

# League of California Cities City Attorneys' Department 2017 Spring Conference

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

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# Overview

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## 1. Why is the Administrative Record Important to You?



## 2. Preparation and Certification of the Administrative Record



## 3. What is IN (and OUT!) of the Record?

- Specifics regarding CEQA Records



## 4. Practice Tips As We Go Along



# Why is the Administrative Record Important to You?

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- The AR is the heart of any Administrative Mandate (and often Traditional Mandate) lawsuit
- Shows the work that the agency has undertaken in support of its ultimate decision
- Constitutes (with judicially noticeable documents) the entire universe of evidence on which the lawsuit must be based
- Critical to successful defense (and prosecution!) of a lawsuit

# **Preparation and Certification of the Administrative Record (and Payment!)**

# Who Prepares the Administrative Record and Who Pays for It?

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- Non-CEQA Administrative Mandate Lawsuits (challenges to a conditional use permit or variance):
  - **NO OPTION – the public agency is obligated to prepare the AR**
  - Record must be delivered to petitioners within 190 days of the written request for the record
  - Petitioner must pay the costs of preparing the record!
- Traditional Mandate
  - If there is a record, arguably the petitioner should pay for it under the same principle governing administrative mandate lawsuits
  - But, there may be no record – only declarations and exhibits

# Who Prepares the Administrative Record and Who Pays for It?

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- CEQA Lawsuits

- **Petitioner** has the option of asking the lead agency to prepare the AR, **OR** electing to prepare the record itself
- **Comprehensive Public Records Act (PRA) Requests are more and more common when Petitioners elect to prepare the AR**
  - ✦ **Consider, in response to such a PRA, providing an organized AR structured as desired by the lead agency, but recognize this also means the lead agency is taking on more work**
  - ✦ **Cost recovery is limited just to the duplication costs, per the PRA**
- 60 days to complete the AR from the date of request (or election); but extensions should be liberally granted when infeasible to meet the deadline

# Practice Tip

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**Some courts have local rules which establish additional deadlines related to preparation of the AR. For example, Los Angeles Superior Court local rules set deadlines for a preliminary cost estimate if the agency prepares the record, preparation of a draft record index, and comments on the index.**

# Who Prepares the Administrative Record and Who Pays for It?

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- CEQA Lawsuits

- Costs

- ✦ Petitioners pay “**reasonable** costs or fees imposed for preparation of the record...”
    - ✦ Lead agency can refuse to release the record until petitioner pays the costs
    - ✦ Whoever prepares the AR shall **strive to do so at a reasonable cost** in light of the scope of the record
    - ✦ Recoverable costs include **staff time, paralegal time, and attorney time** **when shown to be reasonably necessary**
    - ✦ If City incurs record preparation costs, but is indemnified by real party project applicant, real party may be entitled to recover those costs



# Who Prepares the Administrative Record and Who Pays for It?

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- CEQA Lawsuits

- Costs (Continued)

- ✦ If Petitioner Elects to Prepare AR, lead agency **cannot recover** costs associated with reviewing “for completeness” as part of certification
    - ✦ Transcription costs for hearing transcripts prepared **AFTER the fact**, and not presented to decision makers, **are NOT recoverable** from petitioner
    - ✦ Agency CAN recover costs if petitioner’s attempt at prepare the AR is inadequate and incomplete, thus forcing the agency to complete (or supplement) the AR prior to certification

# Practice Tip

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## Some takeaways regarding record preparation:

- **Keep records organized during the administrative proceedings; this will make it easier and less costly to respond to a Public Records Act request**



# Practice Tip

(cont'd)

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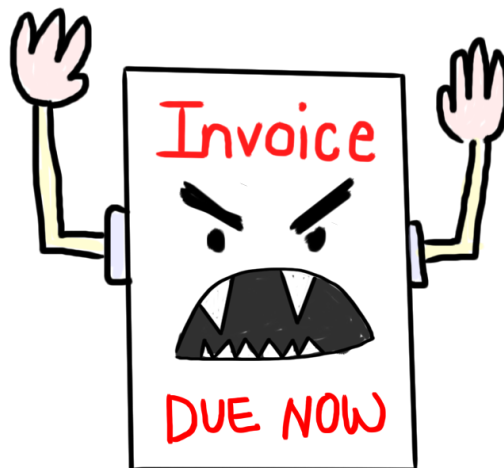
- **Consider whether transcripts of earlier hearings (planning commissions, etc.) should be prepared and presented to the final decision makers (for cost recovery purposes)**
- **Carefully document all costs related to preparing a record or supplementing petitioner's draft record; courts like costs documented concurrently with AR preparation**

# Practice Tip

(cont'd)

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- If agency is preparing 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!



