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 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 Department of Justice, nor even an official directive of ENRD. DOJ advised that nothing in that guidance was intended to limit the "otherwise lawful prerogatives of the Department of Justice or any other federal agency." More recently, ENRD recommended that individual agencies adopt their own guidance. Memorandum re "Guidance to Federal Agencies on Compiling the Administrative Record" (January 1999), Ronald J. Tenpas, Assistant Attorney General, ENRD, December 23, 2008 (Tenpas Memo).

The custodian generally should be a program manager, project manager, or a staff person with significant drafting and analytical responsibility for the action. 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.

#### **B. Initiating and Maintaining the Decision File**

The decision-making process is initiated when the agency begins to consider a concrete proposal for action. For example, in the case of formal consultation under section 7 of the Endangered Species Act (ESA), the decision-making process is initiated when NOAA Fisheries Service receives a written request for consultation from an action agency. If necessary, agency officials should consult with NOAA GC to identify the point at which the decision-making process is initiated.

The custodian should collect and maintain documents containing information material to the decision-maker's consideration of the decision contemporaneously as the decision-making process progresses. As materials become available or are used in preparation of an agency action, the custodian should determine whether they belong in the Decision File, consistent with these guidelines. In order to facilitate this process, the custodian should issue a memorandum at the initiation of the decision-making process alerting appropriate agency staff that a Decision File has been established. The memorandum should inform staff members that if they have materials they believe should be considered by the decision-maker, those materials should be submitted to the custodian for possible inclusion in the Decision File before the decision is taken. The custodian's memorandum will also inform agency staff that materials not submitted for inclusion in the Decision File during the decision-making process will not be available to the decision-maker and, therefore, will not be considered. As discussed below, the custodian's memorandum should identify the proper form for documents and the custodian is responsible for ensuring that documents included in the Decision File take the proper form. If agency staff submit materials that are not in the proper form, the custodian should return them to the staff who provided them. A sample memorandum is attached as Exhibit A.

#### **C. Maintaining the Decision File: Key Points**

- A Decision File should be created as soon as possible after consideration of a decision begins.
- Those documents necessary to create a single organized source of information, both favorable and unfavorable, that reflects the basis for the agency decision should be collected.
- The Decision File should be clearly labeled and should be organized in a logical manner, such as chronologically or by topic, so that documents can be included in the Decision File as they are generated or received.
- Documents placed in the Decision File should be appropriately labeled, attributed, and dated.

- Once the decision-maker has made a final decision, the Decision File should be closed to any later-created documents.

#### IV. CONTENTS OF THE DECISION FILE<sup>6</sup>

As previously stated, a Decision File is the contemporaneous record of the agency's decision-making process. The Decision File (and any subsequent AR) should document the process the agency used in reaching its final decision in order to show that the agency followed required procedures. 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), the National Environmental Policy Act (NEPA),<sup>7</sup> the Regulatory Flexibility Act,<sup>8</sup> the Information Quality Act,<sup>9</sup> the Coastal Zone Management Act,<sup>10</sup> the Endangered Species Act (ESA),<sup>11</sup> the Marine Mammal Protection Act,<sup>12</sup> and the National Marine Sanctuaries Act,<sup>13</sup> among others. The Decision File should also enable the decision-maker to ascertain that the agency has complied with applicable procedural policies such as those in Executive Orders 12,866 and 13,132.

Moreover, the Decision File should:

- Explain and rationally support the agency's decisions. The Administrative Procedure Act requires that the agency consider and address all factors relevant to a particular agency action. Thus, the Decision File should contain those documents necessary to show that the agency followed required procedures, and to show the complete history of the agency decision-making process,
- Include substantive factual information and data that is material to the decision regardless of whether the decision maker will personally review the information, and regardless of whether the information is contrary to the agency's position.

---

<sup>6</sup> Although this section of the guidance document addresses the contents of the agency Decision File in some detail, each NOAA line office may issue further guidance and instruction for its staff detailing an office-specific process for compiling and producing a Decision File and AR. Thus, agency program managers or record officers should refer to this guidance as well as any Line Office-specific guidance prior to compiling the Decision File.

