

Dredging and Environmental Issues:

A panel discussion of environmental issues and impacts to port redevelopment, deepening and widening, and dredging issues around the country.

Preparing Your Record for Legal
Challenges

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Overview

- ▶ **What is the Administrative Record?**
 - ▶ Why is it important to have a complete record
- ▶ **Constructing the Administrative Record**
 - ▶ Opportunities for Input
 - ▶ Compiling the Record
 - ▶ Identifying Documents for the Record
- ▶ **Litigation Considerations**
 - ▶ Filing the Index
 - ▶ Supplementing the Record
 - ▶ Public Records



What is the Administrative Record?

- ▶ “The complete administrative record consists of all documents and materials directly or indirectly considered by the agency.” *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993).
- ▶ “The administrative record is the paper trail that documents the agency’s decision-making process and the basis for the agency’s decision.” 1999 DOJ Memorandum
- ▶ “An administrative record is the paper trail that documents the decision-making process, the basis for the decision, and the final decision.” *Compiling an Administrative Record*, 2000 Mar-Army Law. 35 (Mar. 2000)



Why is it important to have a complete Administrative Record?

- ▶ “... the court shall review the whole record or those parts of it cited by a party...”
5 U.S.C. § 706
- ▶ “The focal point for judicial review of an administrative agency's action should be the administrative record. *Camp v. Pitts*, 411 U.S. 138, 142, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973). The role of the court is not to conduct its own investigation and substitute its own judgment for the administrative agency's decision. *Volpe*, 401 U.S. at 416, 91 S.Ct. at 823-24. Rather, the “task of the reviewing court is to apply the appropriate ... standard of review ... to the agency decision based on the record the agency presents to the reviewing court.” *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44, 105 S.Ct. 1598, 1606-07, 84 L.Ed.2d 643 (1985).

Pres. Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Engineers, 87 F.3d 1242, 1246 (11th Cir. 1996)(emphasis supplied)(hereafter “PEACH”)



Why is it important to have a complete Administrative Record?

- ▶ “If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.... The factfinding capacity of the district court is thus typically unnecessary.... [The court is] to decide, on the basis of the record the agency provides, whether the action passes muster under the appropriate APA standard of review.”

PEACH, 87 F.3d at 1246 (11th Cir. 1996)(quoting *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985)).



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Constructing the Administrative Record

- ▶ “Where litigation is likely, it is also very important to focus on record development through the entire process of decision-making.” EPA’s Action Development Process, Administrative Records Guidance (Sept. 2011)
- ▶ “The composition of an administrative record is left to the sound discretion of the relevant federal agency.” 2008 DOJ Memorandum
- ▶ Agency personnel with assistance of Agency attorney



Constructing the Administrative Record

Administrative Record will typically consist of:

- ▶ Notices
- ▶ Public comments/responses
- ▶ Draft documents (e.g. EIS)
- ▶ Final Documents
- ▶ Decision Document
- ▶ Memoranda
- ▶ Data
- ▶ Reports
- ▶ Analysis
- ▶ Articles
- ▶ Agency correspondence



Opportunities for Input

- ▶ Pre-application
- ▶ Application
- ▶ Requests for Information
- ▶ Any time you submit something to the agency, you are helping to build the record



Compiling the Record

- ▶ Agency responsibility to compile and file administrative record
 - ▶ Could be multiple agencies
- ▶ Consider submitting:
 - ▶ Information on your company
 - ▶ Expert analysis
 - ▶ Government statistics
 - ▶ Comments with explanations



Identifying Documents for the Record

▶ What issues will you face?

- ▶ Dredge & fill
 - ▶ Direct impacts
 - ▶ Seagrass/coral impacts
 - ▶ Indirect impacts
 - ▶ Spoil disposal
 - ▶ Water quality impacts
 - ▶ Species impacts
 - ▶ Historical sites



Identifying Documents for the Record

▶ What are the criteria for permit issuance?

- ▶ What documents are you using to demonstrate satisfaction of those criteria?
- ▶ USACOE 404(b)(1) guidelines- 40 C.F.R. Part 230
 - ▶ 230.10
 - ▶ (b) No discharge of dredged or fill material shall be permitted if it:
 - ▶ (1) Causes or contributes, after consideration of disposal site dilution and dispersion, to violations of any applicable State water quality standard;
 - ▶ (2) Violates any applicable toxic effluent standard or prohibition under section 307 of the Act;
 - ▶ (3) Jeopardizes the continued existence of species listed as endangered or threatened under the Endangered Species Act of 1973, as amended, or results in likelihood of the destruction or adverse modification of a habitat which is determined by the Secretary of Interior or Commerce, as appropriate, to be a critical habitat under the Endangered Species Act of 1973, as amended.



Litigation Considerations

- ▶ Filing record
- ▶ Ensuring complete record
 - ▶ Pre-decision
 - ▶ After litigation begins
 - ▶ Supplement
 - ▶ Extra-record review
 - ▶ 8 exceptions
- ▶ Proving the elements
- ▶ Countering comments
- ▶ FOIA





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Questions?

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