CEQA Portal Topic Paper

Administrative Record

What Is the Administrative Record?

The Administrative Record ("AR" or "record") (formally called the "Record of Proceedings") is the heart of any California Environmental Quality Act ("CEQA") (Pub. Resources Code, § 21000 et seq.) lawsuit as it constitutes the entire body of evidence presented to the decision-making agency, which assists the court in its review of the agency's action. The record consists of evidence that an agency considered, either directly or indirectly (through staff), in making their decision on a project. The AR memorializes administrative proceedings providing evidence of an agency's compliance with CEQA. In a sense, the AR is analogous to the record on appeal and the clerk's transcript of the trial court proceedings that are presented to an appellate court when it reviews the propriety of a trial court decision.

Why Is the Administrative Record Important?

The AR is important because it provides the "whole record" or evidence a court considers when evaluating a challenge to a public agency's decision. Legal challenges to a CEQA determination are governed by Public Resources Code Sections 21168 and 21168.5.

Governing Statutes and Standards of Review

Public Resources Code Section 21168 provides, in pertinent part, that "the court shall not exercise its independent judgment on the evidence but shall only determine whether the act or decision is supported by substantial evidence in the light of the whole record."

Public Resources Code Section 21168.5 applies to "any action or proceeding other than an action or proceeding under Section 21168" challenging a decision of a public agency, whereby judicial review is limited to determining whether there was a "prejudicial abuse of discretion." Abuse of discretion is established either if the agency did not proceed in a manner required by law, or if the agency's decision is not supported by substantial evidence.[1]

[1] Whether an abuse of discretion is *prejudicial* is governed by Public Resources Code section 21005, subdivisions (a) and (b). Although "there is no presumption that error is prejudicial," prejudice may result from noncompliance with either CEQA's "substantive provisions" or CEQA's "information disclosure provisions" if, as to the latter, the error "precludes relevant information from being presented to the public agency, … regardless of whether a different outcome would have resulted if the public agency had complied with those provisions."

The California Supreme Court has held that the standard of review is "essentially the same" under both section 21168 and section 21168.5 (i.e., in both administrative mandamus cases challenging adjudicative agency actions under section 21168 and in traditional mandamus cases challenging quasi-legislative actions under section 21168.5). *Laurel Heights Improvement Association v. The Regents of the University of California* (1988) 47 Cal.4th 376, 392, fn. 5.

Upon certification by the lead agency, the AR is filed with the court and constitutes the "whole record."

Regardless of the differences in statutory wording, a reviewing court will ask: (1) whether there is substantial evidence to support the agency decision; and (2) whether the agency failed to proceed in the manner required by law.

"Substantial evidence" means "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." CEQA Guidelines Section 15384(a).[2] Filing a complete and comprehensive record with the court helps the agency demonstrate that it considered relevant factors in making its decision and made reasonable judgments in light of all the relevant facts. An incomplete record may lead a reviewing court to overturn the agency action or remand the decision for additional information. However, under the substantial evidence test standard, an agency's determinations are given substantial deference and are presumed correct; the challenger bears the burden of proving the contrary.

In certain instances, a court will look to see whether an agency "failed to proceed in the manner required by law". In such cases, a court looks to whether an agency's action or decision does not substantially comply with the procedural requirements of CEQA. In contrast to the substantial evidence test, a court does not give deference to the agency's determinations; instead, the court determines whether an agency has complied with CEQA's legal requirements. Thus, an AR lacking sufficient evidence of an agency's compliance with CEQA's procedural requirements can lead a reviewing court to overturn the agency action or remand the decision for additional information.

Who is Responsible for Preparing the Administrative Record

The petitioner or the lead agency may prepare the record. Pub. Resources Code, § 21167.6. At the time a petitioner files an action challenging a CEQA decision, the petitioner must also file either a request that the respondent agency prepare the record or file a notice that the petitioner elects to prepare the record itself. The request or notice must be personally served on the agency within 10 days after the petition is filed. Pub. Resources Code, § 21167.6(a).