# Who Certifies the Record?

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- Agency is ultimately responsible for certifying the AR as complete for all administrative mandate (and CEQA) records
- Certification attests to the accuracy of the documents included in the AR, and often includes language that the AR is complete
- Certification is typically signed by the City Clerk, or other official tasked with records management for the public agency

## **What is Properly Included In (or Excluded From) the Record?**

# An Upfront Word About the Importance of Good Record Keeping

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# An Upfront Word About the Importance of Good Record Keeping

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- Makes AR preparation easier and more efficient!
- Separate final documents from administrative drafts
  - *And dispose of such drafts if they are no longer necessary in the ordinary course of business, if allowed by the agency's records retention policies, and if no litigation hold is in place*
- Keep Attorney/Client and other privileged documents in a separate file
- Keep Confidential information (like CEQA archeological / tribal cultural resource information) in a separate file
- Applies to both paper documents AND electronic documents!!!



# An Upfront Word About the Importance of Good Record Keeping

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- Litigation Holds:
  - When litigation is “reasonably anticipated” there is a **duty to preserve evidence** – including electronically stored documents
  - “Reasonably Anticipated” can be unclear, but indicia include:
    - ✦ the filing of a Government Claims Act claim
    - ✦ public agency consideration of commencing litigation
    - ✦ threats of litigation at public meetings
  - Under these circumstances, parties must take affirmative steps to preserve potential evidence related to the lawsuit
  - Failure to preserve evidence can result in monetary or evidentiary sanctions
  - **Make sure routine electronic document deletion programs are disabled as part of litigation hold!!**


# What's in a Writ of Administrative Mandate Record?

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- Applicable ordinances, regulations or rules
  - A copy of the General Plan and any applicable Specific Plan
    - ✦ These documents also can be judicially noticed, but it is easier if they are in the record
- Staff reports and other documents providing analysis
- Resolutions or other documents memorializing the decision
- Transcripts and/or minutes from the hearing(s) required for decision

# What's in a Writ of Administrative Mandate Record?

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- PowerPoint presentation and other visual materials presented to decision makers (**in color if that is important to convey the content**)
  - 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**
  - **See Checklist A attached to the Paper!**
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# What's in a Traditional Writ Record?

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- There is no requirement for a record in traditional mandate cases
- But, where a legislative decision is being challenged (such as adoption of a specific plan), the “record of proceedings” will look a lot like a record in an administrative mandate case
- Be prepared for a petitioner who does not want a record but only wants to submit declarations and exhibits to the court
  - These may be cherry-picked documents and not tell the whole story – be prepared to provide the court with ALL relevant documents!

# CEQA Cases and Issues Specific to Them

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- Public Resources Code §21167.6(e) – lists specific items to be included in the AR
  - See Checklist B – attached to the Paper
  - (See the statute for the detailed list!)

## **Several Special Categories to consider:**

- **E-mails** – may fall within the catchall for “any other written material relevant to the... agency’s compliance with [CEQA] including ... all internal agency communications, including staff notes and memoranda....”
  - A record without any (or with very few) e-mails included will likely raise questions regarding completeness.

# CEQA Cases and Issues Specific to Them

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## Administrative Drafts

- AR should include “... any drafts of any environmental document, or portions that have been **released for public review**, and copies of studies or other documents relied upon in any [CEQA] document ...made **available to the public... or included in the respondent agency’s files on the project....**”
- Keeping admin drafts when no longer needed invites arguments over whether they should be in the AR
- File management can show administrative:
  - Drafts are not normally kept in the “ordinary course of business”
  - Are just a temporary step toward preparing final documents

# Practice Tip

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

# CEQA Cases and Issues Specific to Them

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- **Audio Recordings of Meetings for Which No Transcript is Prepared**
  - If there is no transcript, audio recordings are considered “other written material” and should be included in the AR.
  - **BUT** – if audio recordings are “other written material” why does it matter whether or not a transcript has been prepared?



# CEQA Cases and Issues Specific to Them

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- **Documents Referenced in (But Not Attached to) Written Comments**
  - Documents merely cited in a comment letter aren't bootstrapped into the AR... **except when they are!!**
  - Particularly relevant when comment letters include references to information available on websites.
  - Courts consider whether the citation is sufficient to consider the documents **“submitted to”** the lead agency.
    - ✦ Determination based on the amount of effort lead agency must expend to access the cited information.

