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Public Member

Comments on the Draft Report, *Development, Compilation, and Judicial Review of Informal Agency Rulemaking Administrative Records*

I am writing to provide comments on Leland E. Beck's Draft Report to the Administrative Conference of the United States, titled *Development, Compilation, and Judicial Review of Informal Agency Rulemaking Administrative Records*. Mr. Beck does a commendable job compiling agency practices relating to the "administrative record" and offering recommendations on the how the "administrative record" should be developed and compiled. I have outlined three comments below for consideration regarding Mr. Becks comprehensive and dispositive report on the administrative record.

I.   **AGENCIES SHALL ADOPT THE STANDARD THAT ALL PUBLIC COMMENTS RECEIVED ON A RULEMAKING ARE PART OF THE ADMINISTRATIVE RECORD**

Public access to public comments on a public proceeding is a basic prerequisite of open government. For decades federal agencies have made public comments available to the public, first through docket rooms and then, as the internet developed, through online systems developed by each agency. Agency-specific solutions to providing public access to public comments were superseded by Regulations.gov. President Obama has emphasized the importance of the public comment portal and has enhanced its operation. Despite the Administration's emphasis on the use of Regulations.gov to promote public participation and collaboration in agency proceedings, agencies have been slow to accept the common portal, thereby limiting the public's access to public comments.

Public comments are necessarily part of the administrative record. Courts have held that the "complete administrative record consists of all the documents and materials that were directly or indirectly considered by the decision-makers at the time the decisions were rendered."[1] Pursuant to Section 553 of the Administrative Procedures Act, agencies must not only provide the public with an opportunity to participating in the rule making, but agencies must all consider the public comments submitted to the agency. As such, agencies are required to consider all public comments, whether directly or indirectly, during the rulemaking process. Thus, public comments must be included as part of the administrative record.

Despite the fact that public comments must be included as part of the administrative record, there have been instances where agencies have failed to make public comments available

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[1]   *Tenneco Oil Co. v. Dep't of Energy*, 475 F. Supp. 299 (3rd Cir. 1979).

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to the public.[2] Accordingly, there should be a bright line rule that all public comments shall be part of the administrative record.

Moreover, there should be a government-wide adopted practice that the administrative record shall include all comments received by an agency prior to, during, and after a rulemaking. The Environmental Protection Agency has adopted Guidance on Compiling Administrative Records for CERCLA that generally encompasses this practice.[3] Specifically, the EPA Guidance states that comments received prior to the public comment period should be included in the administrative record "if such comments were considered in the selection of the response action."[4] Moreover, "Regions should include in the administrative record all comments it receives during the formal public comment period in their original form."[5] Finally, the Guidance states that "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 labeled 'late comment.'"[6]

II. AGENCIES SHALL ADOPT THE PRACTICE OF MAKING THE ADMINISTRATIVE RECORD ELECTRONICALLY AVAILABLE TO THE PUBLIC

The administrative record should be treated as an integral part of the rulemaking process. Generally though, the administrative record is only disclosed in the course of a lawsuit involving an agency action. As suggested by the EPA's *Action Development Process: Administrative Record Guidance*, administrative records are not "officially compiled" until a court "orders" the EPA to file the record in litigation. NOAA on the other hand embraces a much more comprehensive view of the role of the administrative record. NOAA formally begins compiling the administrative record when the agency "begins to consider a concrete proposal for action" or begins to move forward on a specific course of action."[7] "For example, in the case of a petition for rulemaking, the decision-making process begins when the agency receives a written request for specific action from the public," which thereby triggers the need to begin compiling the administrative record.[8] A government-wide standard should be adopted that reflects NOAA's approach as to when an agency should begin compiling the administrative record

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[2]   *See* Jim Tozzi, *A Proposal to the Committee on Administration & Management of the Administrative Conference of the United States: Effective Information Management in the Regulatory State,* (May 2012) available at http://thecre.com/pdf/JimTozziACUSProposal.pdf

[3]   Environmental Protection Agency, *Revised Guidance on Compiling Administrative Records for CERCLA Response Actions,* available at http://www.epa.gov/compliance/resources/policies/cleanup/superfund/admin-record-mem-rev.pdf

[4]   *Id.* at 9.

