Administrative Records: The Foundation of Land Use and CEQA Challenges

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Administrative Records: The Foundation of Land Use and CEQA Challenges (And Successful Defenses)

By
David M. Snow and Ginetta L. Giovinco

I. Why is the Administrative Record Important to You?

The administrative record is the set of documents that memorializes administrative proceedings such as a decision on a discretionary land use entitlement. Proceedings to attack public agency land use decisions typically take the form of mandamus proceedings – either administrative mandate for matters that require evidentiary hearings,[1] or ordinary or traditional mandate when no evidentiary hearing is required.[2] The administrative record is the heart of any administrative mandate (and, often, traditional mandate) lawsuit. Because the record typically constitutes the entire universe of evidence upon which the court will base its decision,[3] along with judicially noticeable documents, the contents of the record are critical.

Indeed, a complete, detailed, and well-organized administrative record is critical to the successful defense of a writ petition.[4] A public agency's decision may be reversed based on a deficient record.[5] Similarly, an incomplete record could result in the denial of a client's petition for writ of mandate.[6]

This paper addresses both the procedural steps of record preparation – who prepares the record, who pays for it, who certifies it – and substantive issues including the contents of administrative records and what does *not* belong in a record. This paper also discusses issues unique to records in cases involving the California Environmental Quality Act ("CEQA") (Public Resources Code § 21000, *et seq*.). This paper also provides practice tips along the way, including tips focused on thinking about creating your record during the course of the administrative proceedings and tips for what to do once you are in litigation over a decision or action.

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[1] Code of Civil Procedure (hereafter, C.C.P.)§ 1094.5.
[2] C.C.P. § 1085.
[3] Code of Civil Procedure § 1094.5(e) includes certain exceptions whereby evidence outside of the record may be considered by a reviewing court. Specifically, "Where are court finds that there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was improperly excluded at the hearing before respondent, it may enter judgment as provided in subdivision (f) remanding the case to be reconsidered in the light of that evidence; or, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit the evidence at the hearing on the writ without remanding the case."
[4] See *Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 834.
[5] See e.g., *Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 373 ("The consequences of providing a record to the courts that does not evidence the agency's compliance with CEQA is severe – reversal of project approval").
[6] See *Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357.

II. Preparation and Certification of the Administrative Record

A. Who Prepares the Administrative Record and Who Pays for It?

The question of who prepares the administrative record – either who "must" prepare the record or who can "choose" to prepare the record – is one of the first questions that must be answered in an administrative mandate lawsuit. Preparing the record is one of the most important tasks because, with some limited exceptions noted below, the record will comprise all of the evidence upon which the case will be tried, and the parties will be limited to citing to the record in their briefs. In addition, depending on the size of the record, the cost and time involved may be significant, so getting the process started early is important.

> ***Practice Tip***
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> Some judges will not set a briefing schedule until the administrative record has been prepared, certified, and served. In this circumstance timely preparation of the record becomes even more important, or you may be forced to wait months until the court will set a writ hearing date. Then, depending on how busy the court is, find yourself with a hearing date that is several months out from there!

There are various options for who prepares the record. Depending on the type of case this may be the petitioner, the respondent, both of them working together or sequentially, and possibly, even the real party in interest.

1. Non-CEQA Administrative Mandate Lawsuits

In non-CEQA administrative mandate cases (for example, a non-CEQA challenge to a discretionary land use entitlement such as a conditional use permit or a variance)[7] there is no option – pursuant to statute, the respondent public agency must prepare the administrative record: "The complete record of the proceedings shall be prepared by the local agency or its commission, board, officer, or agent which made the decision and shall be delivered to the petitioner within 190 days after he has filed a written request therefor."[8]

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[7] See C.C.P. § 1094.6(e): "As used in this section, decision means a decision subject to review pursuant to Section 1094.5, suspending, demoting, or dismissing an officer or employee, revoking, denying an application for a permit, license, or other entitlement, imposing a civil or administrative penalty, fine, charge, or cost, or denying an application for any retirement benefit or allowance."

[8] See C.C.P. § 1094.6(c).

The law is also very clear in this circumstance that although the public agency prepares the record, the petitioner must pay the costs of the record: "The local agency may recover from the petitioner its actual costs for transcribing or otherwise preparing the record."[9]

2. CEQA Lawsuits

In CEQA lawsuits, the petitioner has the option of either requesting that the respondent lead agency prepare the record or electing to prepare the record itself.[10] In either case, CEQA calls for the record to be completed within 60 days from the date of the request or election.[11] It is important to note that despite this fairly short timeframe, CEQA also provides that extensions of the deadline shall be "liberally granted by the court when the size of the record of proceedings renders infeasible compliance with that time limit…."[12] To obtain an extension, the parties must submit a stipulation or otherwise seek an order of the court.[13] There is no limit to the number of extensions that may be granted but no single extension may be for longer than 60 days unless the court determines that a longer extension is in the public interest.[14]

Practice Tip

Some courts have local rules which establish additional deadlines related to preparation of the administrative record. For example, Los Angeles Superior Court local rules set forth deadlines for a preliminary cost estimate if the agency prepares the record, preparation and exchange of a draft record index, and comments on the index. See LASC Local Rules, Rule 3.232(d).

