

Editor's Note:

On March 18, 2013, EPA issued a final rule, effective April 17, 2013, to revise the National Contingency Plan (NCP), 40 CFR 300.805(c) regarding public availability of the administrative record file. Specifically, this revision added language to the NCP to broaden the technology to include computer telecommunications or other electronic means, that the lead agency is permitted to use to make the administrative record file available to the public regarding documents that form the basis for the selection of a response amendment. The rule is available at www.gpo.gov/fdsys/pkg/FR-2013-03-18/pdf/2013-06189.pdf. Readers should be aware of the amendment when reading this guidance.





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

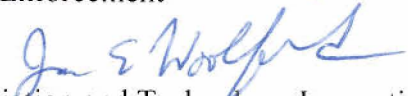
SEP 20 2010

MEMORANDUM

SUBJECT: Revised Guidance on Compiling Administrative Records for CERCLA Response Actions

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This memorandum transmits to you the "Revised Guidance on Compiling Administrative Records for CERCLA Response Actions." This guidance replaces the "Final Guidance on Administrative Records for Selecting CERCLA Response Actions," previously issued on December 3, 1990.

The guidance sets forth the policy and procedures for compiling and maintaining administrative records in connection with response actions conducted under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986, and is consistent with Subpart I of the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. Part 300. Generally, this guidance does not change the policies and procedures first established in the 1990 guidance; rather, the guidance has been streamlined and updated to, for example, acknowledge advancements in the technologies used to manage and convey information, including the administrative record. The Regions, Headquarters, and the Department of Justice participated in developing this guidance.

As noted in the guidance, the administrative record for a response action serves an important purpose: it contains the information that explains why EPA conducted a particular response at a site. The administrative record helps inform the public of the Agency's actions, and also often

serves as a significant source of factual information. It is therefore important that the administrative record—and the underlying documents contained in the record—fully support a cleanup decision and explain, if necessary, how different aspects of a cleanup fit together (for example, what contaminants were found at a site and how each contaminant may or may not have influenced the ultimate cleanup decision). Regional staff responsible for compiling administrative records and developing the underlying documents, including remedial project managers, on-scene coordinators, records management staff, and site attorneys, should work together to ensure that records are complete.

If you have any questions on the attached guidance, please contact Erin Smith at (202) 564-2038 or Steve Wyman at (703) 603-8882.

Attachment

cc: Office of Regional Counsel Branch Chiefs
Community Involvement Managers
On-Scene Coordinators
NARPM Co-Chairs
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Revised Guidance on Compiling Administrative Records for CERCLA Response Actions
U.S. Environmental Protection Agency
Office of Site Remediation Enforcement
Office of Superfund Remediation and Technology Innovation
Office of Emergency Management

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I. INTRODUCTION

This guidance sets forth the recommended procedures for establishing and maintaining administrative records for removal and remedial actions conducted under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 et seq.¹ Section 113(k) of CERCLA requires the Environmental Protection Agency (EPA or the Agency)² to “establish an administrative record upon which the President shall base the selection of a response action.” Basically, through a compilation of documents, the administrative record is designed to tell the story of a response action selection decision (*e.g.*, why EPA decided to conduct a cleanup in a particular manner) and provide documentation showing how the public was involved in selecting the cleanup. In addition, judicial review of a CERCLA cleanup generally will be limited to the administrative record, *see* CERCLA § 113(j), so development of an adequate administrative record documenting the selection of a response action is vital.

Generally, a team of Regional staff (often including a remedial project manager (RPM) or on-scene coordinator (OSC), a site attorney, and records management staff) compiles the administrative record, including identifying documents that should be included, maintains the record, and reviews the record file for legal considerations, such as confidential and privileged information. The team that compiles the administrative record for a site should also include community involvement staff. Regions should develop their own procedures consistent with this guidance for compiling and maintaining administrative records.

Section 120(a)(2) of CERCLA provides that all guidelines, rules, regulations, and criteria for preliminary assessments, site investigations, National Priorities List (NPL) listing, and remedial actions are applicable to federal facilities to the same extent as they are applicable to other facilities. Specific information on compiling the administrative record for federal facility response actions is found in Section IV.B.

Agency personnel involved in compiling an administrative record should consult with the Office of General Counsel when questions arise to ensure that the administrative record is properly compiled. In addition, EPA retains full discretion for choosing the appropriate means for compiling the administrative record in accordance with applicable law. In specific circumstances, it may be appropriate to deviate from this guidance.

¹ This guidance does not address administrative records for enforcement actions, such as the issuance of unilateral administrative orders or administrative settlements. However, this guidance does address whether typical enforcement documents are included in an administrative record, and is also relevant to developing the administrative record for the response actions that are often associated with an enforcement action. This guidance also does not address administrative records for studies, such as preliminary assessment (PA), site investigation (SI), and remedial investigation/feasibility studies (RI/FS), that do not lead to removal or remedial actions under Section 104(a).

² Note that EPA is not always the lead agency for a response action, and therefore may not always be the agency primarily responsible for compiling and maintaining the administrative record. This guidance is intended for use by EPA staff where EPA is the lead agency, but it may also serve as a guide to other agencies acting as lead agency at a site.

A. Purpose and Scope of the Administrative Record for CERCLA Response Actions

For purposes of this guidance, the administrative record is the body of documents and information that “forms the basis” for the selection of a particular response action at a site.³ It generally reflects the information EPA has considered in connection with cleanup decisions at a site and includes the ultimate decisions regarding the response(s). The documents that EPA places in the administrative record should fully explain and support this process, and should therefore include all nondeliberative documents/information that EPA considered or relied upon in selecting the response action, including information that was considered but ultimately not adopted by the Agency.⁴ Because the administrative record consists of documents considered or relied upon in selecting a response action, the administrative record typically is complete once the Agency has selected a response action, and the Region has compiled the information considered or relied upon for the response action selection decision, including any documents that relate to public notice. *See* Section III.E.

To develop an administrative record that adequately supports a response action, Regions should be inclusive in placing information in the administrative record; ensure that the documents that make up the record explain, if necessary, how different information in the record fits together and why EPA rejected alternatives to the selected response; and write the documents in such a way as to be understandable to the public. Regions do not necessarily need to include all documents relating to a site in the record; rather, the administrative record is the subset of site documents that have been considered in selecting a particular response action at the site (*e.g.*, a removal). Thus, the record should include final documents generated by EPA (or another lead agency) and support agency or agencies, as well as technical and site-specific information. Information or comments submitted by the public (including potentially responsible parties (PRPs)) during a public comment period also should be included in the administrative record whether or not they support the selection decision. *See* Section II.A.

The Regions should consider the following principles when developing the administrative record for a response action at a site:

- Where possible, EPA staff (*i.e.*, the RPM or OSC for the site, working with the site attorney and the records coordinator) should compile the administrative record (in the form of an administrative record file) as documents relating to the selected response action are generated or received by EPA;
- The record should include documents that form the basis for the selection of the response action (*e.g.*, the record of decision);
- The record should include documents that provide information explaining the basis for the selection of a response action (*e.g.*, fact sheets);

³ Typically, EPA refers to the administrative record as the “administrative record file” until EPA has selected a particular response action, to avoid creating the impression that the record is complete at any time prior to the final selection decision. *See* 55 Fed.Reg. 8666, 8804-5 (March 6, 1990) (National Oil and Hazardous Substances Pollution Contingency Plan Preamble).

⁴ References in this guidance to documents and/or information that should be included in the administrative record do not include deliberative information except as otherwise provided in Section II.C. EPA staff should work with counsel to determine if materials are deliberative, or if they are otherwise subject to privilege. Information generally beyond the scope of an administrative record is discussed further in Section II.C.

- The record should contain all properly-submitted public comments—along with documents that show the public’s opportunity for participation and comment—related to the selection of a response action and EPA responses to those comments.

CERCLA cleanups are often broken up into distinct response actions, each with its own decision document (*e.g.*, Record of Decision or Action Memorandum). At a given site this may include several removal actions and/or remedial actions, and there may be several operable units as well. For every removal action and every remedial action operable unit, EPA generally compiles a separate administrative record.⁵ Information relevant to more than one response decision, such as a site inspection report or a preliminary assessment report, *may* be placed in the administrative record for an initial response action and incorporated by reference in subsequent administrative records for that site (*e.g.*, by listing the document title and indicating its location in the prior administrative record).

B. Judicial Review of the Administrative Record

CERCLA § 113(j)(1) provides that “judicial review of any issues concerning the adequacy of any response action . . . shall be limited to the administrative record.” In reviewing a challenge to the response action decision, a court should apply the highly deferential “arbitrary and capricious” standard of review set forth in CERCLA § 113(j)(2). Under this standard, a reviewing court is not supposed to act as an independent decision maker (*i.e.*, the court should not substitute its judgment for that of the Agency), but rather act as a reviewing body that ensures that the Agency’s actions were not arbitrary and capricious. Thus, the court should only overturn the response selection decision if a challenger can show on the administrative record that the decision was arbitrary and capricious or otherwise not in accordance with the law. CERCLA § 113(j)(2).

The judicial review provision can provide numerous benefits to EPA. As noted in the legislative history for the Superfund Amendments and Reauthorization Act (SARA), “[l]imiting judicial review of response actions to the administrative record expedites the process of review, avoids the need for time-consuming and burdensome discovery, reduces litigation costs, and ensures that the reviewing court’s attention is focused on the criteria used in selecting the response.” H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. 1, at 81 (1985).