# CEQA Cases and Issues Specific to Them

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**Document type:**

**Part of the AR?**

- Documents previously provided, and which commenter offers to provide again upon request

**YES**

# CEQA Cases and Issues Specific to Them

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## Document type:

## Part of the AR?

- 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

# CEQA Cases and Issues Specific to Them

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## Document type:

## Part of the AR?

- 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. Document is **directly accessible** via URL.

YES

# CEQA Cases and Issues Specific to Them

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## Document type:

## Part of the AR?

- Documents named in comment letters, referencing organization that created the document, but **without information** as to where the document may be available on the web with no offer to provide hard copies

NO

# Practice Tip

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**Agency staff who process comment letters should carefully review those letters for references to specific documents that are immediately accessible through the Internet, 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!)**

# CEQA Cases and Issues Specific to Them (Cont'd)

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- **Studies/Reports Referenced and Relied Upon in the CEQA Document**
  - Make sure the AR includes all studies and reports cited in the CEQA document
  - Staff should print them out and keep them in the file!

# CEQA Cases and Issues Specific to Them (Cont'd)

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- **Consultant/Subconsultant Documents**
  - First question – does the agency have “**actual or constructive possession**”?
  - Does the agency have the right to control the records, either directly or indirectly?
  - Contractual provisions will inform whether or not the agency has “possession” or the documents.
    - ✦ Broad agency “ownership of all documents” clauses suggest possession, and thus inclusion of consultant documents in the AR
  - If in the agency’s “possession” – **consider the catchall regarding internal agency communications / memoranda**



# Practice Tip

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**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.**

# CEQA Cases and Issues Specific to Them (Cont'd)

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- **Confidential Information (Trade Secrets and Tribal Cultural Resources)**
  - Keep separate files for confidential information!
  - Prepare confidential appendix if information will be presented to decision makers

# CEQA Cases and Issues Specific to Them (Cont'd)

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## Privileged Documents

- **Attorney/Client and Attorney Work Product Privileges**
  - Privileged documents should NOT be in the record!
- **Waiver of privilege if documents are shared with the applicant**
  - 2009 – *California Oak Foundation* case – common interest exception to the waiver doctrine allowed sharing of documents with applicant's counsel
  - 2013 – *Citizens for Ceres* case – common interest exception does NOT apply in administrative proceedings stage – only in litigation phase – assuming there is no dispute between agency and real party!

# CEQA Cases and Issues Specific to Them (Cont'd)

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## **Privileged Documents**

- **Deliberative Process Privilege:**
  - “reflects a concern that the quality of decision making suffers when the deliberative process is prematurely exposed to public scrutiny”
  - Protects creative debate and candid consideration of alternatives
  - Protects public from confusion from exposure of discussions before a final course of action is determined
  - Protects decision making by holding decision makers to account for actual decisions, not what they considered in the process

# CEQA Cases and Issues Specific to Them (Cont'd)

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- **Deliberative Process Privilege:**
- Test: whether “**the public interest in confidentiality clearly outweighs the interest in disclosure**”
- **Agency has the burden** of showing that the privilege applies
  - General statements of the policies underlying the privilege unlikely to justify invoking the privilege
  - **Provide evidence showing the specific interests in nondisclosure**

# Rules of Court and Organization of the Record

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- California Rule of Court 3.2205 governs the form and format of administrative records in CEQA lawsuits, and lays out a specific order for documents to appear in the record
- The parties also may stipulate, or the court on its own may order, that the documents be organized in a different way
- Often, a pure chronological order is a useful way to proceed
- Regardless of the organization, a detailed index must be placed at the beginning of the record – this will help you and the court!!

# Practice Tip

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**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.**

# Optional Concurrent Preparation of CEQA Administrative Record?

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- Public Resources Code Section 21167.2 – effective 1/1/2017
- Provides OPTION for concurrent record preparation
  - **Applicant** must request concurrent preparation in writing, **with agreement to pay all agency costs for preparation and certification of the AR**, within **30 days** after agency determination as to level of CEQA review (EIR, MND, ND)
  - **Agency** can grant the request within **10 days** of receiving the request, but **failure to respond constitutes denial**



# Optional Concurrent Preparation of CEQA Administrative Record?

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- Concurrent Preparation involves:
  - Timely posting documents on a web site
  - Include an advisory notice on the Draft EIR, Final EIR, MND, ND or other environmental documents regarding concurrent AR preparation
  - **Certification of AR within 30 days after filing a notice of determination!**
- **Option:** deny the request, but still strive for concurrent preparation without being subject to the more strict requirements in the statute?

# Litigation Related to the Contents of the Administrative Record

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- A petitioner who disagrees about the contents of the record may file a motion – either a motion to augment the record or, possibly, a motion to strike portions of 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.
- 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.

# Questions?

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