

NEPA the Administrative Record and You



*The Truth, The Whole Truth and Nothing but the
Truth*

*Alabama DOT Pre-Construction Conference –
April 2017*

Jack F. Gilbert, Sr. Attorney

FHWA

Southern Legal Services



INTRODUCTION

- Purpose of the presentation
 - Define administrative record
 - Describe purpose of administrative record
 - Explain applicable legal standards
 - **Discuss the process of compilation**
 - **Recognize Potential Problems**

INTRO TO LAWYERS



**“We waited too long to run it by legal.
Now we need to run it by a judge.”**



DEFINITION

- Written record supporting agency's decisions – the agency's file
- Anything and everything relied upon by the decision maker to make the final agency decision or which shows the process
- Documents the agency's decision-making process and the basis for the agency's decision
- More than the final EIS or EA – a paper trail
- *If it is not in the record, it does not exist*



Definition – part deux

- Good question to ask – “Does it record the any part of the process?”
- If not relied upon by the decision-maker or does not reveal the decisional process, only then does it not go into the record.



PURPOSE

- To document and defend your decision if challenged in a lawsuit
- Judicial review of the final agency action is generally limited to a review of the administrative record*
- Basis for lawsuit is Administrative Procedure Act (APA). 5 U.S.C. 706 (2)(A) (Record Review – Paper is the witness)



Legal Standards

- Under the APA, the court inquires whether the agency's decision arbitrary, capricious or an abuse of discretion?
- Agency's action is held to be arbitrary and capricious when it relies on factors Congress did not want considered, or utterly fails to analyze important aspect of problem, or offers explanation contrary to evidence before it, or its explanation is so implausible that it cannot be ascribed to differing views or agency expertise.

Wilson v. U.S. Dept. of Agriculture, 991 F.2d 1211, 1215 (5th Cir. 1993)



Legal Standards (cont)

- Administrative action is upheld if the agency has considered the relevant factors and articulated a rational connection between the facts found and the choice made.

Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 105 (1983)

Shown **only** through the Record



Legal Standards (cont)

The “hard look” inquiry is focused on the full administrative record that was before the Secretary (DA) at the time the decision was made.

Citizens to Preserve Overton Park, Inc v. Volpe, 401 U.S. 402, 420 (1971)



Legal Standards (cont)

- The focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court

Camp v. Pitts, 411 U.S. 138, 142 (1973)



AR Legal Process

- The administrative record is filed with the reviewing court after a complaint has been filed
- Agency may voluntarily agree to include additional documents identified by plaintiffs
- If disputes cannot be resolved, plaintiffs can file motion asking court to “supplement the record”
- Court may allow discovery to determine completeness of the administrative record
 - e.g., sworn testimony on how the record was compiled



What to Include

- FHWA's 2015 Guidance Memo
- The approach: document process through memos
- What files will be included
 - Signed DEIS, FEIS, EA, ROD and Letters of Reevaluation
 - Federal Register Notices, Agency and Public Comments and Responses, Public Transcripts and Exhibits
 - Technical Reports and Studies, Schematics, Photos, Maps, Emails, Computer Files, Meeting Minutes discussing studies/work



What to Include (cont)

- List of all meetings and hearings (formal and informal) and attendance sheets
- Agendas and Transcripts
- Include negative information and contrary views
- Anything before agency at time before decision, even if not specifically mentioned by final decision-maker*



What to Include(not)

- Usually need not include:
 - Invoices/Bills
 - Consultant contracts (but may define scope of work)
 - Unpublished drafts (again may show needed info)
 - Mark-ups of drafts (beware the handwritten notes)
 - Personal notes (truly personal)
 - Duplicates
 - Items unrelated to project
 - Anything coming after decision is made by the agency



What Follows

- Ultimate responsibility for compiling all necessary documents rests with agency
- Agency itself is responsible for deciding what constitutes its administrative record (AR)
- Whoever compiles the AR will sign an affidavit and attest to the accuracy of this Record – Legal counsel cannot do this!
- No definitive regulations exist for an AR



COMPILATION PROCESS

- Step 1: Compiling the Documents
 - Do not wait -- start now. Especially on major projects or controversial projects
 - Gather and review files during the project
 - Obtain relevant documents from all involved parties
 - Start an index or catalog system



Compilation Process (cont)

- Step 2: Initial Review

Key question: *What to select/copy/scan?*

A copied or scanned document is not automatically included in the administrative record

But if it *might* go in the administrative record, it should be copied/scanned/set aside

Key tasks:

Decide what to include – [use the protocol](#)

Create hard copies of electronic files

Create repository – [one collection point/agent!](#)

Identify documents that require special handling (e.g., oversize, damaged, etc.)