Record review is designed to save time by limiting the scope of trials, thereby preserving the government’s resources. Courts generally should not allow a party challenging a decision to use discovery, hearings, or additional fact finding to look beyond EPA’s administrative record. In particular, courts generally will not permit persons challenging a response action decision to depose, examine, or cross-examine EPA staff, state or other federal agency decision makers, or contractors concerning the selection of the response action—this means that by developing an adequate administrative record, Agency staff such as OSCs and RPMs generally will not need to be deposed or testify in court.

A person may challenge a response action decision long after officials responsible for the response decisions have moved into different positions or have left EPA or other involved

⁵ Removal actions are generally not divided into operable units.

agencies. Thus, an adequate administrative record also can save EPA the time and effort involved in locating employees who may not remember the facts and circumstances underlying decisions made at a much earlier time.

Finally, an adequate administrative record can help defend Agency decisions against PRP reimbursement claims under CERCLA § 106(b)(2)(D). In such actions, the PRP must demonstrate “on the administrative record” that the Agency’s decision in selecting a response action was “arbitrary and capricious or was otherwise not in accordance with law.” Where the administrative record used for these actions is the record EPA certified for the site, and where that record is accurate and complete, there should be no reason for a court to consider documents outside the record.

Typically, a trial court should consider materials outside the administrative record only in limited circumstances. *See* CERCLA § 113(j)(1) (“Otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court”). Generally, a court may consider supplemental materials not included in the administrative record if (1) judicial review is frustrated because the record fails to explain the agency’s actions; (2) the record is incomplete; (3) the agency failed to consider all relevant factors; or (4) there is a strong showing that the agency engaged in improper behavior or acted in bad faith. *See U.S. v. Princeton Gamma-Tech, Inc.*, 817 F.Supp. 488, 493 (D.N.J. 1993).

Therefore, it is particularly important that Agency staff ensure that an administrative record is complete and that the included documents clearly explain why EPA made a particular response action selection decision at a site. The record should not only include data, but documents explaining the rationale supporting a particular decision. When the United States presents an administrative record to a court, it should be accurate and complete.

II. CONTENTS OF THE ADMINISTRATIVE RECORD

EPA generally should include the following in the administrative record for CERCLA remedial and removal actions:

- Public comments and documents that demonstrate the public’s opportunity to participate in and comment on the selection of the response action.⁶
- Documents that form the basis for the selection of the response action (*i.e.*, documents that were considered or relied upon in selecting the response action). 40 C.F.R. § 300.800.

The specific documents that are generated for each administrative record may differ.⁷ For a recommended checklist of documents typically included in an administrative record for removal and remedial actions, please see appendices A and B. Please note, however, that Regions should

⁶ Public involvement requirements for removal and remedial actions may differ, and therefore, the public comment procedures discussed in this section may not always apply. For a discussion of the public notice requirements for removal and remedial actions, please refer to Section III.F.

⁷ The format of documents may include hard copies, emails, computer disks, videos, photographs, microfiche, and/or other formats.

not rely exclusively on the checklists when compiling the records, but rather should consider the recommendations in this guidance when making decisions on a site-specific basis.

A. Documents Reflecting Public Participation in the Selection of a Response Action

One of the consistent themes in CERCLA is public participation in the cleanup process.⁸ CERCLA § 113(k)(2)(A) requires that EPA establish “procedures for the appropriate participation of interested persons in the development of the administrative record . . .” for a removal action. For remedial actions, EPA “shall provide for the participation of interested persons, including potentially responsible parties, in the development of the administrative record. . . .” CERCLA § 113(k)(2)(B). That is, EPA should provide the public with an opportunity to participate in the selection of a response action. In addition, CERCLA § 117 requires EPA to allow for public comment on certain aspects of a proposed remedial action. Participation by interested persons (including affected communities) ensures that EPA (or the lead agency, if not EPA) has considered the concerns of the public, including PRPs, in the selection of a response action.

Regions should make the information considered or relied upon in selecting a response action available to the public, provide an appropriate opportunity for public comment on this information, respond to public comments, and place the comments and information received from the public, along with the Agency responses, in the administrative record. Regions should include in the administrative record all documents related to the public’s opportunity to participate (*e.g.*, notices, fact sheets, public meeting agendas and information, etc.), and relevant written comments and information submitted by the public (*e.g.*, reports and data). Regions generally should not include in the administrative record public requests for information, such as Freedom of Information Act (FOIA) requests.

Note that with respect to all public participation, the Regions should assess whether certain information regarding members of the public should remain confidential. This consideration applies to members of the public submitting comments, personal information relating to residential cleanups, and other situations where personal information about members of the public is collected.⁹

1. Public Comments

Regions generally should include public comments on a response action in the administrative record, and should request that substantive oral comments (either in person or over the phone) be put in writing by the commenter and submitted to the Region. Such comments should be included in the administrative record if related to the Agency’s decision with respect to selection of a response action. Where a commenter only provides an oral comment, the Region should reduce it to writing itself if it relied on the comment in selecting the response action. The Region should consider confirming in writing with the commenter that it correctly interpreted the commenter’s oral comment.

⁸ Note that this section may not apply to emergency and time-critical removal actions.

⁹ Note that privacy issues are complex and beyond the scope of this guidance. Regional staff should work with counsel and their community involvement staff to resolve specific site issues.

a. Comments Received Prior to the Public Comment Period

Regions may receive comments from the public that relate to the selection of a response action prior to an official public comment period on that action. The Agency is not required to respond to comments submitted prior to a public comment period. However, Regions are encouraged to consider and respond to early comments, and should include in the record file significant comments that were submitted before the public comment period if such comments were considered in the selection of the response action. Considering such early comments provides practical benefits both substantively and procedurally. Early comments may provide important information for the remedy selection process and allow the public (including PRPs, affected communities, and others) additional informal opportunities for participation in the decision-making process. *See, e.g.*, 40 C.F.R. §§ 300.815(b), 300.825(a)(2), 300.825(b)(2).

Regions may notify commenters that comments submitted prior to a formal public comment period must be resubmitted or specifically identified during the public comment period in order to receive a formal response. Alternatively, Regions may notify a commenter that it will respond to the comment in a responsiveness summary prepared at a later date. If a Region chooses to respond to comments received prior to a public comment period, its response should be in the form of a written response; it also may be reflected by documented actions taken after receiving the comments, including changes in subsequent versions of documents. If the Region prepares a written response to a comment, both the comment and response should be included in the administrative record.

b. Comments Received During the Public Comment Period

Generally, a Region should include in the administrative record all comments it receives during the formal public comment period in their original form; otherwise a Region should place an explanation in the administrative record explaining why such comments were not included in the format submitted. In addition, Regions should address comments received during the formal public comment period in the responsiveness summary included with the ROD for remedial actions. The responses may be combined by subject or other category in the administrative record.

c. Comments Received After the Public Comment Period

Comments that a Region receives after the formal comment period closes and *before* the decision document is signed should be included in the administrative record but labelled “late comment.” Regions should handle such comments as they would post-decision information (*see* Section II.C.1.c), unless the Region elects to consider late-filed comments, in which case it should treat like-natured comments similarly. In such cases, the late-filed comments identified for consideration should be treated as comments submitted during the comment period and addressed accordingly.

The National Oil and Hazardous Substances Pollution Contingency Plan (NCP) sets forth the circumstances under which EPA may add documents to the administrative record file *after* the

decision document is signed. *See* 40 C.F.R. § 300.825. These circumstances are discussed in Section II.C.1.c. Comments EPA receives after the decision document is signed should be placed in a post-decision document file.

2. Other Documents Relating to Public Participation

In addition to public comments, EPA should include documents in the administrative record that are “received, published, or made available to the public” as part of the public participation process. 40 C.F.R. § 300.810(a)(3); *see also* 40 C.F.R. §§ 300.815 (remedial actions), 300.820 (removal actions). These include documents that show the public was notified of site activities and had an opportunity to participate in and comment on the selection of a response action. For remedial actions and under certain circumstances, for removal actions, these documents typically include:¹⁰

- Community involvement plan;
- Newspaper articles showing general community awareness;
- EPA’s proposed plan;
- Documents sent to persons on the community involvement mailing list and the associated date when each document was sent;
- Public notices concerning response action selection, such as notices of availability of information, notices of meetings and notices of opportunities to comment;
- The community involvement mailing list (including all known PRPs);
- Documentation of informal public meetings, including information and summary memoranda or notes of information generated or received during the meetings;
- Transcripts of formal public meetings, including meetings held during the public comment period;
- As noted above, the complete text of all public comments that are submitted as part of the response action selection process and EPA’s response to comments received from the public concerning the selection of the response action; and
- EPA’s responses to comments from the state and other federal agencies (for privileged comments, *see* Section II.C.2).

B. Documents that Form the Basis for the Selection of a Response Action

The administrative record should include the documents and information that form the basis for a response action decision at a site. EPA and other parties (*e.g.*, states) usually produce certain documents for a CERCLA response action (including the information from the public discussed above) that should generally be part of the administrative record for a site.

¹⁰ Many of the listed documents are not required by the NCP for removal actions. *See* 40 C.F.R. § 300.820. For further discussion of the public participation process as it relates to removal and remedial actions, *see* Section III.F of this guidance document.

