

DIRECTOR'S ORDER #88: DOCUMENTS AND OTHER MATERIALS NEEDED FOR LITIGATION

Approved: _____
Director

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Contents:

- I. What is the purpose of this Director's Order?
- II. Generally, what documents and other materials are needed for litigation? Do they have a collective name?
- III. Why is this collection of materials known as the administrative record so important?
- IV. How does this Director's Order relate to Director's Order #19: Records Management?
- V. When should the administrative record be compiled?
- VI. What should be included in the administrative record?
- VII. What types of materials other than paper documents should be included?
- VIII. What should not be included in the administrative record?
- IX. What should be done if there are questions as to whether an item(s) should be included?
- X. Who should compile the administrative record?
- XI. What about materials that may be privileged or otherwise subject to withholding?
- XII. How should the administrative record be organized?
- XIII. What is the authority for this Director's Order?

I. What is the purpose of this Director's Order?

The purpose of this Director's Order is to provide guidance and direction to NPS personnel who are called upon to compile documents and other materials associated with present or anticipated litigation.

II. Generally, what documents and other materials are needed for litigation? Do they have a collective name?

When decisions of the National Park Service are challenged in court, the reviewing court looks to the "information trail" documenting the Service's decision-making process and the basis for

final agency action. These documents and other materials are known collectively as the ***administrative record***. The administrative record should include all materials directly or indirectly considered by or available to NPS personnel involved in the decision-making process. Based on its review of the administrative record, the court will determine whether the NPS's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Administrative Procedure Act (APA), 5 USC 706(2)(A).

III. Why is this collection of materials known as the administrative record so important?

In the event of litigation, a Park Service employee will be designated to compile the administrative record for submission to the court. A thorough and complete administrative record is vitally important, as it allows the NPS to demonstrate to the court that the Service fully considered all relevant factors during the decision-making process. An incomplete record, on the other hand, can severely hamper the Service's ability to defend its decision by making it appear that the decision was not based on a well-reasoned consideration of all the important information. The requirement to provide an administrative record in the course of litigation comes from the APA (5 USC 551 et seq.).

IV. How does this Director's Order relate to Director's Order #19: Records Management?

The purpose of this Director's Order is very narrow – namely, as stated above, to provide guidance and direction to NPS personnel called upon to compile administrative records for purposes of present or anticipated litigation.

Director's Order #19: Records Management, and the Records Management Handbook, deal with the much broader topic of maintaining and providing access to *all* NPS records. "Records" are defined in the Federal Records Act of 1950 (44 USC 2101 et seq.) as

all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them. (44 USC 3301)

Thus, virtually every item to be included in the administrative record pursuant to the APA will also be a "record" within the meaning of the Federal Records Act, and must be filed, stored and retained in accordance with the provisions of Director's Order #19 and the NPS Records Retention Schedule approved by the National Archives and Records Administration.

Good recordkeeping in accordance with Director's Order #19 is mandatory for all Park Service personnel. It will also greatly simplify compilation of an administrative record for litigation purposes. See section V below.

V. When should the administrative record be compiled?

As mentioned in section IV above, good recordkeeping in accordance with Director's Order #19 is required of all NPS personnel, at all times. In those instances where the Service knows or reasonably foresees that a decision will be controversial and/or is likely to result in litigation, it should not wait until a lawsuit is filed to begin collecting the materials that make up the administrative record. Instead, for example, all relevant documents should be photocopied, and the photocopies collected and organized as the decision-making process unfolds. This will help ensure that the record as finally compiled and submitted to the court is complete and accurate. Even if such documents are not photocopied and collected, simply keeping a listing of them will be useful to whoever is ultimately called upon to compile the record.

VI. What should be included in the administrative record?

All employees who are involved in the decision-making process should anticipate the need for an administrative record and identify and safeguard all of the following materials (which, in the event of litigation, will be compiled by a designated employee):

Documents and materials prepared, reviewed, or received by NPS personnel and used by or available to the decision-maker, even though the final decision-maker did not actually review or know about such materials;

Communications the NPS received from other agencies and from the public, and any responses;

Materials that may later be removed from the record as privileged or otherwise subject to withholding;

Materials that favor alternatives to the NPS final decision, or express criticism of it. Items should *never* be withheld simply because they reflect negatively on the decision that was made;

Materials relating to both the substance and procedure of the decision-making;

Minutes or transcripts of relevant meetings;

Documentation of telephone calls and meetings, such as a memorandum to files or handwritten notes, unless they are personal notes (see below);

Relevant NPS policy guidance documents, such as Management Policies (2001), Director's Orders, reference manuals, guidelines, special directives, etc.;

Relevant scientific and technical information relied upon or available to the decision-maker, including reports, research papers, scholarly articles and studies; and

Relevant magazine and newspaper articles and books, relied upon or available to the decision-maker.

VII. What types of materials other than paper documents should be included?

The administrative record should *not* be limited to paper documents. Other means of communication or ways of storing or presenting information, such as computer discs, and microfilm and microfiche, should be included. Relevant e-mail correspondence should be stored in hard copy format with other pertinent documents as the correspondence progresses. Similarly, meetings and telephone calls during which options were weighed or decisions made should be documented by a memorandum to files, done as soon thereafter as possible for inclusion in the administrative record.