[2] California Code of Regulations, title 14, § 15000, et seq., hereafter, "CEQA Guidelines."

Petitioners often elect to prepare the record to reduce the cost or to expedite the process if an agency is understaffed. Regardless of who prepares the record, a petitioner cannot add documents not contained in the record maintained by the agency. *Porterville Citizens for Responsible Hillside Dev. v. City of Porterville* (2007) 157 Cal.App.4th 885, 890.

Timing

The AR must be prepared and certified no more than 60 days after service of the request or notice to prepare the record. Pub. Resources Code, § 21167.6(b). This deadline may be extended only by stipulation of the parties or by court order. There are no limitations on the total number of extensions agreed to by stipulation. Extensions by court order should be liberally granted when the size of the record makes preparation and certification within the 60 days infeasible. There is also no limit on the number of extensions that may be granted by the court, but no single extension shall exceed 60 days unless the court finds a longer extension is in the public interest. Pub. Resources Code, § 21167.6(c).

Costs

The petitioner must pay any reasonable costs or fees to the agency preparing the record. Pub. Resources Code, § 21167.6(b). Where a lead agency prepares the record, the lead agency should request payment prior to releasing the record to petitioner and may withhold the record prior to payment (at least in administrative mandamus cases, and probably in traditional mandamus cases as well). *Black Historical Society v. City of San Diego* (2005) 134 Cal.App.4th 670, 677-678.

If the party paying the cost of preparing the AR ultimately prevails in the litigation, that prevailing party may recover reasonable costs paid for the preparation of the record. Code of Civ. Proc., §§ 1032(b), 1094.5(a). Allowable court costs may also include agency costs for outside counsel and paralegals when reasonably necessary to prepare a complete record. *Otay Ranch, L.P. v. County of San Diego* (2014) 230 Cal.App.4th 60, 70.

When a petitioner elects to prepare the record and the record is incomplete, a lead agency can recover costs associated with supplementing a record to ensure a complete and legally adequate AR is before the court. *Coalition for Adequate Review v. City & County of San Francisco* (2014) 220 Cal.App.4th 1043, 1055. However, an agency cannot recover the costs it incurs in reviewing documents for privileged material or for reviewing the record for accuracy if the petitioner elects to prepare the record. *Citizens for Ceres v. City of Ceres* (2016) 3 Cal.App.5th 237. Where a petitioner unreasonably delays preparation of a record, a lead agency may take over the process of preparing the record and index to expedite CEQA litigation, and can recover costs associated with preparation of the record. *Landwatch San Luis Obispo County v. Cambria Community Services District* (2018) 25 Cal.App.5th 638.

Petitioners electing to prepare the record often request copies of records from public agencies under the California Public Records Act. Gov. Code, §§ 6250-6276.48. However, if the trial court awards court costs to a prevailing agency, the agency is not barred from recovering additional costs for providing records in response to the Public Records Act Request as part of

the CEQA litigation. *St. Vincent's School for Boys, Catholic Charities CYO v. City of San Rafael* (2008) 161 Cal.App.4th 989, 1019 n9.

All costs related to preparing a record or supplementing a petitioner's draft record should be carefully documented by a lead agency. Costs documented concurrently with the preparation of the record will make it easier for the court to award costs.

Certification

Regardless of who prepares the record, the lead agency is responsible for certifying the record. Code of Civ. Proc., § 1094.6(c); Pub. Resources Code, §§ 21167.6(b)(1) and (b)(2). Certification of the record consists of a declaration by a custodian who attests to the accuracy of the documents included in the record and ensures that the record is complete, properly organized, adequately indexed, and presented in a way that will allow the proceedings to be followed and easily understood by a reviewing court. A record is typically certified by the city clerk or other official tasked with records management for the lead agency, who signs the record under penalty of perjury.