1. Decision Documents

Generally, Regions should include the relevant decision documents, as appropriate, in the administrative record. 40 C.F.R. § 300.810(a)(4). These may include:

- Record of decision (ROD) (the remedial action decision document, including responsiveness summary) or the action memorandum for a removal action;
- An explanation of significant differences (ESD) (*see* CERCLA § 117(c)) and information on which it is based, if there is an ESD; and
- Amended ROD and information on which it is based for a remedial action or the amended action memorandum for a removal action, if these are created.

2. Factual Information/Data

Regions should include in the administrative record factual information that forms the basis for the selection of a response action, along with any data or analyses that support or explain the factual information. 40 C.F.R. § 300.810(a)(1). The following is a list of documents containing factual information and data that typically should be included in the administrative record for a response action:

Remedial Actions:

- Preliminary assessment/site inspection (PA/SI) report
- Remedial investigation/feasibility study (RI/FS) workplan (as available), and the final RI/FS
- Proposed plan
- Amendments to the final RI/FS workplan
- Sampling and analysis plan (SAP)
- Sampling data, chain of custody forms, data summary sheets¹¹
- Inspection reports
- Quality Assurance Project Plans (QAPPs)
- Technical studies performed for the site (*e.g.*, groundwater studies)
- Risk evaluation/endangerment assessments and underlying documentation
- Pollution reports (POLREPs), if the remedial action follows a removal action
- Fact sheets or summary information generated regarding remedial action alternatives
- Data submitted by the public, including PRPs

Removal Actions:

- Action memorandum, including amended action memoranda and time and cost exemption memoranda (consistency and/or emergency)
- PA/SI report, including sampling data, chain of custody forms, inspection reports, data summary sheets, and closure memoranda
- Engineering evaluation/cost analysis (EE/CA) for non-time critical removal actions

¹¹ This includes verified data during the RI/FS, or any data collected for previous actions at the site, such as Resource Conservation and Recovery Act (RCRA) actions or removal actions that are considered or relied on in selecting the remedial action. In addition, please note that if sampling data is voluminous, it may be referenced in the index, noting that the information can be made available for review.

- SAP
- Technical studies performed for the site (*e.g.*, groundwater studies)
- Risk evaluation/endangerment assessments and underlying documentation
- Data submitted by the public, including PRPs

3. Policy and Guidance

The administrative record for a CERCLA response action should include all “[g]uidance documents, technical literature, and site- or issue-specific policy memoranda that may form a basis for the selection of the response action.” 40 C.F.R. § 300.810(a)(2). Examples include memoranda on: off-site disposal availability (for remedial actions); special coordination needs (*e.g.*, dioxin); applicable or relevant and appropriate requirements (ARARs) (to the extent not in the RI/FS); cost effectiveness; and, the utilization of permanent solutions and alternative treatment technologies for remedial sites. For further information on the location of policy and guidance documents, please see Section III.B.2.

4. Enforcement Documents

Regions should use the same procedures for establishing an administrative record regardless of whether the response action decision is associated with an enforcement action. Regions should include certain enforcement documents in the administrative record only if they contain information that was considered or relied on in selecting the response action or demonstrate public participation, and such information is not contained elsewhere in the record.¹² For example, enforcement orders where the PRP has been ordered to or has agreed to perform part or all of the RI/FS or removal may be appropriate for the record. *See* 40 C.F.R. § 300.810(a)(5). However, EPA should generally not include enforcement documents solely pertaining to liability. *See* 40 C.F.R. § 300.810(a)(5). If a document (*i.e.*, an enforcement document), or a portion of that document is considered or relied on in selecting a response action and the information is not contained elsewhere in the administrative record, Regions should include the document. Enforcement documents that may contain such information and be appropriate for the administrative record include:

- Administrative orders or consent decrees that are relevant to the selection of the response action (if such information is not contained elsewhere in the file);
- Affidavits;
- Notice letters to PRPs;
- CERCLA § 104(e) information request letters and CERCLA § 122(e) subpoenas; and
- Responses or portions of responses to CERCLA § 104(e) information request letters.

The following information may assist EPA staff in developing an administrative record where there is also enforcement activity at a site:

¹² For more information on cleanup enforcement documents such as consent decrees and orders, please refer to <http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund>.

Negotiation Documents: During negotiations with EPA, a PRP may produce documents with information that it claims constitutes confidential business information (CBI) or offers of settlement subject to Rule 408 of the Federal Rules of Evidence.¹³ Generally, those documents are not part of the administrative record for a response unless they are submitted by PRPs for consideration in selecting a response action and EPA actually considers or relies upon them. *See* also Section II.C.2.

PRP-Lead RI/FS: Where a PRP is conducting the RI/FS, technical documents generated by the PRP should be part of the administrative record if considered by EPA in the response selection decision. Thus, a PRP conducting a PRP-lead RI/FS must submit to EPA (or the lead agency, if not EPA) all technical information relating to the selection of the remedial action generated during the RI/FS. Technical information includes but is not limited to work plans, sampling data, reports, and memoranda. EPA, and not the PRP, must establish and maintain the administrative record (*see Revisions to the Interim Guidance on Potentially Responsible Party Participation in Remedial Investigations and Feasibility Studies* (May 16, 1988), www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-prppart-mem.pdf). EPA may place responsibility for some administrative record maintenance activities on PRPs, such as housing the files at or near the site. To avoid the potential for a conflict of interest, however, PRPs may not be responsible for decisions on which documents comprise the administrative record.

Administrative Orders and Consent Decrees:¹⁴ Generally, only final administrative orders and consent decrees (or information therein) that relate to the selection of a response action but that were issued prior to selection of the response action (*e.g.*, ordering a PRP to conduct the RI/FS), should be included in the administrative record. Administrative orders or consent decrees issued after the signing of the ROD or the action memorandum normally should not be included in the administrative record, unless the consent decree or administrative order meets the criteria for the inclusion of post-decision documents (*see* Section II.C.1.c). Drafts of administrative orders and consent decrees generally should not be included in the administrative record, except in the unlikely event that the document contains information that forms the basis for selection of the response action and the information is not included in any other document in the administrative record. 40 C.F.R. § 300.810(b). In such cases, the information should be included in the administrative record. If the draft document itself is included, it should be in the confidential file (*see* Sections II.C.2, III.H). Regions should work closely with the Department of Justice (DOJ) when including information from enforcement documents in the administrative record.

¹³ A PRP may also produce CBI documents at other times, particularly in response to CERCLA § 104(e) requests.

¹⁴ The issues relating to administrative records for administrative orders, reimbursement petitions, lien challenges, and de minimis settlements are not addressed by this guidance. However, the guidance does apply to developing the administrative record to support the underlying response action that may relate to these actions. Further, as noted in the guidance, certain information in an enforcement document may have been considered or relied upon in selecting a response action, and therefore may be appropriate to include in the administrative record.

5. Other Information

There may be other information not listed above that is appropriate for Regions to include in the administrative record, such as:

Imminent and Substantial Endangerment: The administrative record should include documents explaining a finding under CERCLA § 106 of imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance (*e.g.*, risk assessment and its supporting documentation). For additional discussion, see *A Guide to Preparing Superfund Proposed Plans, Records of Decision, and Other Remedy Selection Decision Documents* (July 1999) (www.epa.gov/superfund/policy/remedy/rods/index.htm). Proper documentation of the determination of an imminent and substantial endangerment in the administrative record can help limit judicial review of that determination in an action under CERCLA § 106.

Resource Conservation and Recovery Act (RCRA) Documents: If an action is taken under CERCLA at a site with a history of RCRA activities, much of the information relating to the RCRA activities (*e.g.*, information relating to waste management or corrective action at a site) may be considered or relied upon in making the CERCLA response action decision, and if so, should be included in the administrative record. Such information may include information on types of wastes, quantity of wastes, observations of potential threats gathered during RCRA investigations, and documents such as permit applications, inspection reports, RCRA Facility Investigation reports, and Corrective Measures Studies.

State Involvement: Documentation of state involvement may be appropriate for the administrative record, including documents identifying state ARARs, CERCLA § 121(f)(1)(G) notices (regarding an opportunity to comment on a proposed plan for a remedial action) and responses, a statement of the state's position on the proposed plan (concurrence, nonconcurrence, or no comment at the time of publication), and the state's opportunity to concur in the selected remedy and be a party to a settlement.

Health Information: Certain information issued by the Agency for Toxic Substances and Disease Registry (ATSDR) may be appropriate for inclusion in the administrative record, including health assessments, health studies, and public health advisories. *See* Section IV.C.

Natural Resource Damages: Information relating to natural resource damages may be appropriate for the administrative record, including Natural Resource Trustee notices and responses, findings of fact, final reports and natural resource damage assessments; information from Indian Tribes; and Historical Resource Trustees. *See* Section IV.D.

Index: Regions should include a copy of the certified index in the administrative record. *See* Section III.D.

C. Documents Generally Not Included in the Administrative Record

Certain documents generally should not be included in the administrative record. Specifically, Regions normally should not include in the administrative record documents that are predecisional and deliberative (which documents will often be privileged in one or more respects). In addition, Regions generally should not include in the administrative record documents that were not considered or relied upon in selecting the response action and do not reflect public involvement in the decision-making process. Regions typically do not need to include these documents in the administrative record, although some may be available to the public if requested under FOIA.

