ADMINISTRATIVE RECORD-KEEPING

Managing the Paper Storm

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What is the Administrative Record?

- Why does it matter?
- It’s all about decision making
National Environmental Policy Act

- Ensures informed agency decisions
- Informs the public
- NEPA is “procedural”
Judicial Review under NEPA

- Review may not occur until FONSI or ROD is issued
- Standard = “arbitrary and capricious”
- Agency must take a “hard look”
Administrative Record

- Information compiled by an agency during the decision-making process
- Includes EIS or EA, plus supporting documents, slides, communication
- Also includes public and agency input
Decisions Must Be Supported

- Decision maker to review the Administrative Record
- Agency must assemble and submit the Administrative Record to court
Supplementing the Record

- Review generally limited to the Administrative Record

- Limited exceptions:
  - If necessary to explain information in the Record
  - If the Record is incomplete
  - If agency acts in bad faith
Potential Problems

- Draft versus Final Documents
- Internal Deliberations
- Email, email, email!
Potential Problems (continued)

- Information submitted by the public or interest groups
- Use of consultants
- Multiple authors
Potential Problems (continued)

- Did I mention email?!!?
Case Study: I-65 to US 31W Connector

- Project Location
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- Project Location
- 2.3-mile new road and interchange with I-65
- Karstic Region
- Transpark Relationship
What makes this Project Special?

- Public controversy / relation with Transpark
- Threat of litigation
- Decided to prepare an EIS, not an EA/FONSI
- Project then ballooned in regard to:
  - Alternatives
  - Indirect and Cumulative Impacts Assessment
  - Section 106 Involvement
Which resulted in …

- Extra Studies
- Revised Reports
- Addendums
- Meetings
- Time Extensions – 2003-2010
- A/R: Files Gone Wild
The A/R for this project:

- Scanned in, or converted to a pdf, every document, news article, notes, etc, from 7 years
- We collected every email from everyone’s computer
- Organized by subject
- Created a spreadsheet of every file, cross-referenced and hyperlinked each
- One DVD — paperless
The A/R:
Bigger Picture

- APA – American Procedures Act of 1946
  - Litigation of NEPA projects occur under APA
  - Premise: Informed Public
  - Oversight of Agencies / Balance of Control

- Purpose of the A/R:
  - Ensure decision makers have complete information
  - Documents the analysis
  - Demonstrates compliance with NEPA and other laws
  - Provides record of responses to public comments

- What courts look at:
  - Arbitrary, Capricious, Abuse or Discretion of Power
  - Judges review is limited to the AR, unless there are glaring omissions
Use of the A/R:
- Reflects Disagreements
- “Discovery” by challengers is reduced
- Documentation of opponents’ views
- A/R closes when the ROD is signed

What happens with this information, before court:
- Federal Agency Legal Council sifts through it all
- Sorts relative vs. non-relative. Relative information=A/R
Bigger Picture

- What to include...
  - Information related to the agency’s decision
  - Information on alternatives rejected
  - Privileged and non-privileged information
  - Studies – all types, baseline, engineering, planning
  - Public Meeting / Hearings Comments, Responses, Minutes, Handouts, Exhibits, etc.
  - Memos, communications, emails
  - Agency and consultant files
  - Anything you relied upon
Case Study: Lessons Learned

- Get organized
- Keep the end in mind
- Emails, they stick around for a long time
- It takes the right personality to make an A/R excellent – someone who knows the process with an eye for holes
Case Study: Milton-Madison Bridge

- Easier said than done!
Case Study: Milton-Madison Bridge

- Three year bridge rehab/replacement project
- Led by KYTC, INDOT, FHWA KY, FHWA IN
- Adjacent to country’s largest National Historic Landmark District
- Inclusive, Collaborative, Transparent process driven by meetings with Project Advisory Group, public, agencies, consulting parties
- Accelerated schedule
How we started out

- Consultant scope of work:
  “An Administrative Record will be developed for KYTC and INDOT in compliance with NEPA”

- Project Set Up
  - Project email account to be copied on all internal correspondence
  - Quality Control Plan
  - Filing cabinet to house data, analyses, & documentation
  - Shared workspace on server for all files
  - Project Communication Protocol
What Changed

- In May 2009, FHWA requested a paper copy of the admin record – to be updated as the project progressed – that would be kept on file at the KY Division office.
Which resulted in …

- A set of binders, indexed and arranged chronologically, for each major involvement effort:
  - Project team meetings
  - Section 6002 Agency coordination
  - PAG coordination
  - Public communications
  - Section 106 consultation
  - NEPA checklist
  - Project Reports

- Record set up at a workstation within FHWA

- Regular updates — trips Frankfort to add pages
Lessons Learned: What worked

- Communicate needs and expectations up front
- One person needs to be responsible for maintaining records
- Version control is essential
- Cross-referencing and indexing makes an enormous dataset usable
- Electronic format allows for easier tracking and word search features
Lessons Learned: What worked

- Incentives and leadership keep a team motivated
Lessons Learned: Challenges

- Keeping up with the accelerated project pace
- Keeping up with changing project scope
- Stick to it: managers need to reinforce importance of following protocols throughout the life of the project