Many public agencies prefer that a petitioner ask the public agency to prepare the record; this allows the respondent to have greater control over the time and cost for preparing the record. In addition, as the respondent ultimately is responsible for certifying the administrative record (discussed below), it can cut down on back-and-forth discussions over the contents of the record, and what the public agency will require to certify it as complete, if the public agency prepares the record in the first instance.

With respect to costs, CEQA provides that where petitioners request that the public agency prepare the record, "[t]he parties shall pay any reasonable costs or fees imposed for the preparation

[9] C.C.P. § 1094.6(c).
[10] Pub. Res. Code § 21167.6(a) and (b)(2).
[11] Pub. Res. Code § 21167.6(b)(1) and (b)(2).
[12] Pub. Res. Code § 21167.6(c).
[13] Pub. Res. Code § 21167.6(c).
[14] Pub. Res. Code § 21167.6(c).

of the record of proceedings in conformance with any law or rule of court."[15] This requirement furthers the principle that "taxpayers ... should not have to bear the cost of preparing the administrative record in a lawsuit brought by a private individual or entity."[16] To that end, a public agency that has been requested to prepare the record may refuse to release the record until the petitioner making the request has paid the agency's preparation costs.[17] CEQA also cautions, however, that "[i]n preparing the record of proceedings, the party preparing the record shall strive to do so at reasonable cost in light of the scope of the record."[18]

California courts have held that recoverable costs and fees related to preparation of the administrative record may include staff time and paralegal time[19] and attorney time when that can be shown to be reasonably necessary.[20]

Older case law held that where a public agency delegated preparation of the record to a real party in interest (project applicant) without the consent or knowledge of petitioners, the real party was not entitled to recover costs following denial of the writ petition.[21] More recent case law has narrowed this principle, holding, for example, that where a city incurred the costs for preparing the record but then was reimbursed by the project applicant pursuant to an indemnification obligation, the real party project applicant was entitled to recover those costs.[22]

When a petitioner elects to prepare the record, the public agency may not recover costs associated with reviewing the petitioner-prepared record of proceedings "for completeness," as this is considered "a chore public agencies face in every case in which the petitioner elects to prepare the record."[23] Similarly, a public agency may not be able to recover the cost of hearing transcripts that were prepared after the fact and were not presented to the decisionmakers during the administrative process.[24] But, the petitioner also cannot escape an agency's right to recover costs even when the petitioner has prepared the record in the first instance if its record ultimately is incomplete and the public agency is forced to prepare a supplemental record to ensure a complete administrative record is before the court: "When a record prepared under subdivision (b)(2) is incomplete, and an agency is put to the task of supplementation to ensure completeness, the language of the statute allows, and the purpose of the record-preparation cost provision to protect public monies counsels, that the agency recoup the costs of preparing the supplemental record."[25]

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[15] Pub. Res. Code § 21167.6(b)(1).
[16] *Black Historical Society v. City of San Diego* (2005) 134 Cal.App.4th 670, 677.
[17] *Black Historical Society v. City of San Diego* (2005) 134 Cal.App.4th 670, 677-678.
[18] Pub. Res. Code § 21167.6(f).
[19] *California Oak Foundation v. Regents of University of California* (2010) 188 Cal.App.4th 227.
[20] *Otay Ranch, L.P. v. County of San Diego* (2014) 230 Cal.App.4th 60.
[21] *Hayward Area Planning Ass'n v. City of Hayward* (2005) 128 Cal.App.4th 176.
[22] *Citizens for Ceres v. City of Ceres* (2016) 3 Cal.App.5th 237.
[23] *Coalition for Adequate Review v. City & County of San Francisco* (2014) 229 Cal.App.4th 1043, 1059.
[24] *San Diego Citizenry Group v. County of San Diego* (2013) 219 Cal.App.4th 1.
[25] *Coalition for Adequate Review v. City & County of San Francisco* (2014) 229 Cal.App.4th 1043, 1055-1056.

In order to keep costs down, many petitioners who elect to prepare the record are now submitting Public Records Act requests[26] to public agencies for all documents that will comprise the administrative record. This puts the public agency in the position of having to assemble and produce all documents that will be in the record. But, because the Public Records Act limits costs associated with production of records to direct costs of duplication or a statutory fee, if applicable,[27] the public agency may not recover all costs associated with that effort such as costs for retrieval, review, and redaction of records.

Practice Tip

Some takeaways regarding record preparation:

- Keep records organized as much as possible during the administrative proceedings; this will make it easier and less costly to respond to a Public Records Act request.
- Consider during the course of the administrative proceedings whether transcripts of earlier hearings (planning commissions, etc.) should be prepared and presented to the final decisionmakers; the costs of transcripts prepared after a lawsuit is filed may not be recoverable.
- Carefully document all costs related to preparing a record or supplementing petitioner's draft record; courts like to see costs documented concurrently with preparation of the record.
- If your agency was asked to prepare the record, insist on payment prior to releasing the record to the petitioner – don't be caught in the position of chasing costs later once you've won!

B. Who Certifies the Record?

Regardless of whether the administrative mandate case involves CEQA or not, and regardless of whether a petitioner prepared the record in the first instance or the respondent public agency did, the public agency is responsible for certifying the record.[28] The certification attests to the accuracy of the documents included in the record.[29] Many agencies also will choose to include language in the certification stating that the record is complete. The certification is typically signed by the City Clerk or other official tasked with records management for the public agency.