Regions should keep material that is beyond the scope of the administrative record in separate files maintained at the Regional office or other central location. Alternatively, if records for a site are maintained in electronic files, for example, in the Superfund Document Management System (SDMS), Regions should mark these documents (*e.g.*, with a document flag) to indicate that they do not belong in the administrative record, and should be kept in a separate file for the site.

1. Documents that Neither Form the Basis for the Selection of a Response Action Nor Demonstrate Public Participation

a. Deliberative Materials (Including Draft Documents and Internal Memoranda)

Under EPA's regulations, in general, only nondeliberative documents should be included in the administrative record. As a result, draft documents are generally not included. *See* 40 C.F.R. § 300.810(b). Drafts are often revised or superseded by subsequent drafts and final documents prior to the selection of a response action and may reflect the internal, predecisional deliberations within the Agency; thus, drafts are typically not included in administrative records.

Where a draft contains unique factual information that is considered or relied upon in a response action decision, that information should be extracted and placed into a nondeliberative document. In rare cases, such a draft itself may need to be in the record. Regions should consider whether to include such drafts in the administrative record. The site attorneys should be consulted prior to including such draft documents in the record.

Similarly, internal memoranda, staff notes and communications are also typically not part of the administrative record. *See* 40 C.F.R. § 300.810(b). However, in unusual cases, such documents may contain information not available elsewhere in the record that explains the decision. Once again, the preferable course of action is to extract the necessary information and create a nondeliberative document that contains the information. In rare cases where creation of a new document is not possible, the site attorney should be consulted to determine, in light of the information contained in the document, whether to include these documents in the administrative record. If the team determines it necessary to place these documents in the administrative record, they should assess whether they should be placed in the confidential file or generally be treated as publicly-available documents. Finally, each Region should consult caselaw in its

jurisdiction to identify specific judicial interpretations of how Courts define and treat deliberative documents with respect to the administrative record.

b. NPL Rulemaking Docket Information

Generally, information included in the National Priorities List (NPL) rulemaking docket, such as the hazard ranking system (HRS) scoring package and comments received on the listing, need not be included in the administrative record for selection of a response action. The NPL docket contains information relevant to the decision to list a site, which is generally not relevant to the decision on the selection of the response action.

However, documents in the NPL docket that contain sampling data or other factual information that is considered or relied upon in selecting a response action should be included in the administrative record if the information is not found in other documents in the record. Such information may include early sampling data taken by parties other than EPA (*e.g.*, a state).

c. Post-Decision Information

In general, post-decision documents should not be included in the administrative record (except in certain circumstances, discussed below), but rather, should be placed in a post-decision document file or the general site file kept at the Region. Since the administrative record contains the information that was considered or relied upon in selecting the response action, documents generated or received after selecting the response action are generally not relevant to that response decision. Such documents may, however, be relevant to a later response selection decision and if so, should accordingly be included in that administrative record. *See* 40 C.F.R. § 300.825. Regions should establish procedures for compiling post-decision information.

The Regions may generally only add documents kept in the post-decision document file or site file to the administrative record in limited situations. For example, documents may be added where a decision document does not address a portion of the decision or reserves a portion of the decision for a later date (*e.g.*, a decision document that does not resolve the type of treatment technology). 40 C.F.R. § 300.825(a)(1). In such cases, EPA should continue to add documents to the administrative record file that form the basis for the unaddressed or reserved portion of the decision, until such decision is made.

In addition, documents may be added where there is an explanation of significant differences (ESD) pursuant to 40 C.F.R. § 300.435(c) or an amended decision document. 40 C.F.R. § 300.825(a)(2) (note that the Regions may also create a separate administrative record for each response decision). With respect to an ESD, the administrative record should include the explanation of significant differences, the underlying documentation for the response action changes, any significant comments from the public, and EPA's responses to any significant comments. For an amended decision document, EPA should include in the administrative record the amended document, the underlying documentation, any significant comments from the public, and EPA's responses to any significant comments. Note that ROD amendments involve a formal public comment period. 40 C.F.R. § 300.435(c)(2)(ii).

As a third example, the Region may consider and place in the administrative record all comments submitted by interested parties after the close of the public comment period if such comments (1) contain significant information not contained elsewhere in the administrative record and (2) where the information could not have been submitted during the public comment period and such information “substantially supports the need to significantly alter the response action.” 40 C.F.R. § 300.825(c).

Furthermore, the Region may also hold additional public comment periods or extend the time for submission of public comments after a decision document has been signed. 40 C.F.R. § 300.825(b). Any such comments should be limited to the issues on which EPA requested comments. EPA generally places in the administrative record all comments received during additional comment periods that are responsive to its request for additional comments, any responses to submitted comments, and all documents that support the request for additional comments (*e.g.*, public notices and transcripts of public meetings) and the final decision with respect to the issue. 40 C.F.R. § 300.825(b).

2. Privileged and Confidential Information

Like the deliberative information discussed in section 1, documents that are privileged or confidential (*e.g.*, documents subject to the attorney-client or attorney work product privileges, or documents that are exempted from disclosure under the Freedom of Information Act (FOIA), such as documents that contain confidential business information)¹⁵ generally are not included in the administrative record, except where “information which forms the basis for the selection of a response action is included only in a document containing confidential or privileged information and is not otherwise available to the public.” 40 C.F.R. § 300.810(c), (d). In such cases, the confidential or privileged information, to the extent feasible, should be summarized in such a way as to make it disclosable and the summary should be placed in the publicly-available portion of the administrative record. 40 C.F.R. § 300.810(d). Alternatively, Regions may redact confidential portions of a document and place the redacted document in the administrative record, but in such cases, the Regions should include the original, unredacted version in the confidential file (*see* Section III.H for procedures concerning the confidential file). If the privileged or confidential information cannot be summarized or redacted in a disclosable manner, the information should be placed only in the confidential file. Note that all documents in the confidential file must be listed in the index to the file. Regions should develop a process (if not already in place) for conducting a review for privileged or other confidential information, and should ensure that documents are not released to the public prior to such review. Regions should perform these reviews as early as possible and they must include consultation with an EPA attorney. Finally, each Region should consult caselaw in its jurisdiction to identify specific judicial interpretations of how privileged and confidential documents are treated with respect to the administrative record.

Where EPA asserts that information considered or relied upon in the selection of a response action is privileged or confidential, the head of the Agency office responsible for developing the

¹⁵ For more information on specific privileges and information exempted from disclosure, please refer to Agency guidance and the Department of Justice’s 2009 Freedom of Information Act Manual, found at http://www.usdoj.gov/oip/foia_guide09.htm.

document in question normally should assert the privilege or exemption; for certain privileges or exemptions, additional approval may be required. The official asserting the privilege or exemption should consult with the site attorney. Note that public disclosure of a privileged or exempted document may result in waiver of the privilege or exemption, although the nature and extent of the waiver will depend upon the privilege or exemption asserted and the circumstances of the disclosure. If the privilege or exemption is waived and the document becomes a public document, it must be disclosed to any requester. In light of the potential for waiver, it is important that EPA not release potentially privileged or exempted documents to any party without consulting with the site attorney. After consulting with the site attorney, Regions may consider whether it is appropriate under the circumstances to include privileged information in the public portion of the administrative record (*e.g.*, the Region may decide that the significance of the information outweighs concerns regarding a privilege in that instance).

III. PROCEDURES FOR ESTABLISHING AND MAINTAINING THE ADMINISTRATIVE RECORD

A. General

The following is a discussion of the procedures Regions should consider when establishing and maintaining the administrative record. This section includes information on the location of the administrative record, the role of the Records Coordinator, compiling and maintaining the administrative record, how certain documents (*e.g.*, privileged documents) should be maintained, public availability of the administrative record, and coordination with other stakeholders such as states. Regions should use this guidance to develop their own procedures for compiling and maintaining administrative records.

B. Location of the Administrative Record

1. General

CERCLA § 113(k)(1) requires that the administrative record be available to the public “at or near the facility at issue.” 40 C.F.R. § 300.805. In addition, a copy of the administrative record should be located at the Regional office or other central location.¹⁶ 40 C.F.R. § 300.805(a). Both copies of the administrative record should be available for public inspection at reasonable times (*e.g.*, 9 a.m. – 4 p.m., Monday – Friday). In the case of an emergency removal, the administrative record need only be available for public inspection at the central location, unless otherwise requested (*e.g.*, by a member of the public). 40 C.F.R. §§ 300.805(a)(5), 300.805(b).

The administrative record located at or near the site should be placed in one of the information repositories that may already exist for community involvement purposes.¹⁷ These

¹⁶ The lead agency (if not EPA) may also keep duplicates of the record at any other location.

¹⁷ An information repository contains documents that relate to a Superfund site and the Superfund program in general. EPA requires an information repository at all remedial action sites and any site where a removal action is likely to extend beyond 120 days. *See* 40 C.F.R. §§ 300.430(c)(2)(iii), 300.415(n)(3)(iii), 300.415(n)(4)(i). The information repository may contain information beyond the scope of the administrative record, since the documents in the administrative record relate to a particular response action selection decision at a site.

are typically located in a library, town hall, or other publicly-accessible place. If there is no existing information repository, or if the repository does not have sufficient space or adequate equipment for viewing the administrative record, EPA may choose any other publicly-accessible place near the site to house it.¹⁸ When a Superfund site is located at or near an Indian reservation, the centrally-located copy of the administrative record may be located at the tribal headquarters.

