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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460**

Office of Public Affairs

November 16, 2017

Re: Freedom of Information Act Request No EPA-HQ-2017-004289

This letter is in reference to your Freedom of Information Act (FOIA) request received by the U.S. Environmental Protection Agency on January 25, 2017, in which you requested “A digital/electronic copy of the document: Creating and Managing Dockets: Frequently Asked Questions for EPA Action Developers” which is published internally for EPA employees at the ADP Library <http://intranet.epa.gov/adplibrary>.”

The Agency has concluded its search for records responsive to your request and is providing the requested document in full. You will soon be receiving an email from the FOIAonline system notifying you that the records are available for your review and the direct link thereto. EPA’s intranet links are being withheld and have been determined to be exempt from the mandatory disclosure requirements pursuant to FOIA Exemption 6 U.S.C § 522(b)(7) which protects information that if released would constitute a clearly unwarranted invasion of privacy.

This letter concludes our response to your request. You may appeal this response by email at [hq.foia@epa.gov](mailto:hq.foia@epa.gov), or by mail to the National Freedom of Information Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue. If you are submitting your appeal by hand delivery, courier service, or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, N.W., Room 6416J, Washington, DC 20001. Your appeal must be in writing, and it must be received no later than 90 calendar days from the date of this letter. The Agency will not consider appeals received after the 90-calendar-day limit. Appeals received after 5:00 pm EST will be considered received the next business day. The appeal letter should include the FOIA tracking number listed above. For quickest possible handling, the subject line of your email, the appeal letter, and its envelope, if applicable, should be marked “Freedom of Information Act Appeal.” Additionally, you may seek assistance from EPA’s FOIA Public Liaison at [hq.foia@epa.gov](mailto:hq.foia@epa.gov) or (202) 566-

1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD 20740-6001; email, [ogis@nara.gov](mailto:ogis@nara.gov); telephone, (202) 741-5770 or (877) 684-6448; or fax, (202) 741-5769.

If you have any questions concerning this response, please contact Candace White of my staff at 202-564-4308.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Nancy Grantham', with a long horizontal flourish extending to the right.

Nancy Grantham  
Acting Principal Deputy Associate Administrator

cc: Jonathan Newton

# EPA's Action Development Process

**Creating and Managing Dockets:  
Frequently Asked Questions for EPA Action Developers**



October 2011



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**1. What is the purpose of this document?**

The purpose of this document is to provide a reference for U.S. Environmental Protection Agency (EPA) action<sup>1</sup> developers when they are creating and managing EPA dockets for rules and other documents issued by the EPA. As indicated by the use of non-mandatory language such as “may” and “should,” it provides recommendations to EPA staff and does not confer any legal rights or impose any legally binding requirements on EPA or the public.

**2. Where can I get specific guidance on creating and managing dockets?**

EPA Regions and offices may provide additional program-specific docketing guidance. You can obtain copies of such guidance from your Regulatory Steering Committee (RSC) representative or your Regional Regulatory Contact (RRC).



**3. Who will use this document?**

This document serves as a tool for EPA staff, including program managers and action developers, who create and manage dockets. The guidance uses the term “you” to refer to the EPA rule writer or action developer.

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<sup>1</sup> As used in this document, the term “action” means rules, policy statements, risk assessments, guidance documents, models that may be used in future rulemakings, Reports to Congress that are statutorily mandated, and any other agency activity for which a public docket is created. In this document, the terms “action” and “Agency action” are used in their broadest sense and are not limited to “action” or “Agency action” as those terms may be defined in statutes.

#### **4. What is a docket?**

A “docket” is a collection of documents made available by an agency for public viewing often associated with an opportunity for public comment. EPA’s dockets consist of materials used in developing a particular rulemaking or other action issued by the agency. Note that a docket and an administrative record are not necessarily the same. See EPA’s *Administrative Records Guidance, October 2011* for more information [REDACTED]

#### **5. How is a docket made available for public viewing?**

Dockets may be available either electronically on Regulations.gov (<http://www.regulations.gov>) or in paper form at EPA’s Docket Centers or other locations specified by EPA. The Federal Docket Management System (FDMS), which is publicly available at Regulations.gov, serves as EPA’s official electronic public docket and online comment system. Regulations.gov does not provide access to documents that contain confidential business information, copyrighted materials or other protected information, audio video material, oversized printed material, or other various physical items.

Most EPA Headquarters dockets are available at the EPA Docket Center located at EPA’s Federal Triangle Offices. Please note that the Office of Pesticide Programs Public Regulatory Docket is located in Arlington, Virginia, not Washington, DC. More information concerning public access to docket materials may be found at <http://www.epa.gov/dockets>. Regional dockets may be accessed electronically at Regulations.gov or at varying regional locations.



Note that a docket is not the only way to make materials available to the public. Unless there is a specific legal requirement to create a docket for a particular action or category of actions, EPA may make materials available to the public through other means such as posting them on the agency's Internet site or by making them available for inspection by appointment. (See Question 9 for more detailed information on specific legal requirements.)