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[26] Gov't Code § 6250, *et seq*.
[27] Gov't Code § 6253(b).
[28] C.C.P. § 1094.6(c); Pub. Res. Code § 21167.6(b)(1) and (b)(2).
[29] Pub. Res. Code § 21167.6(b)(2).

III. What is Properly Included In (or Excluded From) the Record?

A. An Upfront Word About the Importance of Good Record Keeping

Good record keeping practices can make the compilation of an administrative record much easier should litigation ensue. Diligently separating final documents from administrative drafts (disposing of such drafts if they are no longer necessary in the ordinary course of business, if allowed by the agency's record retention policies, and there is no litigation hold in place), keeping confidential documents separate from non-confidential materials, and keeping copies of all documents relied upon during the proceeding will streamline the record compilation process. It is equally important to organize both paper documents and electronic documents.

Further, when litigation is reasonably anticipated, there is a duty to preserve evidence, including electronically stored information. This can come into play whether the agency is the potential plaintiff/petitioner or defendant/respondent. Whether litigation is "reasonably anticipated" can be unclear, however, some indicia suggesting litigation is forthcoming include the filing of a Government Claims Act claim,[30] considering the filing of litigation (and certainly after a grant of authorization by the governing body or retention of special litigation counsel for a matter), and threats of litigation in writing or at public meetings.

Federal and California law (and Federal Rules of Civil Procedure) require a party in a lawsuit to take affirmative steps to preserve potential evidence related to that suit. These obligations are the outgrowth of common law obligations of litigants to avoid spoliation of evidence. If records are deleted or destroyed and the court later determines that those records should have been preserved, the court may impose monetary or evidentiary sanctions against the party that destroyed or deleted the records. Federal courts in particular have been very insistent that electronically-stored records (e-mails, spreadsheets, word processing systems, and all other computer-stored information) be maintained and preserved during the course of the litigation. California's Code of Civil Procedure has followed the federal procedural rules with respect to electronically stored information.

To comply with the law, agencies must preserve those records that would ordinarily be destroyed or deleted as part of its routine records management program. Thus, when litigation is reasonably anticipated, steps should be taken to ensure that relevant documents do not get deleted as part of an automatic electronic records deletion protocol.

If records are deleted or destroyed, and the court later determines that those records should have been preserved, the court may impose monetary or evidentiary sanctions against the party that destroyed or deleted the records.

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[30] *Arntz Builders v. City of Berkeley* (2008) 166 Cal.App.4th 276, 289 (claims give governmental entity opportunity to settle just claims before suit and to allow early investigation of the facts surrounding the claim); C*ity of Ontario v. Superior Court* (1993) 12 Cal.App.4th 894, 902–903.

B. What's in A Writ of Administrative Mandate Record?

The vehicle for challenging administrative decisions of actions for which the law requires that a hearing be given, evidence be taken, and where the lower body (for purposes of this paper, a city or affiliated entity) has discretion to determine the facts in support of its determination, is a Writ of Administrative Mandamus (C.C.P. § 1094.5). Code of Civil Procedure Section 1094.5(a) provides guidance regarding the record of proceedings for administrative writs, stating that "… all or part of the record of proceedings …" may be filed. Unless there are very specific reasons for submitting only part of the record, the best practice is to submit a complete (and well organized) record for consideration and use by the reviewing court. When a reviewing court is called upon to determine if an agency's decision is supported by substantial evidence in the record, the court and the parties need to have the entire record at its disposal.

The documents constituting the administrative record will depend largely on the statutory scheme that governs a particular cause of action. One such common scheme is CEQA, which provides a detailed list of documents to be included in an administrative record, and which is discussed in more detail below.

Documents that should be included in the administrative record include such things as:

1) Applicable ordinances, regulations or rules (including, in the case of a land use dispute), a copy of the General Plan and any applicable specific plan.

2) Staff reports and other documents providing analysis of the issue at hand.

3) Resolutions or other documents memorializing the decision.

4) Transcripts and/or minutes from the hearing(s) required for decision.

5) PowerPoint presentation and other visual materials presented to decision makers (in color if that is important to convey the content).

6) Correspondence related to the decision, including, from interested members of the public, and internal agency correspondence that is not subject to a privilege, such as the attorney client privilege.

Resist the Urge to be Over Inclusive

While it is important to have a complete administrative record, including documents that are only tangentially related to the issue at hand can be counterproductive. Courts generally look unfavorably at efforts to "lard up" the record, and such efforts not only add to the cost of preparing the record in the first instance, but also raise the risk of clouding the court proceedings with record disputes.

Parties also generally have the ability to stipulate as to the contents of the record, keeping in mind the duty to provide all relevant evidence to the court.

