



## Committee on Judicial Review

Minutes

March 19, 2013

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### Committee Members Attending

Ron Levin (Chair)

Betty Jo Christian (via telephone)

Paul D. Kamenar (via telephone)

Peter Keisler (via telephone)

Jeffrey Minear

Judge Gregory Mize (via telephone, as an alternate for Mary McQueen)

Judge S. Jay Plager (via telephone)

David Shonka

Jonathan Siegel (via telephone)

Helgi Walker (via telephone)

Allison Zieve

### ACUS Staff Attending

Paul Verkuil, Chairman

Gretchen Jacobs, Research Director

Stephanie Tatham, Staff Counsel

Jeff Lubbers, Special Counsel (via telephone)

Mandy Abbott, Intern

### Other Attendees

Leland "Lee" Beck, Consultant, ACUS Administrative Record Project

Professor Zheng Chunyan, Yale University

Danny Fischler, Department of Homeland Security

Brendan Klaproth, Center for Regulatory Effectiveness

John Passmore, US Coast Guard

Jud Subar, Department of Justice (via telephone)

Carrie Wehling, Environmental Protection Agency

Jim Wickliffe, Centers for Medicare & Medicaid Services

The meeting began shortly after 2:00 pm at the Administrative Conference. Chairman Verkuil opened the meeting. Ms. Jacobs briefly introduced the project and thanked the project team members, as well as the agencies for their assistance in responding to the survey. Mr. Levin made opening remarks and asked attendees to introduce themselves. He welcomed Mr. Siegel to the Judicial Review Committee and recognized Judge Gregory Mize as an alternate for Mary McQueen from the National Center for State Courts. Following approval of the October 17, 2012 minutes, he called on Mr. Beck to give an overview of the report.

Mr. Beck thanked the committee and ACUS staff for developing the project. He noted that the survey is the heart of the project. Ms. Tatham explained the mechanics of the survey, which was distributed in November 2012, and expressed appreciation for all of the agencies who participated. She noted that the recommendations are rooted in the best practices identified via the survey. Mr. Beck added his thanks to the agencies, and particularly to staff, including Carrie Wehling, at EPA and at the Federal Docket Management System (FDMS). He explained that the



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survey was designed to find out how Congress defines “administrative record” for the purpose of judicial review, and what can and cannot be considered as part of that record. He noted that, although some agencies have more formal internal guidelines, the survey results constitute what the agencies have informally reported as their practices. He distinguished between agency practice and policy.

Mr. Beck then went over several key points from the survey. He observed that there is no agency agreement on what constitutes the administrative record or certified administrative record and that the differences between these concepts could be substantial and definitional. He noted, however, that the judicial definition of the administrative record is simply and broadly all the material that the agency considered, directly or indirectly. Mr. Beck had earlier observed that administrative records before the agency may or may not include privileged materials or materials that were not relied upon, by definition. He noted that there is a problem wherein litigators will ask for all documents related to a rulemaking (under the Freedom of Information Act or FOIA) and will receive a larger file of documents than those certified as the administrative record to the court and wonder why. He explained that courts are inconsistent regarding whether privileged materials are within or without the record. He commented that the weight of judicial authority says that privileged material is not part of the record filed with the court during litigation, but also that FOIA, Section Three of the Administrative Procedure Act, requires broad disclosure. He suggested that the two can be folded together and that FOIA can be used in this sort of litigation for discovery purposes, and that this creates problems for agencies and litigators.

Secondly, Mr. Beck stated that some agencies do compile administrative records as they go, but many do not. He found that record-keeping tends to be risk-driven, such that agencies with less contentious regulations or less of a history of being sued are less likely to keep ongoing records. Next he observed that what agencies present to decisionmakers varies a great deal, but none present the entirety of materials they have available. Finally, he explained that some agencies, like the Environmental Protection Agency (EPA) and the National Oceanic and Atmospheric Administration (NOAA), do have policies regarding administrative recordkeeping. Mr. Beck noted that this is one of the key findings of the survey, since those policies can serve as a model for other agencies. He welcomed additional feedback from the committee or agencies on the recommendations and report.

Mr. Levin noted that the committee’s goals in this project are to encourage dialogue, identify best practices, and draw agencies’ attention to those best practices. Ms. Tatham presented an overview of the draft recommendations and the extent to which they were supported by agency practice, noting that the heart of the recommendation is defining the administrative record and that this effort was informed by earlier Conference Recommendations 74-4 and 93-4. Mr. Levin then opened the floor for discussion of the recommendations, proposing that the



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committee start with global comments and then move sequentially through the recommendations one-by-one.