**6. Where can I go for additional information on how to create a docket?**

In order to create a docket, you must first contact your Program Office or Regional Docket Manager. A list of Docket Managers, additional information about EPA's Docket Center, and procedures for creating a docket for your rulemaking or action may be found on the FDMS Informational webpage [REDACTED]. If you need further assistance with your docket, you can send an email to [fdms@epa.gov](mailto:fdms@epa.gov), or contact your RSC representative or RRC for direction when ready to create your docket.

**7. What is a general docket?**

EPA creates dockets for an array of non-rulemaking actions or documents on which public comment may or may not be sought. EPA refers to such dockets as "general dockets." For example, EPA may be required by statute or regulation to solicit public comment on a range of non-rulemaking actions. These actions include, for example, requests for public comment on proposed collections of information under the Paperwork Reduction Act, proposed settlements and agreements in litigation, draft permits, and various types of approvals for state and tribal programs.

EPA also frequently solicits public comment on other materials of a non-rulemaking nature even though there may be no legal requirement to do so (e.g., Notices of Availability for reports, strategies, risk assessments and other scientific information, guidance documents, and requests for public input on publications in development).

Dockets for actions other than rulemakings contain materials relating to the development and issuance of those actions. Whether a docket is created, and the docket contents for such actions, may vary depending on the type of action being taken and the purpose of the solicitation of comment. For some types of actions, such as the OMB approval process for collections of information under the Paperwork Reduction Act, the applicable statute or regulations may specify the materials to be made available to the public. In the absence of specific docketing requirements, you may refer to the guidelines for rulemaking dockets in this guidance, or consult your RSC representative, your RRC, or your Office of General Counsel (OGC) or Office of Regional Counsel (ORC) attorney.

## **8. What is a rulemaking docket?**

A rulemaking docket typically contains materials relating to each stage or phase in the development of a rule. EPA's rulemaking dockets include paper and electronic documents generated in connection with proposing, amending, repealing, or promulgating a rule.

The rulemaking docket generally contains the documents that form the basis for EPA's decision. EPA staff should assure that these materials are available to the public either through the docket or through other appropriate means. With respect to dockets made available for proposed rules, if a proposed rule relies on materials that are not placed in the docket,

commenters who cannot get access to the materials may question whether public notice was adequate.

**9. What statutes and regulations contain specific provisions regarding EPA rulemaking dockets?**

Docketing requirements can vary according to the statute under which they are written. Specific docketing requirements apply to certain actions under section 307(d) of the Clean Air Act (CAA) and section 411 of the Toxic Substances Control Act (TSCA). If you are developing an action under either of these provisions, you should consult with your program office RSC representative, RRC, or your OGC or ORC attorney. Briefly, these requirements relate to creating a docket, docket contents and other aspects of docketing. For rules subject to these provisions, section 307(d)(2) of the CAA and section 411(b) of the TSCA require EPA to establish a rulemaking docket no later than the date of the proposed rule. Among other things, the provisions address the location of dockets, public availability of docket materials, and the materials to be included in dockets. CAA §307(d)(6)(C) and TSCA § 411(d)(3) specify that the “promulgated rule may not be based . . . on any information or data which has not been placed in the docket as of the date of such promulgation.” CAA §307(d)(4) and TSCA § 411(c)(2)(B) contain specific docketing requirements for drafts of proposed and final rules and accompanying documents. Additionally, specific docketing requirements contained in EPA regulations at 40 C.F.R. § 25.10 direct EPA to include copies of public comments and any agency responses in a docket for rulemakings under the Clean Water Act, Resource Conservation and Recovery Act, and the Safe Drinking Water Act.

**10. What executive orders contain specific provisions regarding rulemaking dockets?**

For any rulemaking sent to the Office of Management and Budget (OMB) for review under Executive Order 12866 (“Regulatory Planning and Review”), the Order directs the agency to identify and make available to the public (1) the draft regulation and certain other documents sent to OMB for review, such as certain analyses and assessments; (2) the substantive changes between the draft regulation sent to OMB for review and the regulation subsequently announced; and (3) the changes made at the suggestion or recommendation of OMB. EPA implements these provisions by placing the materials in the rulemaking docket. For additional information see the guidance document “Compliance with E.O. 12866 Docketing Requirements.”<sup>2</sup>

**11. What should be included in a rulemaking docket?**

The documents in the rulemaking docket may include, but are not limited to, the following items:

**Regulatory Text Documents, such as:**

- Advance notice of proposed rulemaking.
- Proposed rule.
- Notice to extend or reopen the comment period.
- Final rule.
- Direct final rule.
- Notice of availability, or notice of data availability.
- Information collection request.

**Background Documents, such as:**

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<sup>2</sup> E.O. 12866 and this guidance document can be found at [REDACTED]

- Relevant technical documents and factual information (e.g., data files, studies and analyses, graphs, charts; or technical resource documents).
- Guidance manuals and directives.
- Contractors' reports containing information relevant to the rulemaking; and/or other reports containing relevant information, such as trip reports.