C. What's in Your Traditional Writ Record – And Do You Even Have One?

Adjudication of traditional mandate cases often proceeds in a manner similar to administrative mandate cases. Extra-record evidence is generally not admissible in traditional mandate actions challenging quasi-legislative administrative decisions (such as adoption of a specific plan), and such evidence can never be admitted merely to contradict the evidence the administrative agency relied on in making the quasi-legislative decision or to raise a question regarding the wisdom of that decision.[31] Extra-record evidence may be admissible in traditional mandate actions challenging quasi-legislative administrative decisions only under rare circumstances, such as when the evidence existed before the public agency made its decision and it was not possible in the exercise of reasonable diligence to present that evidence to the agency before the decision was made.[32] Thus, in situations where a hearing was held and evidence was taken but the decision was quasi-legislative, there will still be an administrative record, sometimes also called a "record of proceedings" to distinguish it from records in administrative mandate cases.

Where traditional mandate is used to challenge a decision where no hearing was held and no evidence was taken – for example, a refusal to issue a ministerial permit or a challenge to the scope of records produced in response to a Public Records Act request – there is no official record. In these cases, the parties submit declarations and evidence in connection with their briefs; as with administrative mandate cases, live testimony is extremely rare and most courts will decide the case based on declarations and documents.[33] Discovery may be permitted in some instances as well; as one example, the Court of Appeal has just held that the Civil Discovery Act applies to Public Records Act proceedings, which are brought as writ actions.[34]

D. CEQA Cases and Issues Specific to Them

Whether the underlying project is subject to judicial review through a traditional writ or administrative writ, the contents of the CEQA record must include, at a minimum, the following documents:[35]

(1) All project application materials.

(2) All staff reports and related documents prepared by the respondent public agency with respect to its compliance with the substantive and procedural requirements of this division and with respect to the action on the project.

(3) All staff reports and related documents prepared by the respondent public agency and written testimony or documents submitted by any person relevant to any findings or

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[31] *Western States Petroleum Ass'n v. South Coast Air Quality Management Dist.* (2006) 136 Cal.App.4th 1012.
[32] *Western States Petroleum Ass'n v. South Coast Air Quality Management Dist.* (2006) 136 Cal.App.4th 1012.
[33] *California School Employees Assn. v. Del Norte County Unified Sch. Dist.* (1992) 2 Cal.App.4th 1396, 1405.
[34] *City of Los Angeles v. Superior Court* (2017) 9 Cal.App.5th 272.
[35] Pub. Res. Code § 21167.6(e).

statement of overriding considerations adopted by the respondent public agency pursuant to this division.

(4) Any transcript or minutes of the proceedings at which the decisionmaking body of the respondent public agency heard testimony on, or considered any environmental document on, the project, and any transcript or minutes of proceedings before any advisory body to the respondent public agency that were presented to the decisionmaking body prior to action on the environmental documents or on the project.

(5) All notices issued by the respondent public agency to comply with this division or with any other law governing the processing and approval of the project.

(6) All written comments received in response to, or in connection with, environmental documents prepared for the project, including responses to the notice of preparation.

(7) All written evidence or correspondence submitted to, or transferred from, the respondent public agency with respect to compliance with this division or with respect to the project.

(8) Any proposed decisions or findings submitted to the decisionmaking body of the respondent public agency by its staff, or the project proponent, project opponents, or other persons.

(9) The documentation of the final public agency decision, including the final environmental impact report, mitigated negative declaration, or negative declaration, and all documents, in addition to those referenced in paragraph (3), cited or relied on in the findings or in a statement of overriding considerations adopted pursuant to this division.

(10) Any other written materials relevant to the respondent public agency's compliance with this division or to its decision on the merits of the project, including the initial study, any drafts of any environmental documents, or portions thereof, that have been released for public review, and copies of studies or other documents relied upon in any environmental documents prepared for the project and either made available to the public during the public review period or included in the respondent public agency's files on the project, and all internal agency communications, including staff notes and memoranda related to the project or to compliance with this division.

(11) The full written record before any inferior administrative decisionmaking body whose decision was appealed to a superior administrative decisionmaking body prior to the filing of litigation.

The above requirements are mandatory but nonexclusive.[36] Although the statute provides guidance on the contents of a CEQA administrative record, there are a number of nuances that must also be taken into account, many of which are described in the following sections.

1. E-mails

Public Resources Code Section 21167.6(e)(10) includes "any other written material relevant to the respondent public agency's compliance with [CEQA] including … all internal agency communications, including staff notes and memoranda related to the project or to compliance with [CEQA]." Therefore, electronic communications received by the public agency relating to a project or its CEQA review should be included in the record. As discussed below, this does not require inclusion of privileged communications including attorney client privileged communications, documents protected by the attorney work product doctrine, or documents subject to the deliberative process privilege. Given the prevalence of electronic communications in the conduct of business, producing a record that includes no or very few e-mails is likely to raise questions regarding the record's completeness. That said, all such communications should be reviewed very carefully to ensure that privileged or confidential information is not inadvertently included in the record. And, it may be worthwhile to periodically remind staff and consultants that project-related e-mails may end up in the record, so good judgment should always be exercised when drafting such correspondence.

2. Administrative Drafts

Pursuant to Pub. Res. Code Sec. 21167.6(e)(10) the record should include "… any drafts of any environmental document, or portions thereof, that have been released for public review, and copies of studies or other documents relied upon in any environmental document prepared for the project and either made available to the public during the public review period or included in the respondent public agency's files on the project…."