Generally, it is recommended that Regions consult with their Community Involvement Coordinators (CICs) for the site on the location of the information repository and administrative record. Specifically, the CIC can make the initial contact with the community to establish the location for the local repository and request housing for the administrative record, and work with EPA to transmit the administrative record to the local repository. As part of the transmission package, the administrative record should include an introductory cover letter addressed to the librarian or repository manager, an index of the included documents, and an administrative record fact sheet to help answer questions from the public. The CIC should review the fact sheet before it is transmitted. In addition, Regions should include a transmittal acknowledgement form or mail the package with a “return receipt” to ensure that the repository received the administrative record. EPA should handle updates to the administrative record in a similar manner.

Regions should maintain a master administrative record at the Regional office (*e.g.*, in SDMS), and also maintain a separate publicly-available copy of the administrative record at the Regional office or other central location. To preserve the integrity of the master administrative record, it should not be accessible to the public. If it is not feasible for the Region to establish a separate public copy, it will need to establish an effective security system for the master administrative record. Disposition of the master copy of the administrative record must follow the schedule set forth by the National Archives and Records Administration (EPA Series 019R).

Regions may maintain and make a convenience copy of the administrative record available to the public in a manner other than hard copy (*e.g.*, on CD-ROM, microform, or a flash or thumb drive) in addition to a hard copy at the location at or near the site, so long as the appropriate viewing equipment is available. The Agency may also make the administrative record available on the internet, though this should not be the sole method by which the public can access the record. Use of these technologies can significantly reduce the space required to store the administrative record, and can simplify the task of reproducing copies. If using internet, CD-ROM, flash/thumb drives, or microform to maintain the public administrative record at the Regional office or other central location, the Region should provide a computer/micrograph reader and printer—or some other means for the public to obtain copies of documents—at the Regional office or other central location to ensure public access to the administrative record.

2. Special Documents

There are certain documents that are part of the administrative record because they were considered or relied upon in selecting a response action, but that do not need to be physically

¹⁸ If the site is located at a facility that requires security clearance, the administrative record for that site must be located where security clearance is not required. The public must have free access to the administrative record.

located at certain locations where the record is housed. As discussed above, Regions should maintain the administrative record in two locations: (1) at the Agency or other central location, and (2) at a location at or near the site. Certain documents do not need to be in one of these locations, or at times, in either location, unless requested (*e.g.*, by a member of the public). These include (but are not limited to) verified sampling data, chain of custody forms, privileged/confidential documents, policy and guidance documents, technical literature, and certain legal sources. These documents, however, should be incorporated in the administrative record by reference (*e.g.*, referenced in the index but not physically in the record), and the index should indicate where the documents are publicly accessible. Note that if requested, EPA should include these documents in the administrative record at or near the site, unless they are more appropriately placed in the confidential part of the record. 40 C.F.R. § 300.805(b). Additionally, Regions should work with the CIC to the extent that they need to determine the public availability of the documents described below.

Unless requested, the following types of documents normally do not have to be located in multiple locations:

Verified Sampling Data:¹⁹ Verified sampling data may not have to be located in either administrative record (*i.e.*, the record at or near the site or at the Regional office or other central location); the sampling data may be left in the original storage location (*e.g.*, Environmental Services Division or contract laboratory). 40 C.F.R. § 300.805(a)(1). Data summary sheets, however, should be physically located in the administrative record. The index should indicate the location and availability of the sampling data.

Chain of Custody Forms: As with verified sampling data, chain of custody forms do not have to be physically located in either the administrative record located at or near the site or the record at the central location, and may remain in their original location; in such cases, the index should reference them and provide their location. 40 C.F.R. § 300.805(a)(1).

Confidential and Privileged Documents: The confidential file should be kept in a locked cabinet at the Regional office or other central location, such as in a confidential file in SDMS; normally it is not kept at or near the site. The index should list any documents in the confidential file. See Section II.C.2 above.

Policy and Guidance Documents: Guidance documents generated for a particular site should be included in the administrative record located at or near the site and at a central location. However, guidance documents not generated for the particular site for which the administrative record is being compiled do not have to be physically placed in the administrative record at or near the site, so long as the guidance documents are available at a central location, the index to the administrative record indicates their location and availability, and there has not been a

¹⁹ For purposes of this guidance, “verified sampling data” are data that have undergone the quality assurance and quality control process. “Invalidated sampling data” have been incorrectly gathered or analyzed and generally will not be part of the administrative record. “Unvalidated sampling data” are data which have not yet undergone the quality assurance and quality control process. Because they are normally superseded by verified data, the unvalidated data are not generally part of the administrative record. However, such data may in some cases be relied on in selecting a response action, such as an emergency removal where there is no time for verification. Unvalidated sampling data which are relied on in selecting a response action should be included in the record.

request to house the documents in the location at or near the site. 40 C.F.R. §§ 300.805(a)(2), (b). Regions could additionally reference guidance documents in bibliographies for administrative record documents. Regions may develop their own methods for providing information on the location and availability of non-site specific guidance documents. For example, Regions may state in the index that guidance documents listed in the index (and in bibliographies) that are not present in the administrative record will be provided upon request to the Regional contact (*e.g.*, RPM or OSC). To provide the Regional contact with appropriate guidance, each Region should consider maintaining a compendium of guidance documents. A compendium might include guidance documents that are frequently used in selecting response actions. The Regions may want to consider making the compendium available online.

If a guidance document is listed in the bibliography to a document included in the administrative record (*e.g.*, listed in the bibliography to the RI/FS), it need not be listed again in the index to the administrative record. In this case, however, the index should state that documents listed as bibliographic sources might not be listed separately in the index.

Technical Literature: Technical literature generated for the site at issue should be physically included in the administrative record for that site, even if it is publicly available. Similarly, technical literature not specifically generated for the site that is not publicly available should also be included in the site-specific administrative record. Such documents may include technical journals and unpublished documents that are not available online, through the Library of Congress, or not circulated to technical libraries.

Publicly-available technical literature not generated specifically for the site, however, need not be located at or near the site or at the Regional office or other central location if the documents are referenced in the index to the administrative record or cited in a document contained therein. *See* 40 C.F.R. § 300.805(a)(3). These documents do not have to be physically included in the administrative record, unless requested, because they are already available to the public, copying such documents creates a significant burden to EPA, and copyright laws may pose additional barriers to such copying. Examples of publicly available technical literature may include engineering manuals, groundwater monitoring or hydrogeology textbooks, ATSDR toxicological profiles, and articles from technical journals.

If technical literature is listed in a bibliography to a document included in the administrative record (*e.g.*, listed in the bibliography to the RI/FS), it need not be listed again in the index to the administrative record. In this case, however, the index should state that documents listed as bibliographic sources might not be listed separately in the index.

Computer models and technical databases need not be physically included in the administrative record but should be referenced in the index and made available upon request. Printouts or other documents produced from the models and databases should be physically included in the administrative record if such documents contain information that was considered or relied on in selecting the response action.

Certain Legal Sources: Copies of statutes and regulations cited in documents included in the administrative record need not be included in the administrative record if they are readily

available to the public. For example, the NCP and other regulations are easily accessible since they are published in the Federal Register and the Code of Federal Regulations, and are also available online. The Region should work with the CIC to determine the availability of any legal sources to the public.

Copies of the actual standards (statutes or regulations) comprising federal and state ARARs should be physically included in the administrative record if they are not easily accessible. Also, other federal and state criteria, advisories, and guidance documents pertinent to the site may not be easily accessible. If such documents are cited in an RI/FS, appendix to the RI/FS, EE/CA, or ROD, they should be included in the administrative record.

C. Managing the Administrative Record: The Administrative Record Coordinator

Each Region should have an Administrative Record Coordinator. The Record Coordinator generally has the duty of ensuring that administrative records are compiled and maintained according to Subpart I of the NCP and this guidance. The Record Coordinator normally will not be responsible for deciding which documents are included in an administrative record—those decisions should be made by the OSC or RPM, with appropriate consultation with the site attorney. However, Record Coordinators work closely with RPMs, OSCs, enforcement staff, records management staff, site attorneys, community involvement staff, and the DOJ (for cases in litigation) in compiling the administrative record. The Record Coordinator's duties ordinarily include:

- Developing procedures for creating administrative records in accordance with the statute and NCP;
- Coordinating with Regional staff to ensure that the public is notified that an administrative record is available for inspection (*see* CERCLA § 113(k)(2)(B), 40 C.F.R. § 300.815(a) (for remedial actions); CERCLA § 113(k)(2)(A), 40 C.F.R. § 300.820(a)(1) (for removal actions));
- Ensuring that administrative records are available at or near the applicable site (*see* CERCLA § 113(k)(1), 40 C.F.R. § 300.805(a));
- Ensuring that the administrative records are available at the Regional office or other central location (*see* 40 C.F.R. § 300.805(a));
- Coordinating efforts with Regional staff to obtain the necessary documents;
- Indexing the administrative records (*see* 40 C.F.R. § 300.810(a)(6));
- Updating the administrative records and indices on a regular basis (*e.g.*, quarterly);²⁰
- Ensuring that the administrative records are available to the public for copying;
- Ensuring that sampling and testing data, quality control and quality assurance documentation, and chain of custody forms are available for public inspection, possibly at a location other than that of the administrative record (*see* 40 C.F.R. § 300.805(a)(1));
- Coordinating with Regional staff on questions of relevance and confidentiality of documents submitted for an administrative record;

²⁰ Note that this depends on other Agency staff providing documents to the Record Coordinator to add to the record file as they are generated.