Extra-Record Evidence

Evidence outside of the record is generally not admissible in CEQA actions challenging administrative decisions. For administrative mandamus cases, the limited exceptions are set forth in California Code of Civil Procedure Section 1094.5. These exceptions include where evidence was improperly excluded at the hearing before the agency; or "Where the court finds that there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced." Code Civ. Proc., § 1094.5 (e). For traditional mandamus cases, some exceptions have been created by case law. See, e.g., *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners of the City of Oakland* (2001) 91 Cal.App.4th 1344, 1365, fn. 12 [allowing extra-record evidence indicative of possible lead agency misconduct]. It is rare for these exceptions to apply since public agencies usually include all evidence submitted by interested parties in the record. It is important to note that "extra-record evidence can *never* be admitted merely to contradict the evidence the administrative agency relied on in making a quasi-legislative decision or to raise a question regarding the wisdom of that decision." *Western States Petroleum Assn. v. South Coast Air Quality Management Dist.* (2006) 136 Cal.App.4th 1012, 1025, *emphasis in the original*. Additionally, public agencies ordinarily do not apply formal rules of evidence (i.e., no formal discovery including depositions, requests for production of documents, interrogatories or subpoenas) during administrative proceedings.

Augmentation

Parties may stipulate to augment the record after certification of the record if the parties believe that relevant materials may inadvertently be missing from the record. Petitioners may also bring a motion to augment the record if they contend that the agency improperly excluded documents from the record. *Consolidated Irrigation Dist. v. City of Selma* (2012) 204 Cal.App.4th 187.

What Should be Included in the Administrative Record?

Contents of what should be included and the organization of the AR are governed by Public Resources Code Section 21167.6(e) and California Rules of Court, rules 3.2200–3.2208. The AR must contain all records of proceedings, which includes all materials that came before the decision-making body whose action or decision is challenged. The AR must include, but is not limited to the following:

- Project application materials
- Staff reports and related documents
- Transcripts, minutes, or audio or video recordings, of meetings or proceedings (before the advisory bodies and the decision-making agency)
- Notices issued by the agency
- Written comments on the CEQA documents and other comments to or from the agency
- Proposed decisions or findings submitted to the decision-making body of the lead agency
- Documentation of the agency's final decision (resolutions or ordinances adopted by agency approving the project)
- CEQA findings and supporting materials
- CEQA documents (Initial Study ["IS"], Negative Declaration ["ND"], Mitigated Negative Declaration ["MND"], Draft Environmental Impact Report ["DEIR"], Final Environmental Impact Report ["FEIR"], etc.)
- Technical reports or studies used for CEQA analysis or incorporated by reference
- Internal agency communications not subject to evidentiary privileges (e.g., the attorney-client privilege) and draft documents that have been released for public review
- The full written record before any inferior administrative decision-making body whose decision was appealed prior to the filing of litigation

When preparing the record, it is important to include documents related to earlier versions of the project, including those challenged in any previous litigation. However, agencies should resist the urge to be overly inclusive, as courts generally look unfavorably at voluminous records that include tangentially related materials that provide little to no support to the CEQA decision and simply add to the cost of preparing the record. It is important to note that while the above lists required materials, there are nuances within the listed categories that must be taken into account when preparing the record.

Organization of Record

California Rules of Court, rule 3.2205 governs the organization of the CEQA record in litigation. The record must place the documents in a specific order unless the court orders otherwise. It is also important to check with the local rules of the reviewing court for specific deadlines or rules regarding the record and the index. For example, a presiding judge may prefer the record in either electronic or paper format; some local rules set deadlines for a preliminary cost estimate if the agency prepares the record, preparation of a draft record index, and comments on the index.

Regardless of the type of format, the record should be separated out either by tabs or electronic bookmarks identifying each part of the record. Additionally, oversized documents should be presented to allow for easy viewing. In electronic records, PDF's must be provided in a full-text searchable format.

