

## ADMINISTRATIVE RECORD PROCESS

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### INSTRUCTIONS FOR THE PRESERVATION AND COLLECTION OF DOCUMENTS FOR PROJECTS SUBJECT TO CEQA/NEPA

The administrative record (AR) for a project subject to environmental review under the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA) is a collection of documents that a court will examine if the agency's decision is challenged in a lawsuit. The AR consists of all documents and materials directly or indirectly considered by agency decision-makers in adopting or certifying an environmental document<sup>1</sup> and in considering the project for approval. Additionally, the AR includes documents and materials relevant to the process of reaching the agency's decision.

When the California State Lands Commission (CSLC) prepares an environmental document (or jointly prepares an environmental document with a federal agency), it should concurrently develop the AR relating to the environmental document and project in the event there is a legal challenge to the final environmental document. To ensure a complete and accurate AR in case of litigation, it is necessary to obtain relevant documents and other materials from agency staff and consultants. These instructions are intended to provide staff and consultants with instructions for identifying, preserving, and collecting those documents in their possession that may be considered part of the AR.

Meeting notes, telephone records, and emails may be included in the AR (see guidance below), and should be written in a professional manner. Do not carelessly write anything you would not want to see on the front page of a newspaper. Materials labeled "personal", "confidential", or "private", when used in the transaction of public business, *may be public records* subject to inclusion in the AR and to public disclosure under the provisions of pertinent laws such as the California Public Records Act or the federal Freedom of Information Act regardless of any labeling.

It should be noted that under CEQA Guidelines section 15087, subdivision (c)(5), the notice of availability of a draft EIR must specify the "address where copies of the EIR and all documents referenced in the EIR will be available for public review." There is a similar provision for MNDs/NDs. Thus, consultants will be requested to transmit the documents that are specifically referenced in the draft environmental document to the CSLC prior to the document being publically released. Other documents, such as those not specifically referenced in the environmental document, but relied upon, should be transmitted to the CSLC prior to the final hearing on the project to allow decision-makers the opportunity to review and consider the documents. All of these documents are part of the AR.

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<sup>1</sup> For example, Environmental Impact Report (EIR), Mitigated Negative Declaration (MND) or Negative Declaration (ND) under CEQA and Environmental Impact Statement (EIS), Environmental Assessment (EA), or Finding of No Significant Impact (FONSI) under NEPA.

## **I. GENERAL**

### **A. Overview and Background**

CEQA and NEPA require development and maintenance of a “record of proceedings” (CEQA: Pub. Resources Code § 21167.6) or an “administrative record” (NEPA) related to the preparation of an environmental document (e.g., EIR, MND, or ND under CEQA; EIS, EA, or FONSI under NEPA). This “Instructions” document refers to the record of proceedings/administrative record collectively as the administrative record (AR) and provides instructions to CSLC staff and consultant team members (including subcontractors) regarding preservation and collection of documents for inclusion in the AR.

The types of documents and materials that generally should be included in the AR are those that were:

- available to the decision-maker(s) at the time the decision was made;
- considered by or relied upon by the agency;
- available to the agency at the time the decision was made, even if they were not specifically considered by the final agency decision-maker(s), including, but not necessarily limited to:
  - documents referenced in the environmental document or findings for the project,
  - documents incorporated by reference in the environmental document,
  - other documents relied upon by the consultants that may not be listed in the environmental document, including, for example, portions of books or manuals, periodicals, websites, notes from telephone conversations revealing data and information relevant to substantive topics in the environmental document,
  - emails relevant to substantive topics,
  - model outputs that are relied upon in the environmental document but not contained in the document itself, and
  - data, and other documents relied upon by the consultant in preparing the environmental document; and
- Other non-privileged substantive documents and materials relevant to the project or the environmental document.

### **B. General Principle – Materials Must Relate to the Project or CEQA or NEPA Compliance**

A CEQA or NEPA AR reflects the process for considering action on a project and for a project's CEQA or NEPA compliance. A complete and accurate AR is essential for the agency to demonstrate to a reviewing court that it has substantial evidence to support its conclusions and findings. A document, whether paper or electronic, can form a part of the CEQA or NEPA AR if it is kept in the ordinary course of business and it relates to (1) the project, or (2) the substance of the environmental review process. The CEQA or

NEPA AR does not usually include purely administrative matters, such as setting up meetings or a consultant's contract with CSLC, including billing on such contracts. Documents that discuss "development" of how to handle a specific issue or what background information would be needed to develop an issue should be included.

Thus, a document related to this project that you would normally keep in the ordinary course of business should be provided for the AR. Documents that you have not kept are not considered to be kept in the ordinary course of business. Accordingly, you are not asked to retrieve electronic documents that you did not consider important enough to retain, even if they might be retained on some agency back-up tape or could conceivably be retrieved electronically. The AR should include the electronic items you thought were important enough to retain, in the same manner that the AR should include only those paper items you thought were important enough to retain. Decisions about whether to keep documents that are not part of the AR should be handled in the same way you make decisions about other similar types of documents.