<sup>7</sup> 42 U.S.C. § 4341.

<sup>8</sup> 5 U.S.C. § 601 *et seq.*

<sup>9</sup> Pub. L. No. 106-554, § 515.

<sup>10</sup> 16 U.S.C. § 1451 *et seq.*

<sup>11</sup> 16 U.S.C. § 1531 *et seq.*

<sup>12</sup> 16 U.S.C. § 1361 *et seq.*

<sup>13</sup> 16 U.S.C. § 1431 *et seq.*

- Document 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.
- Contain documents that demonstrate the agency has met the legal standards and criteria found in applicable laws, regulations, and relevant agency policies (*e.g.*, Consultation Handbook: Procedures for Conducting Consultation and Conference Activities under Section 7 of the Endangered Species Act, March 1998). For example, when use of the “best available science” or “best scientific and commercial data available” is required, the Decision File should generally contain documents that address and analyze this topic.

Different decision-making procedures and different types of decision documents are used depending on which statute is being applied. Thus, Decision Files can differ, sometimes considerably, in the number and type of documents involved. Still, the goals of the Decision File remain the same—to show the agency followed required procedures, and to show its substantive decision is reasonable and is supported by the evidence before the agency. Therefore, when assembling the Decision File, program managers should: (1) consider what procedures are required, what procedures will be followed, and how such procedures should be documented; and (2) as the time for making a decision approaches, consider the basis for the agency’s choice of actions and determine how it should be documented and explained.

#### **A. Key Principles for Inclusion or Exclusion of Documents in the Decision File**

A key principle to be used by the custodian in evaluating whether to include a document in the Decision File is whether it contains information that is material to the decision-maker’s consideration of the decision. If a document does not contain material information, it should not be included in the Decision File. Documents containing material information should be included in the Decision File regardless of their degree of significance, or whether they support or oppose the agency’s final decision.

Information is material to the agency decision if it relates to the action under consideration (*ie.*, has a logical connection) and informs, or has the potential to inform, the decision-maker with respect to the subject matter of the decision. When considering materiality, the custodian should evaluate the entire context of the decision-making process and on that basis determine whether the information in question informs, or has the potential to inform, the decision-maker. Because materiality determinations can be difficult, these determinations should be made in consultation with an attorney in the office of NOAA General Counsel, as necessary.

In addition, the custodian should consider whether the document is presented in an appropriate format. All documents in a Decision File should be dated, with authorship indicated. Undated, unattributed documents are not likely to be appropriate because it is difficult to tell how they fit into the agency’s decision-making process or to determine what weight to give them. Similarly, documents prepared for signatures should be signed and dated, and copies of the signed and dated versions of the documents placed in the Decision File.



## **B. Examples of Kinds of Documents To Be included in the Decision File**

Documents that may be included in a Decision File will include paper documents, but may also include other means of communication or ways of storing or presenting information. For example, data files, graphs, charts and photos may also be included in some cases. As discussed in greater detail in subpart C., below, certain documents should not be included in the Decision File.

### **1. Documents Essential to the Decision File**

- Documents that are material to the decision facing the agency (including documents incorporated by reference within material documents), whether or not those documents or materials support the final agency decision. The custodian should use his or her judgment, however, in deciding whether any document (or some relevant portion thereof) incorporated by reference within material documents should itself be physically included in the Decision File.
- Any Decision File or AR that supports earlier similar decisions, if material, should be considered for inclusion in the Decision File; the agency should include the index of such an earlier AR, and then determine whether to reproduce all, some, or none of the documents.
- Background documents, directives, and manuals where central to the decision. These should be cited; the custodian should use his or her judgment in deciding whether voluminous background materials should be physically inserted in the Decision File or incorporated by reference. The custodian may consider inserting excerpts as appropriate.
- Comments the agency receives during the public review process and the agency's responses to those comments.
- 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 Decision File include, for example, power-point presentations, agendas, and other handouts, provided either by the agency or the public.
- When information contained on websites is relied on, the Decision File should contain a contemporaneous hard copy of the relevant web pages, including the address and date that it was downloaded, to ensure that the information relied on is preserved before the web site content changes.
- 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.