The AR must contain a detailed index placed at the beginning of the record which lists the title, date, brief description, volume, and page of each document in the order presented. The index must also list out any exhibits, attachments, or appendices contained within a document. Certain documents may appear more than once in the index; however, these documents should be cross-referenced instead of providing duplicates in the paper or electronic copy to prevent the record from being overly cumbersome. Electronic records such as GIS files, videos or audio recordings must also be listed in the index. A copy of the index must be filed with the court at the time the AR is lodged with the court.

Electronic Records

Electronic records may include audio or video recordings of hearings which must be included even if there is a written transcript available for the hearing. *San Francisco Tomorrow v. City and County of San Francisco* (2014) 228 Cal.App.4th 1239. Electronic records (such as PowerPoint presentations, excel spreadsheets and the like) must be in PDF or other format for which software for viewing the document is in the public domain. The electronic records should be provided on a CD, DVD, or USB thumb drive so that the files cannot be altered.

Emails have become one of the most common forms of communication; thus emails received by the agency, as well as internal email communication relating to the project or its CEQA review, should be included in the record. Agencies should be aware that communications from their personal device or account may be subject to disclosure pursuant to the California Public Records Act. *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608.

All documents, including emails should be reviewed very carefully to ensure that privileged or confidential information is not inadvertently included in the record. It is important to keep a list of custodians and search terms related to the project prior to sorting through emails to expedite and reduce costs when searching for relevant and non-privilege materials to be included in the record. As discussed below, privileged communications include attorney-client privileged communications, documents protected by the attorney work product doctrine, documents subject to deliberative process privilege, or documents subject to the common interest doctrine.

Excluded Documents

Documents that are properly *excluded* from the record include the following:

- Records that were not required for public release by the Public Records Act
- Administrative draft documents that have not been released for public review
- Documents cited in written comments but not attached to the comment letter (unless the comments refer to specific websites from which the referenced document can be downloaded)
- Consultant or subconsultant documents not in the actual or constructive possession of the lead agency[3]
- Information that contains trade secrets as defined in Government Code Section 6254.7[4]
- Information regarding cultural resources (including tribal cultural resources)[5]
- Post-decisional documents
- Privileged documents

When in doubt, it is better to err on the side of including the document in the record unless there is a specific provision or privilege to withhold the document. *County of Orange v. Superior Court* (2003) 113 Cal.App.4th 1.

Attorney Work Product and Attorney-Client Privilege

Attorney work product protected materials include any writing that reflects the attorney's impressions, conclusions, opinions, legal research or theories and should not be included in the record. The attorney-client privilege protects disclosure of "confidential communications between client and lawyer." Such documents should be marked "attorney-client privilege" and filed separately. While communications between attorney and client are presumptively privileged, simply labeling a document attorney-client privileged or copying an email to an attorney does not necessarily prevent disclosure of the document. The privilege attaches where the purpose of communication is to seek legal advice. Both the attorney-client privilege and attorney work product protection may be lost if an agency discloses the confidential communication to a third party, such as the applicant.

[3] An Agency has constructive possession of records if it "has the right to control the records, either directly or through another person." *Consolidated Irrigation District v. The Superior Court of Fresno County* (2012) 205 Cal.App.4th 697 (Cal. Ct. App. 2012). Provisions in the consultant contracts will provide whether the lead agency has the right to control or possess the consultant documents.

[4] Pub. Resources Code, § 21160; CEQA Guidelines, § 15120(d).

[5] Gov. Code, §§ 6254(r), 6254.10; Pub. Resources Code, § 21082.3(c); CEQA Guidelines, § 15120(d).