While it should be clear what draft documents have been released for public review, failure to properly maintain the files and dispose of administrative drafts when they are no longer necessary could result in the documents residing in the files for the project and inviting argument over whether they belong in the administrative record presented to the court. Good file management practice could help establish that administrative drafts 1) are not normally kept by the agency in the ordinary course of business; and 2) are merely a temporary step in the process of preparing a final document or determining a course of action. If administrative drafts are disposed of when no longer needed, issues should not arise later when preparing the record. And, if the documents are sought through a Public Records Act request during the administrative process, the agency could likely make a case that disclosure is not required taking into account the factors noted above and because disclosing the documents could expose the agency's decision-making process and lead to

[36] *Madera Oversight Coalition Inc. v. County of Madera* (2011) 199 Cal.App.4th. 48, 63-64 (overruled on other grounds by *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439.)

public confusion through release of preliminary (and potentially inaccurate) information, such that the public interest in nondisclosure clearly outweighs the public interest in disclosure.

Practice Tip

Unless your local document retention polices dictate otherwise, and provided there is not a litigation hold in effect, once an administrative draft document has outlived its usefulness, dispose of it!

3. Audio Recordings of Meetings for Which No Transcript is Prepared

In the absence of written transcripts, "tape recording of public agencies qualify as 'other written materials' for purposes of section 21167.6 subdivision (e)(10)."[37] Copies of such recordings, therefore, should be included in administrative records. In *Consolidated Irrigation District v. Superior Court* (2012) 205 Cal.App.4th 697, 703, the lead agency argued that the quality of audio recordings of certain meetings was not adequate to allow for the preparation of meaningful written transcripts. Because no transcripts existed, the court considered whether the audio recordings should be part of the record, and concluded that inclusion was appropriate. The case suggests that audio recordings of meetings for which transcripts are prepared and included in the record would not need to be included in the record, however, the legal basis for this distinction is unclear, and in the later case of *San Francisco Tomorrow v. City and County of San Francisco,* both the audio recordings and transcripts were included in the record.[38]

4. Documents Referenced in (But Not Attached to) Written Comments

Although documents that are merely cited in a comment letter "cannot be bootstrapped into the record or proceedings" as part of written comments received by the public agency,[39] such documents may constitute "written evidence" and thus included in the administrative record pursuant to Section 21167.6(e)(7).[40] Whether such written evidence must be included in the record turns on whether the documents are "submitted to" the lead public agency. The court in *Consolidated Irrigation* concluded that "the term 'submit to' – which generally means presented or made available for use or study – is concerned with the effort that must be expended by the lead agency in using the 'written evidence' presented."[41] The court construed Section 21167.6(e)(7) to

[37] *Consolidated Irrigation District v. Superior Court* (2012) 205 Cal.App.4th 697, 703; see also *San Francisco Tomorrow v. City and County of San Francisco* (2014) 228 Cal.App.4th 1239.
[38] *San Francisco Tomorrow v. City and County of San Francisco* (2014) 228 Cal.App.4th 1239.
[39] *Consolidated Irrigation District v. Superior Court* (2012) 205 Cal.App.4th 697,721-22.
[40] *Consolidated Irrigation District v. Superior Court* (2012) 205 Cal.App.4th 697,722.
[41] *Consolidated Irrigation District v. Superior Court* (2012) 205 Cal.App.4th 697,723.

mean that written evidence has been submitted "when a commenter has made the document readily available for use or study by the lead agency personnel."[42] In determining how to apply this, the court balanced the level of effort lead agency staff would have to exert in order to obtain the referenced documents. The court concluded as follows: [43]

Document Type	Part of the Record per 21167.6(e)(7)?
Documents previously provided to the lead agency, and which commenter offers to provide again upon request	YES
Documents named in a comment letter, with citation to a general webpage through which the document could be located **and** a specific request that they be included in the record of proceedings	NO
Documents named in a comment letter, with citation to a specific webpage, **but without** a specific request that they be included in the record of proceedings. Assumes the document is directly accessible via the cited uniform resource locator (URL)	YES
Documents named in comment letters, with references to the organization that created the document, but without information as to where the document may be available on the World Wide Web, and with no offer to provide hard copies	NO

Practice Tip

Agency staff who process comment letters should carefully review those letters for references to specific documents that are immediately accessible through the World Wide Web, and should print out or save electronic versions of those documents for the record (even though that burden arguably should be placed on the commenter rather than the lead agency!).

[42] *Consolidated Irrigation District v. Superior Court* (2012) 205 Cal.App.4th 697,723.
[43] *Consolidated Irrigation District v. Superior Court* (2012) 205 Cal.App.4th 697,724-25.

5. Studies/Reports Referenced and Relied Upon in the CEQA Document

All studies and reports cited in the CEQA document should be printed out and kept for the record. Many referenced documents will be included in appendices, however, all studies and reports cited in the CEQA document should be printed out and kept in the lead agency's files. You do not want to be in a position where you must inform a court that you don't have a document that is cited and relied upon in the CEQA analysis!

If questions arise regarding cited documents that are in the possession of consultants and subconsultants, they should be analyzed consistent with the discussion in paragraph 6 below.