The committee proceeded to discuss the draft recommendations. Mr. Siegel thanked Mr. Beck for his work, and praised the report. He recommended that the recommendation, particularly in the preamble, identify the problem it was designed to address. He also suggested including clearer definitions. Mr. Levin agreed that a definitions and terms section should be added and pointed out that Mr. Beck's presentation made a good argument for the need to include definitions.

Judge Plager congratulated Mr. Beck on his work. He raised a structural problem with the draft recommendation because the preamble began with a focus on judicial review, while the bulk of the recommendations and discussion focus more on the administrative record. He observed that the certified administrative record for the judiciary was a relatively small piece of the project. He noted Mr. Tozzi's comments and agreed that the real focus of the administrative record is on the public and the public's ability to understand what the agency is proposing, and on having a broadly based and complete public record. He suggested rewriting the preamble to expand its focus to include the broader question of the role of the administrative record in the agencies activities, but to keep the judicial review as a second step in the process.

Judge Plager also asked whether draft recommendation 2 is inconsistent with 5 U.S.C. § 706, which is referenced in the preamble and which permits designation of the record on review as a part of the administrative record. In addition, he noted that, particularly when there is a narrow issue or only a narrow part of the record is relevant, judges do not want to have to wade through the entire record. Mr. Levin pointed out that at the Court of Appeals level parties frequently stipulate to a joint appendix but can still refer to the larger record if necessary. Ms. Zieve stated that many judges look unfavorably upon references to material that is not in the joint appendix. She also noted that the certified record is usually very large, making it impractical to submit the entire record to the court. Mr. Levin suggested that you could define the certified administrative record broadly, but note that in practice the parties can designate a smaller record.

Chairman Verkuil recommended that in light of Judge Plager's comment, recommendation 2 should explicitly refer to the certified administrative record. Ms. Zieve questioned what purpose defining the certified administrative record would serve beyond assisting courts. Mr. Beck answered that both parties need to receive the entire certified record so that they can have a full picture of the materials in order to choose which ones should go in the joint appendix. Ms. Zieve questioned whether the provision of the certified administrative record has been superseded in reality. Mr. Beck suggested that while perhaps it has been at the appellate level, it is still relevant at the district court level on preenforcement review.



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Mr. Levin inquired whether it would be beneficial to include recommendations that were directed towards courts, in addition to agencies, by way of supervising completeness of the record and entertaining motions from parties regarding what records have been handed over. Judge Plager asked who certifies the so called certified administrative record. He stated that from the viewpoint of the judicial process, certification is done by the parties and that the courts take the joint appendix as a proper set of extracts from the full record and don't look for the stamp of certification. Mr. Levin inquired about materials that one party wanted the other party to include in the certified administrative record, so that they could bring it into the appendix and rely on it in order to make their case. Judge Plager noted that on occasion there are disputes over whether there something should go in the joint appendix. He noted that typically both parties get their way and the joint appendix can get out of hand, and that whether a party has access to something that was before the agency is a whole different issue. The question in those access cases isn't whether the whole certified record is before the court, rather it is a problem of discovery and related issues that can be raised but which the courts know how to deal with.

Judge Plager then moved the discussion to draft recommendation 9(c). He expressed his view that the proper focus is on the agency. Ms. Zieve expressed her view that the committee should delete the phrase information "not relied upon" because agency non-reliance could be important public information. Mr. Levin suggested that all information was in the public record regardless of reliance. Ms. Zieve was concerned that the recommendation could be read to imply that some information could be excluded from the administrative record.

Mr. Shonka suggested that there are a lot of things agencies don't rely on in making any given judgment. It seemed to him that the distinction the committee may want to make was between relevance and irrelevance. If the agency determines something is irrelevant to the record for whatever reason and doesn't rely on it, that's one thing. If the agency determines that something is relevant and still doesn't consider it, that's something entirely different. So the things you may want to include in the record, he suggested, are the things that are relevant and relied upon as opposed to things where there may be some dispute about relevance.