### **C. Examples of Kinds of Documents that Should Not be Included in the Decision File**

The following documents should not generally be included in the Decision File because they are not material to the decision-maker's consideration of the agency action. Generally speaking, these documents consist of personal or internal materials (as well as supporting materials) created or used by agency staff during the development of the decision document. However, because proper classification of documents as deliberative may be difficult, staff should consult with NOAA GC as necessary.

#### **1. Personal notes**

Personal notes, such as an individual's notes taken at a meeting or journals maintained by an individual for his or her own use should not be included in the Decision File (or any later AR).

#### **2. Working Documents**

Working documents are those that relate to routine administrative operations (such as fax cover sheets or materials related to scheduling meetings). Such documents are not material to the decision-maker's consideration of the matter and should not be included in the Decision File.

#### **3. Drafts**

The Decision File should not include internal working (preliminary, interim, rough) drafts of documents that are included in the decision file in final form because such drafts generally are not material to the decision-maker's consideration of the matter. Examples of working drafts include draft decision documents, draft regulations, or drafts of official agency work products (e.g., biological opinions or permits) that are circulated within the agency. Working drafts that have been shared with other federal agencies, but that have not been shared with the public, should be treated in the same manner as working drafts that have been circulated only within the agency, and not included in the Decision File. Draft documents with independent legal significance, such as draft environmental impact statements, should be included in the Decision File.

Working drafts may sometimes be the sole source of material information. For example, a draft may explain a change from an earlier draft, or a draft may contain handwritten notes revealing factual information or presenting analyses that are material to the agency decision and that are not captured elsewhere in the record. In that situation, for purposes of a Decision File, the unique factual or analytical information contained in these drafts should be summarized in the decision memorandum or in a memorandum to the file, which would be placed in the Decision File in lieu of the working drafts themselves.

#### **4. Internal Staff Communications and Discussions**

Public disclosure of documents that reflect internal staff communications, discussions, and deliberations may have a chilling effect on candid discussions within the agency, and such documents should not be included in the Decision File. However, to the extent such documents contain particular facts, data, or points of view that are material to the decision-maker's consideration of the decision (that are not found elsewhere in the Decision File), that information should be summarized in the decision memorandum or a memorandum to the file, which would be placed in the Decision File.

#### **5. Internal Briefing Materials**

Internal briefing materials that have not been shared with the public such as power-point presentations and briefing papers should not be included in the Decision File. Internal deliberative briefing materials and documents reflect the agency's internal deliberative process; the disclosure of these documents may have a chilling effect on candid discussions within the agency. However, to the extent such documents contain particular facts, data, or opinions that are material to the decision-maker's consideration of the decision (that are not found elsewhere in the Decision File), that information should be summarized in the decision memorandum or a memorandum to the file, which would be placed in the Decision File.

In sum, the types of documents described above should generally not be included in the Decision File. We note, however, that it remains the custodian's responsibility to ensure that the facts or data contained in these materials and points of view that are material to the decision-maker's consideration of the decision are addressed in the decision documents or other documents in the Decision File. If, for example, personal notes contain substantive information material to an agency action, staff should include that information in the final decision document or supporting documents accompanying the final decision document through the approval process. In addition, drafts or other documents and materials reflecting internal staff communications and discussions, as well as e-mail, may contain instructions from management to include or exclude certain information or to take a particular approach to an issue or problem. To the extent that managerial instructions or "directions" to staff to take a particular action constitute an aspect of the decision that is not otherwise reflected in the record, the custodian should ensure that these instructions are reflected in the decision document or contained in a "memorandum to the file." While this requires additional work from program staff, this practice eliminates the confusion that arises from including internal deliberative materials in the Decision File.<sup>14</sup>

---

<sup>14</sup> There is not uniform agreement among the courts whether internal deliberative materials must be included in an administrative record. However, to our knowledge, no court of appeals has ever held that notes of telephone conversations, informal notes of meetings and discussions, and emails that reflect internal deliberations must be included in an administrative record. We believe that such documents are not relevant to a final agency decision or judicial review under the APA. ENRD has recently reiterated that they will defend the approach taken here. See Tenpas Memo. In our view, the focus should be on the adequacy of the agency's stated justifications, based on the facts and data in the record, not on the predecisional process that led up to the final decision. In addition, the disclosure of internal, deliberative materials has a chilling effect on candid discussions within the Agency, which adversely affects the overall quality of decisions. Finally, although not necessary to support the approach we take,