- Arranging for production and presentation of the administrative record to a court when necessary for judicial review;
- Maintaining the confidential portion of an administrative record, as appropriate, which includes working with other Agency staff to redact confidential information from a document, if necessary (*see* 40 C.F.R. § 300.810(d));
- Potentially maintaining a compendium of CERCLA guidance documents (*see* 40 C.F.R. § 300.805(a)(2));
- Coordinating with states and federal agencies on administrative records compiled by them (*see* 40 C.F.R. § 300.800(b), (c)); and
- Notifying appropriate personnel when an administrative record is being made available for review.

Note that if the manner in which EPA compiled and maintained the record is questioned in litigation, the Record Coordinator may be called upon to prepare an affidavit or testify about those procedures. Therefore, the Record Coordinator should be familiar with the procedures associated with compiling the administrative record and qualified to fulfill the responsibilities outlined in this section.

D. Compiling the Administrative Record: File and Index

Ideally, the site team, including the RPM or OSC, site attorney, and Record Coordinator, should compile the administrative record by placing documents that were considered or relied upon in selecting the response action in the administrative record file as they are generated or received (and determined to be appropriate for the administrative record) and making the documents available to the public. One way to accomplish this is for the RPM or OSC to create an electronic site file in SDMS and designate documents as they are generated in SDMS for inclusion in the administrative record file, and eventually, the administrative record. The site team also should maintain a hard-copy version of the administrative record. Regions may also scan documents into SDMS for the administrative record.²¹

EPA should continuously update the administrative record file until the remedy selection document is complete (at which time the administrative record should be complete. *See* Section III.E). Ultimately, all documents considered or relied upon in selecting the response action generally should be in the administrative record file by the time the decision document (*e.g.*, the record of decision) is signed.²²

The site team should segregate any documents that relate to the site but that generally should not be included in the administrative record (*e.g.*, documents that may be privileged or draft) and the site attorney and other appropriate staff should periodically review them. EPA should

²¹ Note that in certain circumstances fielded data or metadata from SDMS may appear on administrative record documents. Ideally, such data should be removed from the administrative record. However, if it is visible, Regions may want to consider including a disclaimer indicating that such data is not part of the administrative record.

²² The Record Coordinator should place documents relevant to the response selection but generated or received after the decision document is signed in a post-decision document file. These documents may be added to the administrative record under certain circumstances, discussed in Section II.C.1.c.

resolve any questions regarding whether a particular document should be included in the administrative record prior to important events, such as the start of the public comment period.

Regions typically develop an index of the documents included in the administrative record for a site. *See* 40 C.F.R. § 300.810(a)(6). The index may play a key role in enabling both Agency staff and members of the public to locate and retrieve documents included in the administrative record. In addition, the index can serve as a reference to the public for documents located elsewhere, such as those included in the compendium of guidance documents, and serves as an overview of the history of the response action at the site.

The index can be organized either by subject or in chronological order. If documents are customarily grouped together, as with sampling data and chain of custody documents, they may be listed as a group in the index to the administrative record. 40 C.F.R. § 300.810(a)(6).

E. Finalizing the Administrative Record

All documents that are appropriate for the administrative record generally should be in the record by the date the Agency signs the decision document. An administrative record is complete once the Agency has selected a response action, and the Region has compiled all the information considered or relied upon for the response action selection decision.

EPA must certify the completeness of the administrative record when the record is filed in court (*see* Appendix C for a sample certification). When EPA is the lead agency, such certification should be signed by the Regional Administrator's designee, after consultation with the site attorney. Any certification of the administrative record should be made by program staff and not legal staff. The Region also may choose to have the Record Coordinator certify that the record was compiled and maintained in accordance with applicable Agency regulations and guidance. Such certification should attest that the administrative record was compiled in accordance with current Agency procedures and should not address the completeness of the administrative record.

If a state or other federal agency is the lead agency, that agency must certify that the record was compiled and maintained in accordance with applicable regulations and guidance. After the state or federal agency provides this certification, the Regional Administrator's designee should certify as to the completeness of the record.

If, after certification, the Region discovers that documents considered or relied upon in selecting the response action were accidentally omitted, the Region may add such documents to the record after notice to the public (and where appropriate, the court and opposing parties). The index for the record should include such notice.

F. Public Availability of the Administrative Record

1. General

CERCLA § 113(k) specifies that the administrative record “shall be available to the public.” To satisfy this provision, EPA complies with the public participation procedures set forth in CERCLA § 113(k) and § 117. The NCP contains additional provisions with respect to public availability. *See also* “Superfund Community Involvement Handbook” (April 2005), EPA 540-K-05-003.

Although many of the provisions concerning the availability of the administrative record depend upon the nature of the response action (*i.e.*, whether the response is a remedial or removal action), certain provisions are important regardless of the type of response action. In coordination with its community involvement staff, Regions should publish a notice of availability in a major local newspaper of general circulation (in the vicinity of the site at issue) when the administrative record for the site is first made available for public inspection. *See* 40 C.F.R. §§ 300.815(a), 300.820(a)(1), 300.820(b). The notice should include general background about the site, identify the dates of the public comment period, explain the purpose of the administrative record, its location and availability, and how the public may participate in its development. Regions should ensure that public notices are clearly written and placed in well-read sections of the newspaper. Regions should also distribute the notice to persons on the community involvement mailing list. These notices should also be sent to all PRPs for the site, if they are not already included on the community involvement mailing list. As PRPs are issued notice letters, Regions should add their names to the community involvement mailing list and mail them all the notices sent to the other PRPs. Finally, a copy of the notice of availability and list of recipients should be included in the administrative record.

Regions may combine public notice with other notices for the same site, such as a notice of availability of the community involvement information repository, if they occur at the same time. In addition to the required newspaper notice, Regions may inform the public of the availability of the administrative record through existing mechanisms (*e.g.*, the community involvement mailing list). Regions, in coordination with community involvement staff, should consider the specific needs of the particular community when conducting community outreach (*e.g.*, language).

2. Remedial Actions

Regions should make the administrative record for a remedial action available for public inspection when the remedial investigation begins. 40 C.F.R. § 300.815(a). When the RI/FS workplan is approved, Regions should place documents relevant to the selection of the remedy generated up to that point in the administrative record. Documents generally available at that time include the PA/SI, the RI work plan, inspection reports, sampling data, and the community involvement plan. Regions should continue to add documents to the administrative record periodically after they are generated or received during the RI/FS process.

The administrative record should be publicly available both (1) at a Regional office or other central location; and (2) at or near the site. 40 C.F.R. § 300.805(a). Regions should work with public involvement staff to determine where to place the administrative record and send the notice of availability to persons on the community involvement mailing list, including PRPs.

3. Removal Actions

CERCLA § 113(k)(2)(A) requires that EPA establish procedures for the appropriate participation of interested persons in the development of the administrative record for the selection of a removal action. “Appropriate” participation depends on whether the removal is emergency, time critical or non-time critical.

a. Time Critical and Emergency Removal Actions

A time critical removal action is a removal action (including an emergency removal action) for which, based on the site evaluation, EPA determines that a period of less than six months exists before on-site removal activities must begin. 40 C.F.R. § 300.415(n)(2). For all time critical removal actions, EPA must make the administrative record available for public inspection no later than 60 days after the initiation of on-site activity and publish a notice of availability of the administrative record in a major local newspaper of general circulation. 40 C.F.R. §§ 300.415(n)(2)(i), 300.820(a)(1). Where possible, the administrative record should be made available earlier. As with remedial actions, newspaper notices should provide background on the site, include relevant deadlines, explain the purpose of the administrative record, its location and availability, and how the public may participate in its development. Notices should be clear and placed in well-read sections of the newspaper. Where on-site action is expected to extend beyond 120 days from the initiation of removal activities, EPA should by the end of the 120-day period establish an information repository at or near the site (as well as a repository at a central location). 40 C.F.R. § 300.415(n)(3)(iii).

For emergency removal actions, where the release or threat of release requires that on-site removal activities be initiated within hours of the determination that a removal is appropriate and on-site removal activities cease within 30 days of initiation, the administrative record only needs to be available for public inspection at the central location, unless someone requests that a copy be placed at or near the site. 40 C.F.R. § 300.805(a)(5), (b).

For time critical removal actions, EPA should hold a public comment period of not less than 30 days in appropriate situations. 40 C.F.R. §§ 300.415(n)(2)(ii), 300.820(a)(2). In general, a public comment period will be considered appropriate if cleanup activity has not been completed at the time the administrative record is made available to the public and if public comments might have an impact on future action at the site. If EPA considers a public comment period to be appropriate, it should begin at the time the administrative record is made available for public inspection. Note, however, that even if an action is completed before the administrative record is available, the record should be made available to the public. The notice for the public comment period may be combined with the notice of availability of the administrative record if they occur at the same time. The notice should be mailed to everyone on the community involvement

mailing list, and also sent to all PRPs if they are not already on the community involvement mailing list.