Mr. Shonka noted that there was a difference between recommendation 9(c) and recommendation 2. He noted that recommendation 2 refers to materials protected from disclosure. He took that to mean that there may be a class of materials filed under seal and reviewable in court but perhaps not shared with the parties. He explained that there was another mass of materials that were deliberative internal memoranda that may not contain facts that are relevant to the case but rather contains staff analysis and recommendations that the agency may consider but that aren't public. Rather, he analogized these materials to the memoranda that clerks write for judges and that never become a part of the judicial record for the purposes of judicial review. By the same token, he suggested that these sorts of legal analyses from staff don't really belong in the administrative record. He differentiated between factual materials which agencies may rely upon or did rely on or should rely on versus the purely deliberative



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privileged materials which most courts recognize are not a part of the record. He felt that recommendation 2 addresses two different complaints and that these may need to be broken out.

Mr. Shonka pointed out that it is the agency's burden to defend its rule. He explained that if an agency leaves something out of the record it does so at its own risk. He also submitted that if a party submits things to an agency then those materials are by definition part of the record, and that the agency has no discretion to leave out of the record that which somebody puts in which is inconsistent with what the agency likes or prefers.

Mr. Levin suggested that material information, whether favorable or unfavorable should be included in the administrative record. He raised the scenario previously raised by Betty Jo Christian at an earlier meeting where the junior associate or the summer intern at the agency gathers a number of articles that are discarded by the next level up official. He asked whether you want to say such things are a part of what the agency considered, comparing the process to clicking through to links on an internet search. He suggested that there might be some threshold level of materiality or relevance, but that this was different from whether the agency relied upon information. Mr. Shonka said that the recommendation needs to be clarified. Ms. Zieve stated that the standard can't be what the agency relied on. She pointed out that the definition of the certified administrative record on page six seemed different from the guidance discussed on page eight and expressed the view that the two ought to be consistent. Ms. Zieve expressed the view that everything an agency uses should at least be catalogued so that the public can see what those materials were.

Mr. Levin noted that previous recommendations have used qualifiers in the definition of the administrative record, such as "seriously considered" or "actively considered" or (as in Recommendation 93-4) "substantially relied on or seriously considered", and that the committee might consider whether to include language that imposes some floor here. On the other hand, he suggested that doing so might be unnecessarily provocative. Ms. Zieve expressed concern that agencies might ignore information that they perceive to be unfavorable and then avoid having to disclose that information because they did not rely on it. She stated that she hadn't seen a problem of exclusion in the administrative record and expressed concern that some of the language suggests exclusions. She asked why the committee would want to suggest exclusions. Mr. Levin asked whether the answer would be filling the record with things the agency never really thought about and holding them accountable for such materials. Ms. Zieve inquired about whether this happens in the real world. Mr. Levin suggested that it may but that on the other hand Mr. Beck's report shows that agencies may not be including all that some might think they should because they think some of it is of marginal interest and why bother.

Mr. Minear returned to the point that Mr. Shonka made, which is that the certification of the record is the agency's opportunity to lay out what it considered in the course of defending an agency regulation. If the agency did not put certain materials in they act at their own risk because their actions will be set aside for failure to consider relevant information when that





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information was available to them. He felt that thinking of certification in that sense helps to narrow the inquiry. It is the agency's obligation to lay out the materials which they will rely on. The lawyers will go through the record to identify those parts of it they think are relevant to the controversy or to the issues they have raised. Mr. Verkuil commented that this is an area where the administrative record may differ from the record on appeal.

Ms. Christian commented that there is a tension because on the one hand if something is not included by the agency because they did not, in fact, rely on it you may have an opposing party say you should have relied on it and that the agency had an obligation to consider it even if the agency didn't rely on it. Mr. Shonka asked whether the solution in that situation was for the court to remand the case to the agency for it to consider the information it should have but didn't. He suggested that in such a case the agency is sealing its own fate by admitting that there is highly relevant information submitted by a party that it did not consider. On the other hand, if no party submitted information as part of the rulemaking proceeding and the agency never found it and it is not there, the question is still was the agency's decision based on that which was before it and was put before it by the parties. Ms. Zieve suggested that her concern may be definitional. She noted that the Recommendation 9 discussed materials excluded from the public docket or the administrative record and inquired whether the public docket was the same thing as the administrative record or if it was something different.

Mr. Levin suggested that the term docket as used in the recommendation could be confusing because of the related concept of the court docket. Ms. Jacobs clarified that some agencies may only put public comments and public notices on the public docket (such as Regulations.gov). Ms. Zieve asked if the public docket was a subset of the administrative record and the certified administrative record was a different subset. Mr. Beck clarified that the docket is a subset of the administrative record. Not everything that an agency considered in formulating a proposed rule is put on the docket. At the end of the comment period, for example, the agency may reconsider a number of propositions in the proposed rule. New documents considered after the close of the comment period may not be included in the public docket. An agency may put such materials in the docket later on, but there is not hard and fast rule that they must. Mr. Beck suggested that it was fair to say that there is a good deal more that is not on the public docket and is in the administrative record.