Common Interest Doctrine

The common interest doctrine is not an independent privilege but rather a nonwaiver of the attorney-client privilege. The common interest doctrine may protect communications with third parties from disclosure where the parties have a mutual shared interest in maintaining the confidentiality of the communication for which a lawyer is consulted. *Oxy Resources California LLC v. Superior Court* (2004) 115 Cal.App.4th 874, 891. However, in 2013, the court in *Citizens for Ceres v. Superior Court* held that prior to a decision on the project, the interest of the lead agency and applicant are fundamentally divergent. *Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889, 898. Prior to project approval, the agency must carry out an environmental review process maintaining an unbiased interest, whereas the applicant's primary interest in the environmental review process is having the agency produce a favorable environmental document that will pass legal muster. *Id.* at 918. Under this more stringent view of the common interest doctrine, communications between legal counsel of the applicant and agency prior to project approval are part of the record, notwithstanding the existence of a confidentiality agreement between the applicant and agency.

Deliberative Process Privilege

The deliberative process privilege is a qualified privilege that protects the mental processes by which a given decision was reached. A local agency may withhold a record if it can demonstrate that the public interest in confidentiality clearly outweighs the public interest in disclosure of the record. *Times Mirror Company v. Superior Court* (1991) 53 Cal.3d 1325,1338. The key issue in determining whether deliberative process privilege applies is "whether the disclosure of materials would expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Id.* at 1342. The lead agency has the burden of explaining the agency's specific interest in withholding the document in order to invoke the privilege and thereby prevent disclosure and inclusion of the document in the AR. *Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296.

When Should the Administrative Record Be Prepared?

Preparing the record concurrently with CEQA documents would help a lead agency keep records organized during administrative proceedings and help keep costs of preparing the record down. If the lead agency prepares the record simultaneously with preparation of environmental documents, the lead agency must also concurrently document costs of this effort so that it may be reimbursed by the petitioner. Additionally, preparing the record concurrently with environmental documents would make it easier to respond to a Public Records Act request.

If the record is prepared after a project has been completed, the agency will have to go back through its files on a project to make sure all relevant materials are properly included in the record. This may be costly and a less efficient process if the agency is short staffed or if materials relied on by the decision-maker are not all centrally located. However, an agency that

waits to prepare a record after the completion of the project would not accumulate costs should the petitioner elect to prepare the record.

Applicant Request of Concurrent Preparation

A project applicant may request in writing that the lead agency prepare the record concurrently with the preparation of an environmental document. Pub. Resources Code, § 21167.6.2. This request must be filed within 30 days after the lead agency determines which type of CEQA document to prepare for a project. Pub. Resources Code, § 21167.6.2. The written request of the applicant shall also include an agreement to "pay all of the lead agency's costs of preparing and certifying the record." Pub. Resources Code, § 21167.6.2(f). Upon receipt of this request, the lead agency can grant or deny the request within ten (10) days of receipt of the request. Pub. Resources Code, § 21167.6.2(e)(1). Failure of the lead agency to respond to the request within ten (10) days shall be deemed to be denial of the request. Pub. Resources Code, § 21167.6.2(e)(3).

When a record is prepared concurrently pursuant to Public Resources Code Section 21167.6.2, documents included in the record must be available, posted on, and be downloadable from, an Internet Web site maintained by the lead agency commencing with the date of the release of the draft environmental document for the project. Pub. Resources Code, § 21167.6.2(a)(1)(B). Additionally, a specific required notice must accompany any environmental document stating that the AR will be prepared concurrently with the administrative process, that documents will be posted on the lead agency's internet web site, and that written comments on the project are to be submitted in a readily accessible electronic format. Pub. Resources Code, § 21167.6.2(d). These additional requirements assist in expediting the preparation of the record; however, a lead agency must be aware of the strict timelines and ensure documents can be posted on the Internet Web site prior to agreeing to concurrent preparation of the record.

Record Keeping Protocol

Given the possibility that petitioners may elect to prepare the record, the timing of when the AR should be prepared is not as critical as good record keeping by the lead agency. The lead agency should consult with agency counsel for record-keeping protocol and guidelines. Good record keeping practices include, but are not limited to, diligently separating final documents from administrative drafts, keeping confidential materials separate from non-confidential materials, and capturing screenshots of websites of materials relied upon or of documents made available to the public. Drafts of materials no longer necessary in the ordinary course of business may be disposed of if the agency's record retention policy allows for such, and there is no litigation hold in place. These good record-keeping practices should be applied to both hard copy materials and electronic materials.