EPA should respond to all significant comments received during the public comment period and place the comments and the responses to them in the administrative record. 40 C.F.R. § 300.415(n)(2)(iii). Regardless of whether EPA holds a public comment period, comments that EPA receives prior to the date the decision document is signed and that relate to the selection of the removal action should be placed in the administrative record. Information, including comments, generated or received after the decision document is signed, is discussed further in Section II.C.1.c.

b. Non-Time Critical Removal Actions

A non-time critical removal action is a removal action for which, based on the site evaluation, EPA determines that a planning period of at least six months exists before on-site removal activities must begin. 40 C.F.R. § 300.415(b)(4). Regions should establish the administrative record for a non-time critical removal action no later than when the EE/CA approval memorandum is signed and make the administrative record available for public inspection when the EE/CA is made available for public comment. 40 C.F.R. §§ 400.415(n)(4), 300.820(a)(1). The administrative record should be available at the Regional office or other central location, and at or near the site. Regions should publish a notice of the availability of the administrative record in a major local newspaper of general circulation and include a copy of the notice in the record. 40 C.F.R. § 300.820(a)(1). The newspaper notice should be coordinated with the community involvement staff and distributed to persons on the community involvement mailing list and placed in the administrative record. These notices should also be sent to all PRPs if they are not already on the community involvement mailing list. As PRPs are discovered, Regions should add their names to the community involvement mailing list and mail them all the notices sent to the other PRPs.

G. Maintaining the Administrative Record

Regions should have in place document room procedures to ensure orderly public access to the administrative record, and to ensure the security and integrity of the administrative record to the extent possible. Each Regional office generally should have a reading area where visitors are able to review the administrative record, and the administrative record should be available during reasonable hours. The public reading area should generally include:

- Administrative record;
- Guidance compendium, if applicable;
- Access to appropriate equipment for viewing/printing copies of documents, such as a computer with a CD-ROM drive and printer, photocopier, and/or a microfilm reader/printer (for information on copying, please refer to Section III.I below); and
- Sign-in book to accomplish controlled access and minimize instances of lost or damaged documents. In addition, sign-in books provide documentation of EPA's efforts to provide public access to the administrative record. Pertinent information recorded in the book may include: name, affiliation, date of visit, address, phone number, and site documents viewed.

Note that Regions may choose not to use a sign-in book if it deters the public from reviewing the administrative record and/or if there are privacy concerns.

Because documents in the administrative record should be complete, properly organized and legible, Regions should maintain the integrity of the administrative record. If possible, storage and reading areas should be supervised to maintain proper security, and documents should not leave the document room or be left unattended. To the extent feasible, the Record Coordinator should check the order of the documents after being viewed by the public to ensure that all documents have been returned intact. The documents in the administrative record should be kept secure, either in a locked room or in locked cabinets.

The administrative record located at or near the site should be handled in a similar manner. If possible, the administrative record should be treated as a non-circulating reference; it should not leave the local repository except under supervision. In the event that a copy of the administrative record is contained on a CD-ROM, the Region may want to make multiple copies, so that one copy can be retained by the local repository as a “master” copy and the others available for circulation. When a Region provides the administrative record to the location at or near the site, it should include appropriate EPA phone numbers and/or contact information to the manager of the local repository in the event that problems or issues arise with respect to the record. This information can be included in an informational fact sheet accompanying the administrative record. In addition, the Record Coordinator should plan periodic reviews of the local copy of the administrative record.

Where the site is EPA-lead (whether Fund- or PRP-lead), Regions should retain (in addition to the publicly available administrative record) a master copy of the administrative record at the Regional office or other central location, if feasible. Where a state or other federal agency is the lead agency at a site, EPA should ensure that the state or other federal agency maintains (in addition to the publicly available administrative record) a master copy of the administrative record and where possible, supplies a copy of the index to EPA.

With respect to the public repository, it may be appropriate for Regions to maintain only key documents and a copy of the entire index at the local repository, especially if space is limited after initiation of the response action or after other key events, such as judicial review. Alternatively, a local repository may prefer to have the documents available via CD-ROM or internet, in light of potential space concerns. *See* CERCLA §§ 113(g), (h). The Region should work with the CIC to determine how best to present information to the community.

For general records maintenance, EPA should maintain the public record at least until all cleanup actions (as well as Five Year Review and long-term monitoring) and litigation concerning a site are complete and any statutes of limitation for cost recovery have passed. EPA also should maintain the administrative record in accordance with appropriate records schedules. *See* EPA Records Schedule 019 (<http://www.epa.gov/records/policy/schedule/sched/019.htm>).

H. Confidential File

When an administrative record has a confidential file (*see* Section II.C.2), EPA should list all documents in the confidential file in the index for the administrative record, identify them as “privileged” or “confidential,” provide the title and location of the document, and the basis for the privilege or confidentiality. The Record Coordinator should store the confidential portion of the administrative record in files at the Regional office, in a confidential file in SDMS, or other central location and separate from the publicly-available file; the confidential portion of the record should not be located at or near the site. Each privileged document should be stamped “confidential” at the bottom of each page of the document or in a manner that clearly indicates that all or part of the document is confidential. Where the material is not a written document (such as a computer disk) the jacket should be stamped “confidential.” The Record Coordinator should maintain a complete list of all materials contained in the confidential portion of the administrative record, along with a log that identifies persons on the access list (*see* below) for the confidential file that have checked out and returned the materials in the confidential file (including the time, date, and document name).

As soon as EPA establishes a new administrative record, the Record Coordinator should prepare a routine access list for the confidential file. When EPA is the lead agency, this routine access list must be approved by the appropriate designated person (*e.g.*, the Waste Management Division Director), and legal staff. Once these offices give approval, only persons on the list will be able to access the confidential files, and they must obtain access through the Record Coordinator. For state or other federal agency-lead sites, the Regions should take steps to ensure that the state or other federal agency develops routine confidential file access list procedures.

This policy and procedure for privileged materials does not supersede any policy and procedures established under FOIA, 5 U.S.C. § 552 or EPA regulations implementing FOIA at 40 C.F.R. Part 2. Decisions regarding disclosures of materials under FOIA should be coordinated among the various lead agency officials with access to such materials.

I. Copying

CERCLA § 117(d) requires that each document “developed, received, published, or made available to the public” under that section must be made available for public inspection and copying at or near the site. Under CERCLA § 113(k)(2)(B), these documents must also be included in the administrative record. Regions should ensure that documents in the administrative record are available for copying, but EPA does not bear responsibility for copying the documents itself. Therefore, the administrative record should ideally be available at a facility with a computer printer, microform printer, or copy machine (*e.g.*, a public library).

When the administrative record is available at a facility at or near the site and copying facilities are available there, Regions may encourage the requester to make use of the copying facilities at the location. If copying of the administrative record located at or near the site is difficult for a requesting party, EPA may arrange for copying on behalf of a requester at the Regional or other central location. Regions may ask that requesters arrange for copying by contractors or commercial copy centers that then bill the requester directly.

It is important that EPA follow the FOIA regulations at 40 C.F.R. Part 2, in determining the appropriate charge for copying. Copying fees should be waived for other federal agencies, EPA contractors or grantees, and members of Congress. EPA currently charges \$.15 a page for paper copies, though the Agency does not charge for the first 100 copies or until total copying costs reach \$15, as provided in 40 C.F.R. Part 2. Reproduction of photographs, microfilms or magnetic tapes, and computer printouts should be charged at the actual cost to EPA.

IV. INVOLVEMENT OF OTHER PARTIES

A. States

1. State Involvement in Federal-Lead Sites

The administrative record for a federal-lead site should reflect the state's opportunity to be involved in selecting the response action. However, the administrative record should only include final state comments, unless other comments explain or convey decisions on substantive aspects of a proposed or selected remedy (*e.g.*, the scope of a proposed action or the identification of potential ARARs). Any preliminary deliberations between the state and EPA relevant to the response selection need not be part of the administrative record if superseded by documentation of the state's final position. Regions should consult with the site attorney to determine if such deliberations are appropriate to include in the record. The record for a remedial action should include documents that reflect at least the following state participation or the opportunity for state participation (40 C.F.R. § 300.825(b)):

- Letter to the state requesting identification of ARARs and the final response from the state identifying ARARs (and certification from the state);
- Comments, or the opportunity to comment, on a proposed finding or decision to select a response action not attaining a level or standard of control at least equivalent to a state ARAR;
- Comments, or the opportunity to comment, on the final draft RI/FS or the proposed plan and EPA responses to the comments;
- Significant post-decision comments by the state and EPA responses to the comments (placed in the post-decision document file for possible inclusion in the administrative record, *see* Section II.C.1.c).

The administrative record for a removal action should reflect any state participation, especially any state comments and EPA responses to the comments.

The governing body of an Indian tribe should be afforded the same treatment as a state in accordance with CERCLA § 126.

2. Federal Involvement in State-Lead Sites

Where a state has been officially designated as lead agency for a CERCLA site, the state should compile and maintain the administrative record for that site in accordance with CERCLA § 113(k) and 40 C.F.R. § 300.800 et seq. of the NCP. Since EPA has ultimate responsibility for both the selection of a response action and the record on which that response action is based, EPA should participate in compiling and maintaining the record. In such cases, EPA should assure that the administrative record forms a complete basis for the selection of the response action.