Mr. Levin stated that another way to put it is that the caselaw states that the agencies must identify significant studies on which it proposes to rely so that parties can respond and that implies that less significant studies do not have to be made public during the related proceeding. Mr. Levin suggested that, on the other hand, Mr. Tozzi is proposing that the entire administrative record be put online so that there would be no difference.

Ms. Zieve then suggested that the way to define the terms was to describe the certified administrative record as a subset of the public docket, which is a subset of the administrative



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record. She said that the certified administrative record has to include all things that were available to the public.

Judge Plager stated that this raises the terminology problem again given the public and the court dockets, which are different. He also asked for clarification regarding whether the certified administrative record was a term of art. Ms. Christian described the Surface Transportation Board's (STB's) past practice, which was to send to the court a complete list of everything they regard as being in the agency record. She noted that this list was in their view the complete entire record and that later on the parties get to the designation of materials they are relying on, but only after the major step in the proceeding wherein the STB prepares a list they send to the court and certify as the record. Mr. Lubbers pointed out that Recommendation 9(c) describes exclusions from the public docket or the certified administrative record and suggested that separating discussion of these concepts might be helpful. He also noted the distinction between materials that might not be online, such as confidential business information. Ms. Christian suggested that these issues frequently come up for the STB with respect to attorney client memoranda, interagency memoranda, and sometimes confidential business information. She suggested that the dispute isn't just about what appears online but also goes to whether such materials are in the record at all and the dispute about whether the record is complete generally deals with a petitioner's claim that there are documents that the agency did not include on its list because they fall within one of these categories: privileged or confidential for some reason.

Mr. Lubbers explained that there may be three categories of documents in the docket, the public docket, the paper docket, and non-public docket. Judge Plager did not know whether there was a legal distinction between the paper and public dockets. Mr. Lubbers recommended that draft recommendation 9(c) should be divided. Ms. Zieve suggested that there was no need to divide the docket into two dockets and that agencies can include a listing of information in the online public docket even if that information isn't available online but rather only in a reading room. Mr. Beck explained that those materials are a still part of the public docket.

Ms. Jacobs described her experience as a DOJ litigator where the agency typically certified an administrative record through a short declaration signed by an agency official, which may describe exclusions in a very categorical but not specific sense, that would be delivered to the court.

Mr. Levin asked whether impact analyses were included in the recommendation, Mr. Kamenar suggested that they were, and that draft recommendation 1 included such materials. Mr. Kamenar raised concern that recommendation 1(v) would allow the agency to include only an index of this information, and expressed the view that this would not suffice. He then raised a question regarding 1(vii) and asked whether proffered materials were pertinent and if agencies had the option to include an index of proffered materials under 1(v). Mr. Levin asked whether recommendation 1(vii) permitted the agency to include materials in the record that it did not actually consider.



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Ms. Christian stated that recommendation 1 might create a problem within some agencies regarding whether information was actually considered or not because of turnover. Mr. Levin suggested that logical relevance to the rule is insufficient as a threshold for inclusion.

Mr. Lubbers commented that Recommendation 2011-1 spoke to the distinction between the public and online records and recommended that agencies should follow applicable law, which only touches upon the issue. He stated that it was worth saying as much as the Conference could say about this issue because it is a key question that agencies will be dealing with from now on because of the internet docket. He noted that draft recommendation 1 begins with the concept of the administrative record but does not discuss the docket issue and expressed the view that there are important differences between administrative records and public dockets and public dockets and non-public dockets and so forth that will have to be made clear.

Mr. Lubbers also commented that reports of “any advisory committees” in Recommendation 1(iv) should be qualified to “any relevant advisory committees.” The committee agreed. Ms. Zieve noted that advisory committees frequently issue recommendations and suggested broadening the category of materials considered under Recommendation 1(iv) accordingly. She also noted that the sub points under Recommendation 1 used varying or no qualifiers and suggested that all of the sub points should contain the same qualifier. Ms. Zieve also suggested changing proffered to considered. Ms. Tatham explained that this category of materials might include information supporting a rule, for example predictive information. Mr. Levin explained that these materials, as with similar materials proffered by the party, would not be part of the administrative record. Mr. Beck commented that the inclusion of such materials present a question of supplementation of the certified administrative record.