6. Consultant/Subconsultant Documents

When the lead agency has either actual or constructive possession of consultant (or subconsultant) documents, some of the consultant documents may be properly part of the record. This conclusion was reached in the case of *Consolidated Irrigation District v. Superior Court* in 2012, and was further reinforced by the California Supreme Court's citation to *Consolidated Irrigation* in the recent *City of San Jose v. Superior Court* public records act case, in which it held that a public official's writings on a personal device or account about the conduct of public business may be subject to disclosure pursuant to the California Public Records Act.[44]

When dealing with consultant files, the first question is whether the consultant documents are "in the possession of the agency." Courts have construed "possession" to include both actual and constructive possession.[45] In the CEQA context, "an agency has constructive possession of records if it has the right to control the records, either directly or through another person."[46] Whether the lead agency had the right to control consultant records will largely turn on the document ownership provisions contained in the consultant contracts.

Based on this, a lead agency should critically consider whether it is in its best interest to assert ownership of all consultant (and subconsultant) documents in consulting agreements. If such agreements are drafted to afford the lead agency broad ownership or control of consultant documents, constructive possession of those documents may be imputed to the lead agency.

Once it is determined that the documents are in the lead agency's possession, any documents falling within the categories set forth in Public Resources Code Section 21167.6(e) should be included in the administrative record. If the expansive interpretation of public agency files to include consultant documents applies, special attention should be given to documents covered by the catchall provision of Section 21167.6(e)(10).. This potentially expansive interpretation would

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[44] *City of San Jose v. Superior Court* (2017) 2 Cal.5th, 608.
[45] *Batt v. City and County of San Francisco* (2010) 184 Cal.App.4th 163, 172.
[46] *Consolidated Irrigation District v. Superior Court* (2012), 205 Cal.App.4th 697, 710, as modified on denial of reh'g (May 23, 2012); citing *People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1417 (doctrine of constructive possession for crime of felon in possession of a firearm).

not, however, negate the attorney client privilege or other potentially applicable privileges that might extend to certain consultant documents.

Practice Tip

When drafting or reviewing contracts for CEQA documentation services consider whether it is more beneficial to the lead agency to assert ownership over all consultant and subconsultant documents, or whether the potential inclusion (or argument over inclusion) of those documents in the administrative record warrants less agency control over the consultant documents.

7. Confidential Information (Trade Secrets and Tribal Cultural Resources)

CEQA contemplates that some documentation prepared or provided by interested parties must be kept confidential. This requires special attention during the administrative process with respect to document preparation, review, and how it is kept in the project files. In the event of litigation, special attention will also be required when preparing the administrative record.

Information that contains trade secrets, which are defined in Govt. Code Sec. 6254.7, cannot be included in an agency's CEQA documentation or otherwise disclosed.[47]

Similarly, information regarding cultural resources, including tribal cultural resources, is protected from disclosure through the Public Records Act and CEQA.[48]

To the extent that such confidential information is to be shared with decisionmakers, it should be compiled in a confidential appendix, and kept separate from the public project and related CEQA documents. Such confidential information should not be included in the administrative record, but should instead be provided separately to the court under seal as permitted by the court.

The confidentiality requirements applicable to information regarding tribal cultural resources do not extend to documents that are "publicly available, are already in the possession of the project applicant before the provision of the information by the California Native American tribe, are independently developed by the project applicant or the project applicant's agents, or are lawfully

[47] Pub. Res. Code § 21160; 14 Cal Code Regs. 15120(d).
[48] Govt. Code § 6254(r), Govt. Code § 6254.10, Pub. Res Code § 21082.3(c); 14 Cal Code Regs § 15120(d).

obtained by the project applicant from a third party that is not the lead agency, a California Native American tribe, or another public agency."[49]

8. Privileged Documents

Attorney-Client and Attorney Work Product Privileges

Documents subject to the attorney client or attorney work produce privileges do not belong in the administrative record.[50] In the past, questions arose regarding whether lead agencies could share privileged documents with legal counsel for the project applicant without waiving the attorney-client privilege. In 2009, the court in *California Oak Foundation v. County of Tehama* held that the common interest exception to the waiver doctrine allowed the lead agency to share confidential information with the applicant's legal counsel without losing the protections of the attorney client privilege.[51] This ruling, however, was significantly scaled back in 2013 by the decision in *Citizens for Ceres v. Superior Court*. In that case, the court held that prior to a decision on the project, the interests of the lead agency and project applicant are "fundamentally at odds" because the lead agency's obligation to prepare "environmental documents that reveal the project's impacts without fear or favor" conflicts with "the applicant's primary interest … in having the agency produce a *favorable* EIR that will pass legal muster."[52] This more constrained view of the common interest exception means that sharing otherwise privileged documents with legal counsel for an applicant during the administrative process would waive the privilege, making them public documents and properly part of any administrative record.

The common interest exception to the waiver doctrine could, however, apply after a decision on the project has been made, and litigation commenced, if there is no dispute remaining between the lead agency and the applicant.[53] That, however, is well after the content of the administrative record has been set!