The state as lead agency should maintain the administrative record at a state office (*e.g.*, the state's central environmental agency office) and at or near the site. At a minimum, the state as lead agency also should transmit to EPA a copy of "the index of documents included in the administrative record, the RI/FS work plan, the RI/FS released for public comment, the proposed plan, any public comments received on the RI/FS and proposed plan, and any other documents EPA may request on a case-by-case basis." See 40 C.F.R. § 300.800(c). These documents should be transmitted to EPA as they are generated or received (note that transmittal of the index is not sufficient). In addition, EPA may request other documents on a case-by-case basis.

The Superfund Memorandum of Agreement (SMOA) or Cooperative Agreement (CA) with the state, should address the administrative record requirements. The following language should be included in the SMOA or CA where the state has been officially designated the lead agency for a CERCLA site:

The state must compile and maintain the administrative record upon which the selection of the [remedial, removal] action is based. The compilation and maintenance of the record must follow 40 C.F.R. Part 300, Subpart I and consider EPA guidance on the administrative record. The administrative record must be located at the state environmental agency office, and at or near the site. In addition, the state must submit copies of the index, the RI/FS workplan, the RI/FS released for public comment, the proposed plan, and any public comments received on the RI/FS and proposed plan to the EPA Regional office, as they are added to the administrative record file. In addition, the state must submit other documents that are requested by EPA. The state shall comply with Section 113 of CERCLA and any applicable regulations. EPA may require the retention of other documents for cost recovery purposes.

The administrative record compiled by the state should reflect EPA's participation, comments, concurrence, and disagreements at the same stages as are required for state involvement in a federal-lead site. The state should place in the administrative record any documents submitted by EPA for inclusion in the record.

B. Federal Facilities

Federal agencies have the responsibility, pursuant to Executive Order 12580, to establish the administrative record for federal facilities under their jurisdiction, custody, or control when using

CERCLA authority for a response action. The administrative record for a federal facility should include all information considered or relied on in selecting the response action at the facility, including documents submitted by EPA on the selection of the response action. The federal agency should comply with all NCP and CERCLA requirements in compiling and maintaining the administrative record, including the minimum public participation requirements in CERCLA §§ 113, 117. *See* 40 C.F.R. § 300.800(b).

The federal agency should maintain the administrative record at or near the site and ensure easy public access to the record. If, for example, a site is a Department of Defense facility, the administrative record should be housed in a location that does not require military clearance for access. The federal agency should keep a complete copy of the administrative record at a location within the federal agency office comparable to an EPA Regional office.

Where the Region is the lead regulatory agency at a federal facility, the Region shall compile and maintain the administrative record. In such cases, the Region should assure that the administrative record forms a complete basis for the selection of the response action. In addition, if the Region is involved in the selection of the response action at a federal facility on the NPL, the federal lead regulatory agency should transmit to the Region “a copy of the index of documents included in the administrative record file, the RI/FS workplan, the RI/FS released for public comment, the proposed plan, any public comments received on the RI/FS and proposed plan, and any other documents the Region may request on a case-by-case basis.” 40 C.F.R. § 300.800(b)(3). These documents should be transmitted to the Region as they are generated. Transmittal of the index will not suffice. In addition, other documents may be requested by the Region on a case-by-case basis. Inter-Agency Agreements should delineate the procedures for compiling and maintaining the administrative record.

C. ATSDR

Participation in the selection of a response action by the Agency for Toxic Substances and Disease Registry (ATSDR) should be reflected in the administrative record. The administrative record should include the initial and subsequent health assessments and any other information EPA solicits and obtains from ATSDR which EPA considers or relies on in its selection of a response action.

Draft versions of the health assessment and other draft documents upon which ATSDR comments should not be included in the administrative record. If, however, EPA solicits comments from ATSDR on a draft document such as a draft work plan or RI report, and receives formal comments from ATSDR which EPA considers or relies on in selecting a response action, then the document and comments should be included in the administrative record.

In the event that the ATSDR health assessment and EPA’s risk assessment appear inconsistent, a document explaining the difference should be generated and placed in the administrative record.

D. Natural Resource Trustees

CERCLA § 122(j)(1) requires that EPA give notice to the Natural Resources Trustee of a release or threatened release of any hazardous substance which may have resulted in damages to natural resources. The administrative record should include the notice to the Natural Resources Trustee, and any subsequent final communications (*e.g.*, a release of final report). In addition, any factual information provided by the Natural Resources Trustee which is considered or relied on in selecting a response action should be included in the administrative record.

V. CONCLUSION

The policies and procedures established in this document are intended solely for the guidance of employees of the U.S. Environmental Protection Agency. They are not intended and cannot be relied upon to create any rights, substantive or procedural, enforceable by any party in litigation with the United States. EPA reserves the right to act at variance with these policies and procedures and to change them at any time without public notice.

For further information concerning this memorandum, please contact Erin Smith, (202) 564-2038, or Steven Wyman, (703) 603-8882.

APPENDIX A

Documents Generally Included in the Administrative Record for a Removal Action

OSCs should identify documents to be included in the administrative record for a removal action that (1) were considered or relied on in selecting the particular action; and (2) show public involvement in the process as addressed by the NCP (recognizing that for some removal actions, pre-remedy public involvement is not required or practical). Taking the time to put together a complete and accurate administrative record will, among other things, protect OSCs and other Agency personnel from having to give testimony in litigation challenging an Agency action.

The following are documents that may be appropriate for a removal administrative record:

Document	Included	N/A
Index of documents included in the record		
Action memorandum		
Amended action memorandum (<i>i.e.</i> , exemption memorandum), such as emergency, cost, consistency, etc.		
Closure memorandum		
Engineering evaluation/cost analysis (EE/CA) for non-time-critical removal actions		
EE/CA approval memorandum		
Preliminary assessment (PA)		
Site inspection (SI) report		
Sampling and analysis plan		
Sampling data		
Chain of custody forms		
Memoranda on site-specific or issue-specific policy decisions		
Inspection reports		
Data summary sheets		
Technical studies performed for site (<i>e.g.</i> , groundwater studies)		
Risk evaluation/endangerment assessments and underlying documentation		
Correspondence with PRPs regarding any aspect of the removal action		
Data submitted by the public, including PRPs		
Guidance documents (site-specific should be in the record; general guidance documents may be included by reference)		
Documents showing public involvement: community involvement plan, newspaper and other public notices, documents sent to persons on the community involvement mailing list, community involvement mailing list, documentation of public meetings, public comments, responses to significant comments		
Information in administrative orders or consent decrees that are relevant to the selection of the response action		
Affidavits containing relevant factual information not contained		

elsewhere in the record file		
Notice letters to PRPs, if appropriate for inclusion		
CERCLA § 104(e) information request letters and CERCLA § 122(e) subpoenas and responses, including deposition transcripts, if appropriate for inclusion		
Responses to CERCLA § 104(e) information request letters, if appropriate for inclusion		
RCRA Documents, if applicable		
Documentation of state involvement		
ATSDR documents		
Documents supporting a finding under CERCLA § 106 of imminent and substantial endangerment		

APPENDIX B

Documents Generally Included in the Administrative Record for a Remedial Action

Document	Included	N/A
Index of documents included in the record		
Record of Decision (ROD)		
Amended ROD		
Remedial investigation/feasibility study (RI/FS) (workplan and final)		
Amendments to RI/FS workplan		
Proposed plan		
Explanation of significant differences (ESD)		
Preliminary assessment (PA)		
Site inspection (SI) Report		
Sampling and analysis plan		
Sampling data		
Chain of custody forms		
Pollution Reports (POLREPS), if appropriate for inclusion, such as when a remedial action follows a removal action		
Memoranda on site-specific or issue-specific policy decisions		
Inspection reports		
Data summary sheets		
Technical studies performed for site (<i>e.g.</i> , groundwater studies)		
Risk evaluation/endangerment assessments and underlying documentation		
Fact sheets or summary information regarding remedial action alternatives generated if special notice letters are issued to PRPs at an early stage of the RI/FS		
Correspondence with PRPs regarding any aspect of the remedial action		
Data submitted by the public, including PRPs		
Guidance documents (site-specific should be in the record; general guidance documents may be included by reference)		
Documents showing public involvement: community involvement plan, newspaper and other public notices, documents sent to persons on the community involvement mailing list, community involvement mailing list, documentation of public meetings, public comments, responses to significant comments		
Parts of administrative orders or consent decrees that are relevant to the selection of the response action		
Affidavits containing relevant factual information not contained elsewhere in the record file		
Notice letters to PRPs, if appropriate for inclusion		
CERCLA § 104(e) information request letters and CERCLA § 122(e) subpoenas and responses, including deposition transcripts, if		

appropriate for inclusion		
Responses to CERCLA § 104(e) information request letters, if appropriate for inclusion.		
RCRA Documents, if applicable		
Documentation of state involvement		
ATSDR documents		
Documents supporting a finding under CERCLA § 106 of imminent and substantial endangerment		

APPENDIX C

Sample Certification Language for Judicial Review

CERTIFICATION OF DOCUMENTS COMPRISING THE ADMINISTRATIVE RECORD

The United States Environmental Protection Agency (EPA) hereby certifies that the attached documents constitute the administrative record for selection of response actions under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, for the [name of site] site in [City or County], [State].