VIII. What should not be included in the administrative record?

The administrative record should *not* include:

Materials made after the decision;

Materials associated with, but not part of, the decision-making process;

Correspondence (including e-mail) in which the NPS action is discussed in a general way, but which does not reflect actual decision-making (e.g., communications between park staff whose work may be affected by the final decision but who are not themselves involved in the decision-making process);

Various versions of a document, i.e., “working drafts,” where the differences among the drafts reflect minor editing changes only. However, drafts with hand-written notes or changes from one version to the next which reflect the decision-making process should be included; and

Personal notes kept in the individual’s own files and not shared with others.

IX. What should be done if there are questions as to whether an item(s) should be included?

Putting together a good administrative record is complicated, and questions almost always come up as to whether a particular item belongs in the record. Following the guidance in this Director’s Order should help resolve many of those questions. Additional helpful information will be posted from time to time on the Office of Policy and Regulations webpage, at <http://www.nps.gov/policy>. As a general rule, it is better to err on the side of inclusion, rather

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than exclusion. If questions about administrative record requirements in general or any item(s) in particular remain, however, personnel should contact the Office of the Solicitor (SOL) for assistance.

X. Who should compile the administrative record?

As the decision-making process unfolds, NPS decision-makers themselves have lead responsibility to fully document their role in both the substance and procedure of the decision-making. Following the guidance of this Director's Order will be helpful in that regard. A decision-maker may designate another NPS employee to assist him/her in collecting and organizing the resulting documentation.

In the event of litigation, an employee will be selected to be responsible for compiling the administrative record. That individual should be responsible and careful, and must be prepared to provide an affidavit. The employee should keep a record as to (1) where he/she searched for materials, and (2) who was consulted in the process. In the course of conducting a thorough search, the employee should:

Search any NPS files relating to the final decision;

Contact all NPS program personnel involved in the final decision-making (including Washington and regional office personnel) and ask them to search the files under their control for any and all documents and other materials related to the Service's action;

Contact any non-program personnel who might have been involved, e.g., in the Office of Policy and Regulations or Office of Legislative and Congressional Affairs;

Search archives for documents and materials related to the final NPS decision if personnel involved in that decision are no longer with the NPS. Former employees may be contacted for guidance as to where to search;

Contact any contractors that may have been involved, and ask them to search their files for all materials related to the Service's action; and

Contact any other agencies that may have been involved in the decision-making process to be sure the record contains all the documents relied on by the NPS.

XI. What about materials that may be privileged or otherwise subject to withholding?

Privileged information is excluded from evidence because its disclosure would be harmful to a principle or relationship that society deems worthy of protection. For example, privileged status is accorded to confidential communications between attorney and client, physician and patient, etc. An administrative record file generally includes materials that will be withheld on the basis

of privilege. In the context of Federal agencies, permissible privileges include, but are not limited to, attorney-client, attorney work product, deliberative or mental processes, and executive. In addition, some statutes direct agencies to withhold sensitive information. Such statutes include the Archaeological Resources Protection Act of 1979 (ARPA), 16 USC 470aa—470mm; the Native American Graves Protection and Repatriation Act (NAGPRA), 25 USC-3001—3013; and the Privacy Act of 1974, 5 USC 552(b). In the event of litigation, such privileged or sensitive items will be removed or redacted. Nonetheless, the index of record will need to identify such items, state that they are being withheld, and give the basis for the withholding. SOL must review an administrative record for privilege before it is forwarded to the Department of Justice (DOJ) or any party to the litigation.

XII. How should the administrative record be organized?

Organize the materials in chronological order and/or by topic. Materials that do not fit together in chronological order may be separated by category, e.g., internal NPS policies, communications from the public, etc.

In the event of litigation, an attorney from SOL or DOJ should be given the opportunity to review the record for privilege, completeness and organization. The SOL or DOJ attorney may want to review documents and materials the NPS decided not to include in the administrative record. Once such reviews are completed,

It is generally useful to stamp or number each item.

A final index to the administrative record should be prepared. The index should identify each document by item number, and a brief description, e.g., “Minutes dated December 10, 1998 documenting November 30, 1998 public meeting.” If an item is being withheld on the basis of privilege or prohibition against disclosure, the index should state the privilege or prohibition.

The NPS employee charged with compiling the administrative record must certify it. If the record is not certified, it cannot be filed with the court. The language of the certificate should state how the employee has personal knowledge of the assembly of the record. Sample certificates are available from SOL and/or DOJ.

The DOJ attorney or an Assistant United States Attorney will determine how to file the administrative record with the court.

XIII. What is the authority for this Director’s Order?

Authority to issue this Director’s Order is contained in the National Park Service Organic Act (16 USC 1 – 4), and delegations of authority found in Part 245 of the Department of the Interior Manual (DM).

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As is the case with all components of the NPS directives system, this Director's Order is intended only to improve the internal management of the NPS, and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its departments, agencies, instrumentalities or entities, its officers or employees, or any other person.

----End of Director's Order----