[5]   *Id.*

[6]   *Id.*

[7]   Memorandum from Lois Schiffer, General Counsel, NOAA, to Administrators and Directors, National Oceanic and Atmospheric Administration, at 11 (Dec 21, 2012) available at http://www.gc.noaa.gov/documents/2012/AR_Guidelines_122112-Final.pdf

[8]   *Id.*

Moreover, the administrative record should be available to the public electronically. An example of where the administrative record is made available to the public electronically is the website of the Hanford Site.[9] The website of the Hanford Site has the entire administrative record available electronically, and can be sorted by category such as "author," "date," "document type," and "recently added." The administrative record for Hanford Site also includes public comments[10] and is a searchable database. The Department of Energy and EPA guidance on administrative records for CERCLA state that the rationale for the compiling the administrative record is not only for judicial purposes, but also serves "as a vehicle for public participation in selecting a response action." The same policy rationale serves all government agency actions, not just as it pertains to CERCLA. As discussed in the subsequent section, federalregister.gov is an existing electronic database that can be used to provide the public with electronic access to agency administrative records.

III. REGULATIONS.GOV SHOULD BE CONTROLLED BY THE FEDERAL REGISTER AND IT SHOULD INCLUDE THE ADMINISTRATIVE RECORDS OF AGENCIES

Records management is the foundation of government operation. Modern and effective management of government records, both internally generated materials as well as contributions from the public, is essential to the efficient functioning of all aspects of government. Unfortunately, across the government agencies' records management is currently conducted in a fragmented and inconsistent manner.[11] Recognizing the need to improve information management, President Obama stated in his Presidential Memorandum on *Managing Government Records* the following:

> Improving records management will improve performance and promote openness and accountability by better documenting agency actions and decisions. When records are well-managed, agencies can use them to assess the impact of programs to reduce redundant efforts, to save money, and to share knowledge within and across their organization. In these ways, proper records management is the backbone of open Government.

In the Presidential Memorandum, President Obama further outlined six benchmarks for achieving an effective records management policy:

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[9] Department of Energy, Hanford Site, available at http://www5.hanford.gov/arpir/. Note, under CERCLA the EPA is required maintain administrative records for public availability.

[10] *See e.g., http://www5.hanford.gov/arpir/?content=findpage&AKey=D197027760*

[11] For a thorough discussion on current information management by the government, *See* Jim Tozzi, *A Proposal to the Committee on Administration & Management of the Administrative Conference of the United States: Effective Information Management in the Regulatory* (May 2012) available at http://thecre.com/pdf/JimTozziACUSProposal.pdf ; Also noted by the Draft Report at 45 ("Agencies' practices now vary widely, reflecting divergent needs and capacities for electronic record keeping and document management").

(i)   creating a Government wide records management framework that is more efficient and cost effective;

(ii)   promoting records management policies and practices that enhance the capability of agencies to fulfill their statutory missions;

(iii)   maintaining accountability through documentation of agency actions;

(iv)   increasing open Government and appropriate public access to Government records;

(v)   supporting agency compliance with applicable legal requirements related to the preservation of information relevant to litigation; and

(vi)   transitioning from paper-based records management to electronic records management where feasible.

All six of the goals can be met by requiring all agencies to incorporate their administrative records into federalregister.gov. While regulations.gov was developed to serve as a central repository for agency public dockets and to aggregate public comments, regulations.gov has not been fully embraced by all agencies and suffers from numerous deficiencies.[12]

Federalregister.com does, however, have the capacity to serve as the much need centralized electronic records management database that can be implemented by all agencies. The Federal Register 2.0 site has achieved immediate acclaim among federal administrative and management experts.[13] Federalregister.gov is an easily accessible database that is beneficial to agencies. In particular, "Agencies can observe the number of users on the web site and run standard web analytics."[14] Federalregister.gov would also enable agencies to index their administrative records, which would improve recordkeeping practices by the agencies and reduce the administrative burden of complying with FOIA requests and complying with the certification of administrative records for agency lawsuits.

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[12]   *See* Jim Tozzi, *A Proposal to the Committee on Administration & Management of the Administrative Conference of the United States: Effective Information Management in the Regulatory State,* (May 2012) available at http://thecre.com/pdf/JimTozziACUSProposal.pdf

[13]   For examples, ACUS awarded the Office of the Federal Register its first Walter Gellhorn Innovation award. http://www.acus.gov/best-practices/awards/walter-gellhorn-innovation-award-winner-office-of-the-federal-register/

[14]   ACUS, federalregister.gov: The daily newspaper for the government, available at http://www.acus.gov/best-practices/success-story/federalregister-gov-the-daily-newspaper-for-the-government/

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The Federal Register 2.0 site provides a unique opportunity to establish clear guidelines on what agencies shall include as part of the administrative record, increase accountability through documentation of agency actions, increase public participation in rulemakings, increase the public's access to government information, and establish a Government wide records management framework that is more efficient and cost effective. For this reason, and the reasons set forth in my proposal identified in footnote 12 above, the Office of the Federal Register should assume management of Regulations.gov.