Mr. Wickliffe with C.M.M.S. stated that his agency could benefit from clarification of what information should or should not be in the record when it comes to pre-decisional material such as drafts that were created during the process of the development of the rule. Mr. Levin raised the more general question of, when there are pre-decisional and other deliberative materials if the agency, whether the agency should explain that there are such materials but that it is not providing them versus instances where the agency is not obligated to mention such materials at all. He felt that a paradigm for the first set of materials would be a trade secret and a paradigm for the latter would be the first five drafts of some document that is pre-decisional, and which nobody expects to be included in the record. He explained that you could disclose such materials but that the usual practice would be to not include such materials. He suggested that agencies should offer guidance to their staff describing what normally would be done in this instance. Mr. Beck explained what agencies have done to clarify this issue in their guidance and that there can be differing treatment of varying types of drafts, such as those taken regularly while working on a document versus those provided to the Office of Management and Budget for purposes of review under E.O. 12,866.





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Mr. Beck then returned to Judge Plager's point and explained that a number of courts have historically required the deposit of full administrative records and that some courts still require the entire record. He asked what is most convenient and effective for the courts, agencies, and parties but also preserves the record as a document. He felt that an appendix of agreed upon materials with a corresponding record somewhere was the appropriate balance at the appellate level but observed that district courts tend to require the entire record. He also noted that there are evolving models of record provision. He noted that CFTC has attempted to offer the record on its website as the certified administrative record, and that district courts have had a mixed response to this approach.

Mr. Levin suggested moving on to record compilation, indexing, preserving, and guidance. He asked how strongly the committee wanted to suggest telling agencies to compile their records contemporaneously. He stated that there are advantages to contemporaneous compilation in terms of bureaucratic regularity but that, on the other hand, some rules might be of such minor scope and salience that an agency might wonder why bother. Ms. Christian suggested that the committee should not recommend things in categorical terms when it is not certain if there are situations where what they recommend does not make practical sense. Mr. Levin noted that the use of the term best practice denotes some level of aspiration. Chairman Verkuil observed that the survey was extensive and that the Conference can't do much better empirical work. Surely, he observed, some agencies probably were left out but he also suggested that the Conference should not be too shy in recommending best practices given the dataset that they have for fear that some agencies are outliers. He suggested that criticism is appropriate where there is not data, but that there is data in this case. He also suggested recirculating the recommendation to all of the Conference's agencies to see if anyone has comments. Ms. Christian supported and the committee agreed to circulate the recommendation to the surveyed agencies, including those who did not respond.

Mr. Wickliffe from C.M.M.S. supported the notion of circulation. He also suggested that recommendations should be explicit to aid individuals within agencies who want to uphold the Conference's notions of good regulatory processes. He stated that establishing good, solid regulatory processes every time may be the only way to ensure availability of a comprehensive regulatory docket of everything that was considered. He also expressed the view that individuals who are trying to drive these initiatives within their agency need the support of unequivocal best practices. He commented that a different mentality might have been acceptable for his agency prior to the Affordable Care Act but that now the agency is in a highly regulatory litigious period. Mr. Verkuil thanked Mr. Wickliffe for sharing this perspective. Mr. Fischler from the Department of Homeland Security stated that his practice would benefit from an explicit recommendation of best practices for the reasons already discussed. He expressed support for narrowing limiting language regarding resources or risk evaluation to more specific examples or more concrete criteria to improve the utility of the recommendation. As an example, he said that many Coast Guard rules face a minimal risk of litigation. Mr. Fischler explained that agencies



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face a variety of considerations in compiling records and stated that the question for the committee is whether there is independent value for agencies in compiling administrative records as they proceed, even if there is not a risk of litigation. Mr. Levin suggested that public accountability was such a value.

Another public commenter raised the question of records preservation and noted that each agency maintains record schedules that explain how long records should be preserved, and that are approved by NARA. Mr. Wickliffe explained that unfortunately all staff involved in assembling the record might not know what that records schedule dictates and how it is applied. Mr. Levin pointed out that a rule might be challenged many years after promulgation on direct review. Mr. Shonka pointed out that the retention period of any record could range from “dispose when finish” to “in perpetuity.” Mr. Shonka explained that most records for major actions are maintained permanently and eventually titled over to the National Archives. Mr. Beck commented that the historic guidance from NARA has focused on adjudication rather than the regulatory process. He commented that he had experienced a case where public rulemaking comments were not preserved and this impeded adoption of a final regulatory action.

Mr. Levin asked whether there was further discussion. Given that there was not, he adjourned the meeting.