When litigation is reasonably anticipated, the lead agency has a duty to preserve evidence which includes electronically stored information. During the process of preparing CEQA documentation, litigation may be unclear; however, litigation would be "reasonably anticipated" if there are threats of litigation made in a public comment letter or at a public meeting or hearing,

or if a party files a Government Claims Act claim. In such instances, the agency must comply with the California Discovery Act and preserve records regardless of standard business protocols or routine records management programs to ensure that relevant materials do not get deleted. A court may impose monetary or evidentiary sanctions against a party if records are deleted and the court later determines that those records should have been preserved. Code of Civ. Proc., § 2023.030.

Are There Differences in How the Administrative Record is Prepared for an IS/ND or an EIR?

Public Resources Code Sections 21168 and 21168.5 (one or the other) apply to legal challenges to any CEQA determination including an IS, ND, MND, and EIR. Thus, the AR for an IS, ND, or MND challenge would be prepared similarly to that of an EIR with the exception of minor differences in the organization and volume of the record given fewer documents prepared for the project.

Is There an Administrative Record under NEPA?

Legal challenges under the federal National Environmental Policy Act ("NEPA", 42 U.S.C.A. §§ 4321, 4331 to 4335, 4341 to 4346, 4346a, 4346b, 4347) are brought under the Administrative Procedures Act ("APA"). In a NEPA challenge, the AR is compiled by the federal agency. Similar to an AR under CEQA, the AR under NEPA includes all relevant studies, data, and documents used by the federal agency to prepare the NEPA document, as well as those documents considered by the decision maker.

Preparing the Administrative Record in a Joint CEQA/NEPA Document

When a project requires approvals from a California public agency but will also be carried out, financed or approved in part by a federal agency, the preparation of a joint EIR/EIS or ND/FONSI may be required. CEQA Guidelines, §§ 15220-15228. Typically, the joint document must meet requirements of both CEQA and NEPA; thus preparation of the record for a joint document must meet these requirements as well. Additionally, many federal agencies have their own regulations as well as guidance for preparing the AR, so it is important to identify whether a federal agency has specific guidelines that must be adhered to. Generally, for a joint document, the CEQA portion of the record is prepared followed by the NEPA required materials.

Important Cases

The following published cases involve issues related to the Administrative Record:

- *Black Historical Society v. City of San Diego* (2005) 134 Cal.App.4th 670
- *California Oak Found. v. County of Tehama* (2009) 174 Cal.App.4th 1217
- *Citizens for Ceres v. City of Ceres* (2016) 3 Cal.App.5th 237
- *Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296
- *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608
- *Coalition for Adequate Review v. City & County of San Francisco* (2014) 220 Cal. App.4th 1043
- *Consolidated Irrigation Dist. v. City of Selma* (2012) 204 Cal.App.4th 187
- *County of Orange v. Superior Court* (2003) 113 Cal.App.4th 1
- *Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357
- *Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807
- *Landwatch San Luis Obispo County v. Cambria Community Services District* (2018) 25 Cal.App.5th 638.
- *Otay Ranch, L.P. v. County of San Diego* (2014) 230 Cal. App.4th 60
- *Oxy Resources California LLC v. Superior Court* (2004) 115 Cal.App.4th 874
- *Porterville Citizens for Responsible Hillside Dev. v. City of Porterville* (2007) 157 Cal.App.4th 885
- *Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362
- *San Francisco Tomorrow v. City and County of San Francisco* (2014) 228 Cal.App.4th 1239
- *St. Vincent's School for Boys, Catholic Charities CYO v. City of San Rafael* (2008) 161 Cal.App.4th 989
- W*estern States Petroleum Assn. v. South Coast Air Quality Management Dist.* (2006) 136 Cal.App.4th 1012, 1025

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