### **C. Applicable Time Period**

A document generally may only be included in the AR if it was prepared or relied upon before the Notice of Determination (NOD) or Record of Decision (ROD) is filed. Transcripts of hearings related to action on the project or associated environmental documents prepared after the NOD is filed are considered part of the AR.

## **II. MATERIALS NEEDED FOR THE ADMINISTRATIVE RECORD**

The first part of Section II provides instructions for identifying and preserving non-email documents. The second part of Section II includes instructions concerning email. The third part of Section II provides instructions regarding confidential communications, including communications regarding settlement negotiations.

### **A. Non-Email Materials Needed for the Administrative Record**

To ensure a complete and accurate record, please retain and provide when requested the following types of materials that may be in your possession. The categories listed below include hard copy files and electronic files.

#### **Document Categories**

1. **Written communications**: Written communications/letters received or sent related to the project, or the environmental document (i.e., letters to/from other agencies or stakeholders related to the project or environmental document).
2. **Staff Notes**: Notes made regarding the project or the environmental document including meeting notes, telephone call notes, etc.
3. **Memoranda**: Internal staff memoranda to file or to agency staff or consultants related to the project or environmental document.

4. **Document Materials:** Any materials (data, graphics, photographs, reports, analysis, etc.) prepared or relied upon in the drafting of any environmental document for the project, or used in drafting or revising sections of the environmental document and that were either made available to the public for review or kept in your files—even if not included in the environmental document reference list. These would include, but not be limited to, reference reports cited in an environmental document and those not cited to in an environmental document but relied upon in the development of that document, field surveys, written staff analysis on an aspect of a report or project, newspaper clippings, maps, periodicals, scientific research, etc. If information is gathered from the internet, the internet pages relied upon should be printed out because websites often change and information could be lost if not printed until after the NOD/ROD is filed. Additionally, the date they were printed often appears on the printed version and it must be evident that the document was available on the web prior to project approval.
5. **Other:** Other written or electronic materials that may not fall within one of the other categories but are related to the project or the environmental document.

#### **B. Email needed for the Administrative Record**

This includes email kept in the ordinary course of business, not email you would ordinarily delete. Email, like any other paper document or communication, belongs in the record if you keep it in the ordinary course of business. In other words, if you saved email into one or more files for this project and you would normally keep it in the ordinary course of business, you will need to retain it and provide it for the AR.

#### **C. Communications with Agency Legal Staff and Settlement Negotiations:**

The CEQA and NEPA AR will not include confidential attorney-client communications or communications related to settlement negotiations, so email that is exclusively between agency staff and consultants and agency attorneys or are related to settlement negotiations should be retained and provided in a separate file, labeled “Confidential Communications.” It will be reviewed separately by agency staff and agency attorneys to determine whether some of the materials should be included in the AR.

Documents that include words such as “attorney-client communication,” “confidential,” or “subject to legal privileges” should be kept in the file labeled “Confidential Communications.” Usually these words are found in the subject heading or at the beginning of a message, but they could be anywhere, including in an email document that is part of a later chain. Even if the words are not found in the document, it may still be confidential. If you have any question about whether something is confidential, include it in the confidential file. The material in the confidential file will be reviewed later to determine whether the document(s) will be included in the AR. If you have any doubt, include it. It is better to include something you think would be part of the record and let others decide how to handle it later.

### **III. MATERIALS NOT NEEDED FOR THE ADMINISTRATIVE RECORD**

The following materials are not part of the AR:

1. Administrative draft chapters of the environmental document that were not circulated to the public for review and are not kept in the ordinary course of business, including red-line comments of agency staff or consultants. Such documents should be discarded once the public draft or final document is published or earlier if not needed for staff review.
2. Email transmitting administrative draft chapters of the environmental document without other text. The AR does not include internal agency drafts of the environmental document or specific chapters that were never released for public review. Accordingly, do not include email that simply transmits all or portions of the environmental document for internal staff review.
3. Materials or emails related solely to setting up meetings.
4. Consultants do not need to retain or provide the following items needed for the AR maintained by agency staff:
  - a. Copies of the public draft or final environmental document; and
  - b. Official agendas, minutes and handouts distributed at the official public meetings held by the agency/agencies.

### **IV. ORGANIZATION AND COLLECTION OF ADMINISTRATIVE RECORD MATERIALS**

Due to the many people involved in the project and preparation of the environmental document, each individual staff member must make judgments about their own materials. Relevant items may be included in hard copy files or electronic files on a hard drive or shared drive. Each individual must identify materials in their possession that could potentially be part of the AR. Therefore, review your paper and computer files related to the project and sort them, to the best of your ability, into the Document Categories listed above.

#### **A. Paper Records**

It is not expected that most staff will have kept a great amount of paper records related to the project that will be kept in the ordinary course of business. Therefore, after you have collected and sorted the materials in your possession, we ask that you electronically scan paper records in a separate pdf file for each category, with the pdf file containing your name and the category the documents fall under.