Deliberative Process Privilege

The deliberative process privilege, as articulated by the California Supreme Court, "reflects a concern that the quality of decision making suffers when the deliberative process is prematurely exposed to public scrutiny."[54] The privilege furthers three policies: "'First, it protects creative debate and candid consideration of alternatives within an agency, and, thereby, improves the quality of agency policy decisions. Second, it protects the public from the confusion that would result from premature exposure to discussions occurring before the policies affecting it had actually been

[49] Pub. Res. Code § 21082.3(c)(2)(B).
[50] *Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889, 914.
[51] *California Oak Found. v. County of Tehama* (2009) 174 Cal.App.4th 1217, 1222.
[52] *Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889, 918 (italics in original).
[53] *Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889, 922.
[54] *California First Amendment Coal. v. Superior Court* (1998) 67 Cal.App.4th 159, 170, citing *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325.

settled upon. And third, it protects the integrity of the decision-making process itself by confirming that "officials should be judged by what they decided(,) not for matters they considered before making up their minds." ' " [55] The privilege, in California, represents a common factual circumstance where "the public interest in confidentially clearly outweighs the interest in disclosure."[56]

Documents protected by the deliberative process privilege need not be included in the administrative record, however, the agency invoking the privilege has the burden of showing that the privilege applies.[57] Thus agencies should bolster the case for non-disclosure with specific reasons supporting that determination. General policy statements of the reasons underlying the privilege, are not sufficient to invoke the protections, and an explanation of the "public's specific interest in nondisclosure" is required.[58] In *Humane Soc'y of the United States v. Superior Court of Yolo County*, the Humane Society sought to compel the University of California to disclose records related to the its publication of a study of the economic impacts on egg-laying hen housing in California.[59] The University claimed the deliberative process privilege in its refusal to produce documents related to the prepublication communications and deliberations regarding the study. The University supported its assertion of the privilege "with expert opinion evidence and explained specific interests in nondisclosure, including diminution in the quantity and quality of studies from which the public benefits."[60] Disclosure would fundamentally impair the academic research process to the detriment of the public that benefits from the studies produced by that research. The University's articulation of the specific interest in nondisclosure led to the court upholding the assertion of the privilege..[61]

9. Rules of Court and Organization of the Record

California Rule of Court 3.2205 governs the form and format of administrative records in CEQA lawsuits. This rule lays out a specific order for documents to appear in the record.[62] The rule also provides that the parties may stipulate, or the court on its own may order, that the documents be organized in a different fashion.[63] As a practical matter, a pure chronological order is often a useful way to proceed, provided that the parties and the court agree to that organization. Regardless of the organization, a detailed index must be placed at the beginning of the record.[64]

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[55] *California First Amendment Coal. v. Superior Court* (1998), 67 Cal.App.4th 159, 170, citing *Jordan v. United States Dept. of Justice* (1978) 192 U.S.App.D.C. 144, 591 F.2d 753, 772–773.
[56] *California First Amendment Coal. v. Superior Court* (1998), 67 Cal.App.4th 159, 170.
[57] *Citizens for Open Govt. v. City of Lodi* (2012) 205 Cal.App.4th 296, 307; *Humane Soc'y of the United States v. Superior Court of Yolo County* (2013), 214 Cal.App.4th 1233, 1267.
[58] *Citizens for Open Govt. v. City of Lodi* (2012) 205 Cal.App.4th 296, 307 (city failed to meet its burden to show applicability of the privilege).
[59] *Humane Soc'y of the United States v. Superior Court of Yolo Cty*. (2013), 214 Cal.App.4th 1233.
[60] *Humane Soc'y of the United States v. Superior Court of Yolo Cty*. (2013), 214 Cal.App.4th 1233, 1267.
[61] *Humane Soc'y of the United States v. Superior Court of Yolo Cty*. (2013), 214 Cal.App.4th 1233, 1267. ()
[62] Cal. Rules of Court, Rule 3.2205(a)(1).
[63] Cal. Rules of Court, Rule 3.2205(a)(3).
[64] Cal. Rules of Court, Rule 3.2205(b).

Increasingly, courts are becoming amenable to, and oftentimes even requesting, electronic versions of the record. In addition, many courts request hyperlinked briefs where citations to the administrative record immediately pull up the relevant document(s). Some courts also request hard copy excerpts of portions of the record that have been cited, an approach expressly contemplated by the Rules of Court.[65]

Practice Tip

Preparing hyperlinked briefs and excerpts of records takes time. When setting a briefing schedule, be sure to account for the time necessary to prepare these documents. Oftentimes, the parties will agree that joint excerpts of the record will be submitted a certain number of days following filing of the reply brief so that the excerpts include all citations from the reply brief.

E. Optional Concurrent Preparation of CEQA Administrative Record?

Public Resources Code Section 21167.6.2, which was added to CEQA effective January 1, 2017 by Senate Bill 122, allows a project applicant to request in writing that the lead agency prepare a record of proceedings concurrently with the preparation of a negative declaration, mitigated negative declaration, EIR, or other environmental document for a project. The request must be filed within 30 days after the lead agency has determined whether an EIR, MND or ND will be prepared for the project, and must include "an agreement to pay all of the lead agency's costs of preparing and certifying the record of proceedings … in a manner specified by the lead agency."[66]

The lead agency can grant or deny the request within 10 days after receipt of the request, unless otherwise extended by agreement of the parties. Concurrent record requests are deemed denied if the lead agency fails to timely respond.[67]

When prepared concurrently pursuant to Section 21167.6.2, the documents placed in the record must be "posted on, and be downloadable from, an Internet Web site maintained by the lead agency commencing with the date of the release of the draft environmental document for the project. If the lead agency cannot maintain an Internet Web site with the information required pursuant to this section, the lead agency shall provide a link on the agency's Internet Web site to that information."