#### **D. A Note About E-Mail**

Because of the extensive use of electronic mail in today's society, electronic mail messages (e-mail) deserve special attention. E-mail is an important means of communication. However, e-mail itself is merely a medium and the decision whether to include the content of e-mail messages in a Decision File should be made based on the nature of that content and the identity of the author and recipients, not solely on the basis of the medium that is used. E-mail between agency staff and the general public should be included if it meets the materiality criterion. However, as discussed above, internal e-mail messages that reflect internal staff deliberations are not included in the Decision File because under these guidelines all material information will be included in other documents that are included in the Decision File. If an e-mail is the exclusive source of particular facts or data that are material to the decision, the sender of the e-mail should incorporate the information in a signed and dated memorandum to be placed in the file. Generally, if an e-mail contains factual information or analysis that is material to the agency decision, the content of that e-mail should be included in the final decision document, or supporting memoranda relied on by the decision-maker (or incorporated by reference in documents relied on by the decision-maker). As discussed above, it is the custodian's responsibility to ensure the information is provided in an appropriate form.

#### **V. THE ADMINISTRATIVE RECORD**

Once the agency has been notified that litigation has commenced for judicial review of the agency decision, a designated employee (typically the same employee ("custodian" who compiled and maintained the Decision File) should begin the process of compiling the AR. Generally, the Decision File should contain the documents necessary to be included in the AR. However, the custodian should confer with NOAA GC attorneys regarding specific instructions for the compilation of the AR. The custodian should also consult with the decision-maker to determine whether the decision-maker considered any other material documents that have not already been included in the Decision File.

#### **A. Criteria for Inclusion in the Administrative Record**

Under the Administrative Procedure Act, courts review the lawfulness of agency decisions on the basis of the "whole record" before the agency.<sup>15</sup> Federal courts have elaborated on the phrase "whole record" and have generally found that the whole record "consists of all documents and materials directly or indirectly considered by the agency."<sup>16</sup> For the purposes of these guidelines, the term "directly considered" means those material documents personally considered and reviewed by the decision-maker whether they support or oppose the agency decision. Such

---

we note that including predecisional materials can greatly multiply the administrative burden and expense, as well as delay the production, of an administrative record. Where appropriate, in consideration of relevant caselaw and court orders, it may be necessary to gather and segregate these documents within a separate file.

<sup>15</sup> 5 U.S.C. § 706.

<sup>16</sup> *Thompson v. Dep't of Labor*, 885 F.2d 551, 555 (9<sup>th</sup> Cir. 1989).

documents may include decision documents, documents referred to by reference, and any other materials forwarded to the decision-maker along with the decision document for which the Administrative Record was compiled. Furthermore, the term "indirectly considered" means other material documents available to the decision-maker, regardless of whether they support or oppose the final agency decision or whether the decision-maker actually personally reviewed them. Such documents may include, but are not limited to, memoranda to the record, studies and reports that are in agency files, public comments, agency responses to proposed actions, minutes of meetings with interested parties, and relevant scientific documents that are in agency files. These materials will generally consist of factual information and analyses or opinions that are material to the decision-maker's decision. For purposes of a NOAA AR, documents that have been "directly or indirectly considered" by the decision-maker generally will consist of the documents in the Decision File.

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

If the custodian has properly maintained the Decision File, the task of compiling an AR will be easy. As discussed above, the Decision File and the AR should be coextensive. Once litigation is filed, the custodian will begin the process of organizing and indexing the AR. That process will focus on reviewing the Decision File and taking the following steps:

- Omit from the Decision File documents that appear in duplicate to avoid the waste of time and resources.
- Review the Decision File to ensure it contains the documents that were submitted to the decision-maker.
- Omit documents not in existence at the time of the agency decision. Documents not in existence at the time of the agency decision are not material to the agency's decision (nor were they considered by the decision-maker) and must be excluded from the AR.<sup>17</sup>
- Segregate "Protected Documents." 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. Protected documents containing material information that are directly or indirectly considered by the decision-maker represent a special category of documents within the AR because, although they should be gathered for inclusion in the agency Decision File, they are generally not provided to the litigants when the AR is provided unless their disclosure is required by the court.<sup>18</sup>

---

<sup>17</sup> Program managers should consult with NOAA General Counsel 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.