For example, Jane Doe has materials that fall into two of the categories. She would scan any written notes in her possession in one pdf file and then label it "Jane Doe Staff Notes." She would then scan any field data and reference reports in one pdf file and

label it “Jane Doe Document Materials.” When asked to provide them, please copy them onto a CD/DVD labeled Jane Doe: [name of project] Administrative Record Documents.

If you have voluminous paper records, please discuss alternatives with the appropriate agency project manager before scanning.

## **B. Electronic Records**

1. For electronic files, please create and save a main folder on your agency’s server (not your computer hard drive) for documents, with subfolders for each category, and place the files in each subfolder accordingly. For example, Jane Doe would create a folder with the title “Jane Doe [project name] Administrative Record Documents” and the subfolders would be labeled “Jane Doe Staff Notes” or “Jane Doe Document Materials.” When asked to provide them, please copy them onto a CD/DVD labeled Jane Doe: [name of project] Administrative Record Documents.
2. For emails, it is not necessary to categorize them. Use care to preserve emails since many email systems are set to auto-delete messages after a set retention period. Make it a habit to preserve emails that may be included in the AR at the time of creation or receipt. Retain emails by one of the following methods:
  - a. Move them to a permanent folder reserved for electronic business records and label the folder with your name, [the project name] Administrative Record Emails. Save them on a CD/DVD when asked to provide them; or
  - b. Print and file them with similar paper documents.

## **C. Depository for Project Administrative Record**

Agency staff will identify a contact person who is responsible for compiling the project AR. It may be someone in the agency or a consultant. Staff and consultants will be notified regarding the procedure for sending materials to the person designated. When asked for materials, please prepare your files and put them onto a CD/DVD [The CD/DVD should be clearly marked with your name and the title [project name Administrative Record]. The CD/DVD should also identify which resource category (e.g., air quality, traffic, biological resources, etc.) to which the materials most pertain.

Please note that you may not have any saved documents that fall in the categories described above. If, after reviewing your files, you determine that you have no documents that may be part of the AR, please inform the contact person of this in an email so he/she can track your response. This is an important step that must be taken in case there is litigation and the agency/agencies have to prove to the court that it has undertaken a thorough effort to obtain all documents that constitute the AR including staff email.

## **ATTACHMENT 1**

### Example Environmental Document Administrative Draft Record Index (see 2012 Cal. Rules of Court, Rules 3.1365 – 3.1368)

#### **A. The Project Decision**

1. Notice of Determination
2. Resolutions or other approval documents adopted by CSLC/BOEMRE approving the project
3. CEQA Findings and Determinations, Statement of Overriding Considerations, and Mitigation Monitoring Program.

#### **B. The Project Final EIR**

1. Notice of Preparation – January 24, 2003
2. Draft EIR – November 2007
  - a. Notice of Completion of Draft EIR
  - b. Draft EIR and Appendices
  - c. Comments on the Draft EIR – this would include the actual letters, emails, etc.
  - d. DFG Filing fees
3. Final EIR – May 2010
  - a. Final EIR and Appendices

#### **C. The Initial Study**

#### **D. Staff Reports Prepared for the Administrative Bodies Providing Subordinate Approvals or Recommendations to the Lead Agency in Chronological Order**

#### **E. Transcripts and Minutes of Hearings, in Chronological Order**

#### **F. The Remainder of the Administrative Record, For Example:**

1. Scoping
  - a. Records of scoping meetings /workshops (includes meeting notices, newspaper ads, materials prepared for meetings – agendas, notes, and transcripts/minutes)
  - b. Public Meetings
  - c. Written Comments on the NOP
  - d. Scoping PowerPoint presentation slides
  - e. Public Mailing list or lists for NOP or Scoping Meetings

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2. Records of public meetings on Draft EIR
  - a. On Draft EIR (includes meeting notices, newspaper ads, materials prepared for meetings – agendas and notes)
  - b. On other public meetings, as applicable
3. Final EIR notices
  - a. 10 day response to public agencies
  - b. Final EIR Distribution letters (to commenters, requested, libraries, agencies)
4. Materials cited in the Draft EIR
5. Chapter References in the Draft EIR
6. Other Materials prepared or used by staff and consultants
  - a. Reference materials relied upon by staff or consultants even if not listed in the references section
  - b. Memos to the file prepared by the staff and consultants on the Project EIR
  - c. Modeling
    - i. EIR Subcommittee on modeling
    - ii. Output not included in DEIR
    - iii. Other?
  - d. Correspondence related to the Project EIR
    - i. Hard copy correspondence in agency staff files
    - ii. Hard copy correspondence in consultant staff files
    - iii. Email correspondence in agency staff files
    - iv. Email correspondence in consultant staff files
  - e. Notes kept by staff
    - i. Agency staff notes
    - ii. Consultant staff notes
7. EIR Committee Materials
  - a. Notices of Meetings
  - b. Minutes
  - c. Handouts at meetings
  - d. Other