Preserve all originals (including electronic files, documents and materials)



Compilation Process (cont)

- Step 3: Indexing Format:
 - Must include basic identifying information: to, from, date, etc.
 - Typically organized in chronological order
 - Must be accurate and easy to use
 - Index/Log Examples that have been used

Compilation Process (cont)

Route 9 Administrative Record - Scanned Documents

DOCNO	ENDNO	ARIN_OUT	DATE	FROM	TO	TITLE	CHARACTERIST
WV005253	WV005254	O	05/02/1995	Nettler-Richard / Robins & Kaplan	VanKirk-Fred / WVDOH	State project U302-9-15.20 (02), federal project DPC-0042(012), related to proposed upgrade of WV Route 9 (from Charles Town bypass to WV 45 in Berkeley & Jefferson counties)	Marginalia
SK000001	SK000119	O	01/01/2001	WVDOH		State project no. U219-9-10.43, federal project no. HDPS-9215(004)S, FHWA-WV-EIS-93-03-F record of decision	
SK000139	SK000139	I	10/01/2000	WVDOH		Final environmental impact statement section 4(f) evaluation volume II: section 8, state project no. U219-9-10.43, federal project no. HDPS-9215(004)S, FHWA-WV-EIS-93-03-F	
SK000441	SK000441	I	10/01/2000	Beverage-Samuel / WVDOH; Smith-Thomas / FHWA		State project no. U219-9-10.43, federal project no. HDPS-9215(004)S, final environmental impact statement section 4(f) evaluation, volume 1: sections 1 thru 7, figures, appendices	
SK000847	SK000850	O	08/18/2000	Nettler-Richard / Robins & Kaplan	Smith-Thomas / FHWA	West Virginia Route 9 upgrade, Jefferson County, WV, Virginia state line to Charles Town, federal project HDPS-9215(004)S	
SK000950	SK001123	O	10/01/2000	WVDOH; FHWA		Final section 4(f) evaluation	
FH000532	FH000551	I	04/08/1994	Nettler-Richard / Robins & Kaplan; Ferster-Andrea / Robins & Kaplan	Higginbotham-Billy / FHA; Epperly Jr-Randolph / WVDOH	Environmental impact statement and section 4 (f) evaluation for proposed upgrade of WV Route 9 (from the Charles Town bypass to the Virginia state line)	Draft
FH000634	FH000651	I	04/08/1994	Nettler-Richard / Robins & Kaplan; Ferster-Andrea / Robins & Kaplan	Higginbotham-Billy / FHWA; Epperly Jr-Randolph / WVDOH	Environmental impact statement and section 4 (f) evaluation for proposed upgrade of WV Route 9 (from the Charles Town bypass to the Virginia state line)	Draft

All Documents Containing: Ferster and Epperly

Compilation Process (cont)

**Index to Administrative Record
Volume 1
Documents # 1-75**

Doc. #	Document Title	Document Subject	Date	Location
1	Terry A. Del Bene, Rock Springs, WV to Randy Epperly, Director, Roadway Design Division, WVDOH	Opposes the construction of Corridor H because WV does not have infrastructure services to support increased population highway would allow. Concerned about impacts to Civil War battlefields and Native American sites.	1/30/95	Volume 1
2	Thomas W. Richards, Chairperson, Association for the Preservation of Civil War Sites, Inc., Fredericksburg, VA to Robert L. Moore, District Administrator, VDOT, Staunton, VA.	Feels that proposed Corridor H route would destroy or have deleterious affect on Civil War battlefields at Cedar Creek, Corricks Ford, Moorefield, and Shaver's Ford.	1/30/95	Volume 1
3	Caroline Brady Wilson, Elkins, WV to Randy Epperly, Director, Roadway Design Division, WVDOH	Opposes the construction of Corridor H because of cost and potential damage to national forests, springs and caves and Civil War battlefields.	1/20/95	Volume 1
4	Benjamin Axleroad, Arlington, VA to Randy Epperly, Director, Roadway Design Division, WVDOH	Opposes the construction of Corridor H because would be threat to environment and historic battlefields, and waste of taxpayers' money.	2/18/95	Volume 1



Compilation Process (cont)

- Document Format:
 - Each page of the administrative record should be numbered sequentially – e.g., from page 00001 through page 56,421
 - Typically organized in chronological order
 - Typically organized in volumes
 - Must be produced from best available copy
 - Should be able to be reproduced in hard-copy and CD/DVD.