<sup>18</sup> When protected documents contain material information that was directly or indirectly considered by the decision-maker, those documents may need to be identified in the index to the AR even though they are not produced to the litigants except as provided by the court. Agency staff should consult with NOAA GC as appropriate.

- Segregate "Privileged documents" unless a decision is made to waive the privilege. Privileged documents are those the government may choose to withhold from disclosure to the litigants. Where required by case law or court order, staff should gather and segregate privileged documents. Relevant privileges and prohibitions against disclosure include, but are not limited to, attorney-client documents (including legal memoranda prepared by agency counsel) and attorney work products. Documents reflecting the agency's internal deliberative process are also privileged under the Deliberative Process Privilege, but as discussed above are generally not included in the Decision File. Pursuant to these guidelines generally, privileged documents are not provided to the litigants when the AR is provided. However, when privileged documents are the sole source of material information that has been considered directly or indirectly by the decision-maker, a privilege log may be created to identify such documents. The custodian should consult with NOAA GC before doing so.

The custodian should work closely with NOAA General Counsel when converting the Decision File to an AR. Having a complete, organized Decision File ready when a lawsuit is filed will greatly enhance the agency's ability to meet court ordered deadlines, compile a complete AR, and defend the challenged decision.

## Exhibit A – Sample Decision File Memorandum

[DATE]

### Memorandum

**TO:** [Appropriate Program Staff]  
**FROM:** [Custodian]  
**RE:** Initiation of Decision File for [insert brief description of agency action]

This is to inform you that a Decision File has been established for the above-referenced agency action. If you have materials that you believe should be considered by [insert name and/or title of decision-maker] (Decision-making Official), those materials must be submitted to me, as soon as possible, but not later than [(insert date if appropriate)] for possible inclusion in the Decision File. Please note that any materials not submitted for inclusion in the Decision File during the decision-making process, prior to issuance of a final decision, will not be available to the Decision-making Official and, therefore, will not be considered.

The “National Oceanic and Atmospheric Administration Guidelines for Compiling an Agency Administrative Record (NOAA AR Guidelines),” describes in detail the kinds of documents that should and should not be submitted for inclusion in a Decision File.<sup>1</sup> In general, you should submit: documents that contain information, data and analysis that are material to this [insert name or description of agency action] whether or not those documents or materials tend to support or oppose a particular outcome. Those documents may include: Decision Files or Administrative Records that supports earlier similar decisions; background documents, directives, and manuals where central to the decision; comments received during the public review process and any agency responses to those comments; 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 Decision File include, for example, power-point presentations, agendas, and other handouts, provided either by the agency or the public.

Conversely, working documents, draft documents, internal briefing materials, and electronic mail (e-mail) message should not be submitted in their original form for inclusion in the decision file. To the extent that any draft documents, e-mail messages, or other such materials contain unique factual or analytical information that is not otherwise contained in the Decision-File, such information should be summarized in or attached to a “memorandum to the file” and submitted to me for possible inclusion in the Decision. If you are unsure whether the factual or analytical information contained in your

---

<sup>1</sup> The NOAA AR Guidelines are available at [indicate NMFS directory or web address where guidelines can be found].

## **Exhibit A – Sample Decision File Memorandum**

documents or materials is contained within other documents already in the Decision File, please contact me as indicated below. Documents and materials that are not submitted to me in proper form will be returned to the appropriate staff for revision.

Please submit materials for inclusion in the Decision File to me in hardcopy to **[insert building/room number]**. If you have any further questions about this memorandum or the appropriate content of the Decision File for the above-referenced agency action, please contact me at **[insert phone number/e-mail address]**.