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[65] Cal. Rules of Court, Rule 3.2205(c).
[66] Pub. Res. Code Sec. 21167.6.2(f).
[67] Pub. Res. Code § 21167.6.2(e)(3).

The statue requires the draft and final EIR, MND, ND or other environmental document to include a notice, in no less than 12-point type, stating that:

> "THIS DOCUMENT IS SUBJECT TO SECTION 21167.6.2 OF THE PUBLIC RESOURCES CODE, WHICH REQUIRES THE RECORD OF PROCEEDINGS FOR THIS PROJECT TO BE PREPARED CONCURRENTLY WITH THE ADMINISTRATIVE PROCESS; DOCUMENTS PREPARED BY, OR SUBMITTED TO, THE LEAD AGENCY TO BE POSTED ON THE LEAD AGENCY'S INTERNET WEB SITE; AND THE LEAD AGENCY TO ENCOURAGE WRITTEN COMMENTS ON THE PROJECT TO BE SUBMITTED TO THE LEAD AGENCY IN A READILY ACCESSIBLE ELECTRONIC FORMAT."[68]

Before a lead agency agrees to the concurrent preparation, it should be aware of the strict timelines for making documents available through the Internet web site, or in some other readily accessible electronic format, as well as the requirement to certify the record of proceeding within 30 days after the filing of a notice of determination.

The benefits of expediting the administrative record preparation phase of any litigation that may follow the lead agency's action on the project should also be considered.

On a final note, Environmental Leadership Projects, which require the Governor certification as to the project's investment of at least $100 million in California, creation of highly skilled jobs paying prevailing wages, and other criteria, qualify for streamlined litigation, and require that the administrative record be certified within 5 days after project approval.[69] In order to meet that deadline, concurrent record preparation will be necessary!

F. Litigation Related to the Contents of the Record

A petitioner who disagrees about the contents of the record may engage in law and motion proceedings related to the record; presumably, a respondent lead public agency will not need to engage in similar proceedings because it certifies the record in the first instance and is in a position to include or exclude the documents it believes are appropriate.

Where a petitioner contends that the public agency improperly excluded documents from the record, a motion to augment the record is the appropriate procedural vehicle to address the situation.[70] Some courts will hear these motions in advance of the writ hearing so that the record is settled and the parties know the universe of documents prior to briefing, while other courts will have the parties brief the issue but will defer deciding the motion until the writ hearing itself.

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[68] Pub. Res. Code § 21167.6.2(d).
[69] Pub. Res. Code § 21186(g).
[70] *Consolidated Irrigation Dist. v. City of Selma* (2012) 204 Cal.App.4th 187.

There is no officially sanctioned form of motion when a petitioner believes that a record improperly includes documents that do not belong there, but secondary treatises and our practical experience suggests that a motion to strike is the common means of addressing this.[71]

[71] See, e.g., Procedural Motions, The Rutter Group California Practice Guide: Administrative Law Ch. 20-C [20:198] (2016 update).

IV. Checklists for Record Contents***[72]

A.	General Contents of an Administrative Mandate Record
	All project application materials, if applicable
	Correspondence, as applicable
	All notices related to public hearings
	Agendas for public hearings
	Staff reports and all attachments thereto, and related documents (e.g., PowerPoint presentations)
	All written testimony or documents submitted by any person, agency, or group
	Transcripts from public hearings
	Minutes from public hearings
	Final versions (adopted/signed) of resolutions and ordinances, including exhibits thereto
	Proposed findings or decisions
	Final findings or decisions (e.g., hearing officer decisions)
	Emails, notes, and memoranda, as applicable (and not privileged)

B.	General Contents of a CEQA Record
	All project application materials
	Environmental review documents (ND, MND, EIR)
	Technical studies and appendices to environmental review documents (see above discussion regarding confidential documents)
	All notices (both related to CEQA documents and public hearings)
	Agendas for public hearings
	Staff reports and all attachments thereto, and related documents (e.g., PowerPoint presentations)
	All written testimony or documents submitted by any person, agency, or group, related both to the environmental documents and the project as a whole
	All written evidence or correspondence related to compliance with CEQA (e.g., consultation letters, scoping meeting summaries)
	Transcripts from public hearings (and audio recordings?)
	Minutes from public hearings
	Draft documents released for public review (including resolutions, ordinances, and findings)
	Final versions (adopted/signed) of resolutions and ordinances, including exhibits thereto
	Findings, mitigation monitoring and reporting programs, and statements of overriding considerations (if applicable)
	All documents cited or relied on in the environmental documents, findings, or statement of overriding considerations
	Internal (non-privileged) public agency communications, including emails, notes, memoranda (consider whether consultant/subconsultant records are in agency's "possession")
	Record before any lower administrative decisionmaking body (e.g., Planning Commission) whose decision was appealed to a higher administrative decisionmaking body (e.g., City Council) prior to the filing of litigation
	Is a confidential appendix needed for tribal cultural resource or trade secret documents?

[72] These checklists are intended to provide general guidance regarding documents that often are part of the record, but are not intended to be exhaustive.