EMAILS



"I REALIZE THAT IT'S ANNOYING WHEN SOMEONE FAILS TO RESPOND TO YOUR EMAIL. BUT I HARDLY THINK IT MERITS A 5 BILLION DOLLAR LAW SUIT."

MIKE SHAPIRO



ISSUES

- Emails/Chains/
- Closing Loops
- Oral Conversations/Meetings
- Personal Notes
- Storage/Employees Leave/Retention
- Open Records Requests/FOIA



POTENTIAL PROBLEMS

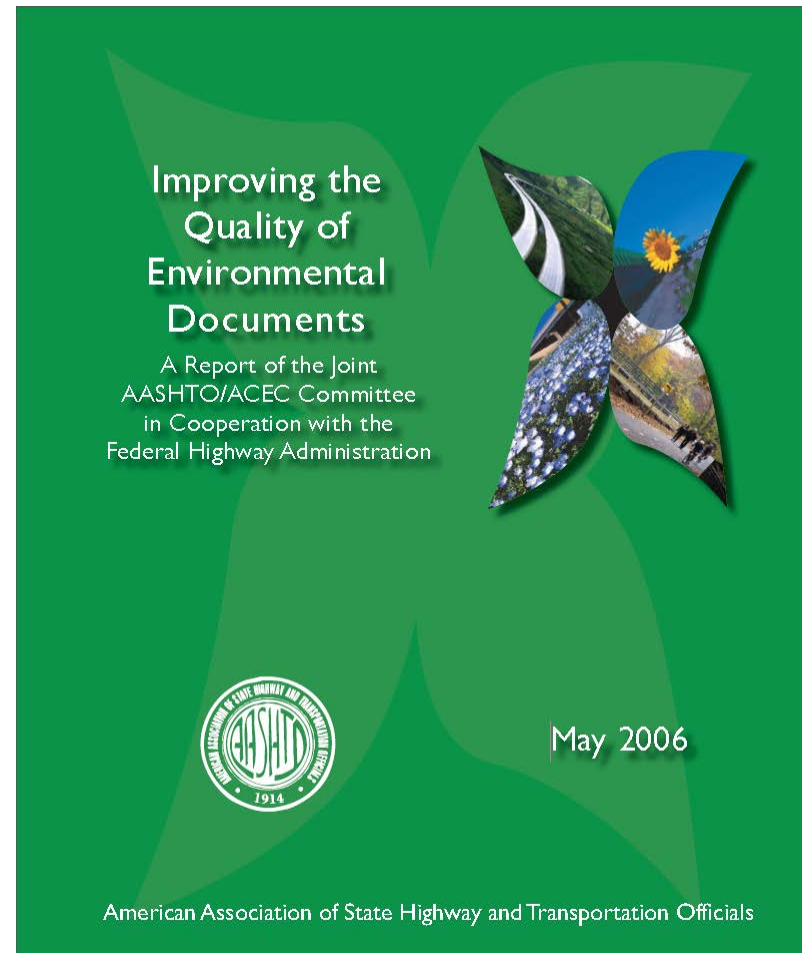
- Poor-Quality Originals
- Production Problems
- Process Breakdowns
- Who has the Files?

gUIDANCE (small g)

AASHTO/ACEC/FHWA

3 Core Principles

- Tell the story
- Be brief
- Meet legal requirements



AASHTO PRACTITIONER'S HANDBOOK

01

July 2006

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

Preparing the administrative record for a complex project can be a major challenge. This Handbook provides a starting point for undertaking this important task.

Issues covered in this Handbook include:

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

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

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

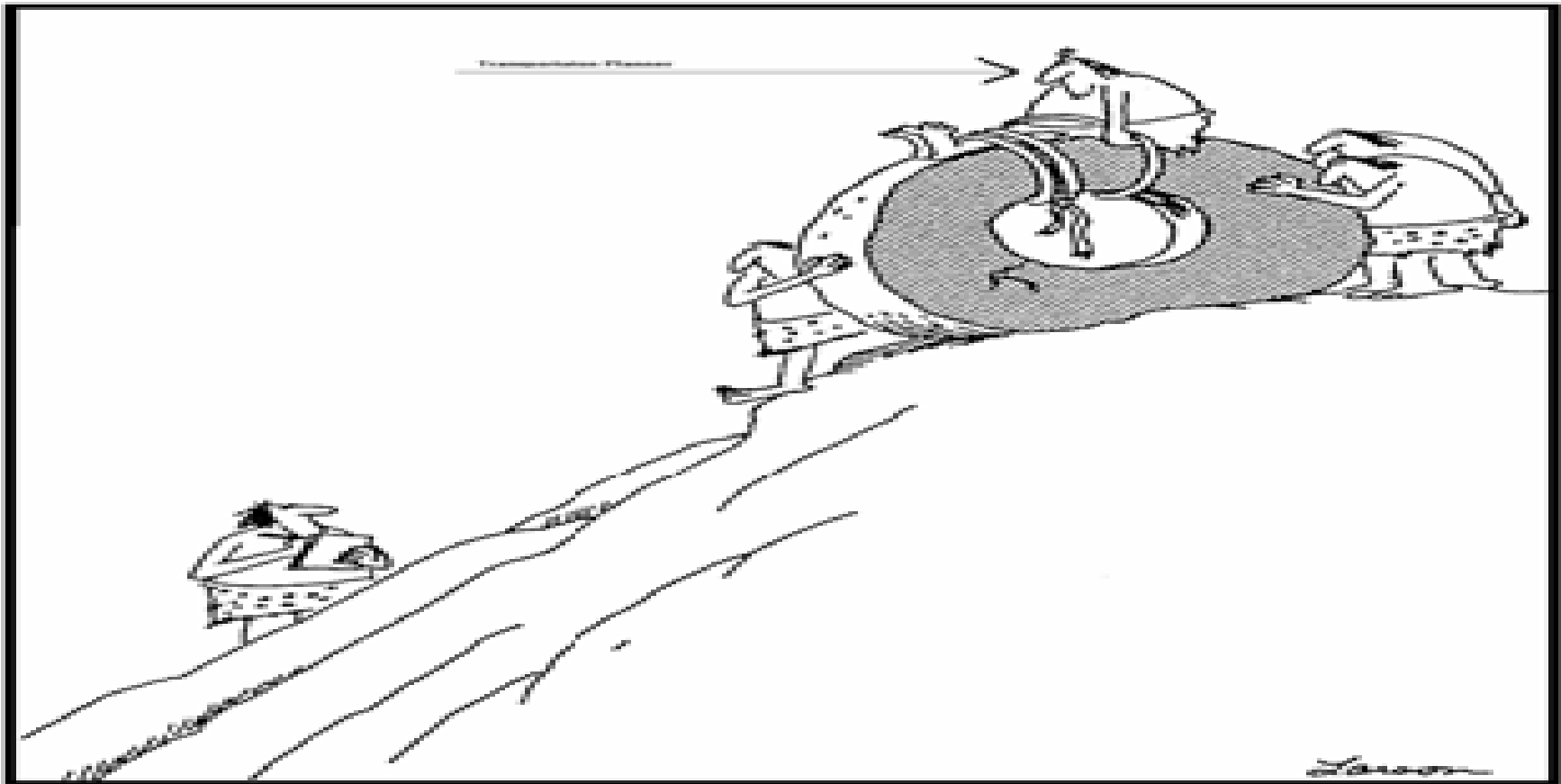
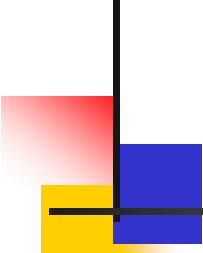
•key issues to consider;
•In addition, key regulations, guidance materials, and sample documents
a background briefing
for each Handbook is posted on the Center's web site [at](http://www.aashtocenterforenvironmentalexcellence.org)
practical tips for achieving compliance.
<http://www.aashtocenterforenvironmentalexcellence.org>



AASHTO Center for Environmental Excellence



American Association of State Highway and Transportation Officials



Early experiments in transportation



QUESTIONS

- **When is it prepared?**

**If you are asking when the answer is
NOW!!**



Questions (cont)

- **Where is it kept?**

Every document in project file need not be in DOT office

Should have one location for the AR

Will finally end up in the Court file



3 “Save You” Rules

- Always Remember:

- “Take great care to prepare a complete record.”
- “If it is not in the record, it did not happen.”
- “When in doubt, refer back to rules 1 and 2.”

-Judge Wiseman, Court of Appeals, 5th District, California



Conclusion

- **Thanks for your time**
- **Good Luck!!!**