[Note: Background documents generally should not include pre-decisional, deliberative materials. See Question 12, below, for further information].

**Information received from members of the public, such as:**

- Lists of participants in external group meetings regarding the rulemaking.
- Summaries of relevant information regarding the rulemaking received during external group meetings.
- Records of communications containing relevant information from members of the public, including summaries of telephone conversations or other contacts containing information relevant to the rulemaking.
- Redacted versions of documents from members of the public containing confidential business information (CBI) or redacted versions of other documents containing information whose disclosure is protected by statute. [Note: Although information received from other federal agencies may sometimes be included in the docket, pre-decisional deliberative communications from other federal agencies generally should not be docketed unless specifically required by statute, regulation or Executive Order. See Question 15 for further details.].

- Materials related to public hearings or meetings including transcripts or summary minutes, lists of speakers or attendees, and hearing or meeting briefing materials such as agendas and handouts.
- Copies of comments regarding a proposed rule or notice received from members of the public (whether during or after the applicable comment periods) and attachments submitted with those comments.
- Response to comments.

**Supporting materials for statutory and Executive Order reviews, such as:<sup>3</sup>**

- Initial and final regulatory flexibility analyses prepared under the Regulatory Flexibility Act or documentation supporting the factual basis for a certification of no significant economic impact on a substantial number of small entities.
- Documentation of any consultations or analyses under the Unfunded Mandates Reform Act and other relevant statutes and Executive Orders.
- E.O. 12866 materials documenting inter-agency review, if applicable, as discussed in Question 10.
- Supporting materials for any collection of information for which comment is being sought under the Paperwork Reduction Act.

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<sup>3</sup> For a list of applicable administrative statutes, executive orders, and EPA policies, go to EPA's Regulatory Development website at [\[REDACTED\]](#).



Because these types of materials document the agency's internal decision-making process prior to the agency's final decision, rather than providing support for the final decision, they are generally excluded from the docket. [Note: One general exception is that the rulemaking docket does include the pre-decisional deliberative materials docketed under the specific statutory and executive order provisions discussed under Questions 9 and 10, above.]

**14. What should I do if I include something in the docket that shouldn't be there?**

If a document is mistakenly placed into the docket and you believe it should be removed because it contains pre-decisional deliberative material or for other reasons, you should notify the Docket Center and consult your OGC or ORC attorney. The Docket Center has a form that you will need to fill out and have signed by your manager and your OGC/ORC attorney. On the form you will explain why the document is being withdrawn from the docket. That explanation will be placed in the docket to explain why the document is no longer available.

**15. What if a "pre-decisional" document contains factual information that helped to form the basis of a final decision?**

In the development of an agency action, the factual information that forms the basis for the final decision, or a necessary justification for a policy decision that is reflected in the rule, should not be contained solely in a pre-decisional deliberative document. However, in unusual cases, a pre-decisional deliberative document (such as an internal memo or a document labeled "draft") may be the only available document that contains factual information forming the basis of a final decision or that provides a necessary justification for a policy decision. If you believe that this may be the case, you should consult with your OGC or ORC attorney and your



management before proceeding. In such cases, it is highly preferred that the pre-decisional deliberative material be redacted from the document, and the redacted document be placed in the docket without the pre-decisional deliberative material. If the pre-decisional deliberative material cannot be redacted, you should write a separate document to record the information for the docket rather than docketing a document that is deliberative in nature. If the pre-decisional deliberative material cannot be redacted and you are unable to write a separate document, and you therefore need to place in the docket a document containing pre-decisional deliberative material, you may want to attach a cover note explaining its relevance.

**16. How are internal comments for a rulemaking handled?**

Internal comments on a rulemaking from EPA offices or Regions are generally considered internal agency documents, not public comments. They should be sent directly to the appropriate EPA contact rather than to a public docket. As indicated above if these documents contain factual information relied on by EPA, that information should be segregated or recorded in a separate document for placement in the docket.

Informal staff notes, such as those taken by EPA staff at a meeting, generally are not included in the docket unless they contain information relevant to the decision that is not contained in other documents. A succinct 'Note to Docket' from the project manager, or appropriate supervisor is a good way to capture information from meetings, telephone calls, and other contacts with outside parties, rather than relying on informal staff notes.

**17. What about comments from other federal agencies?**

Pre-decisional deliberative documents shared between EPA and other federal agencies generally should not be docketed unless a statute, regulation, or Executive Order directs the agency to include these materials in the docket. See Question 10, above, for a discussion of these provisions. If a document that is deliberative in nature contains relevant information relied on by the agency, that information should be recorded in a separate document for the docket.

In some circumstances, the docket may receive communications from another federal agency that were not intended as public comments, but rather as pre-decisional and deliberative, interagency communications. If the comment was intended to be pre-decisional and deliberative, it should be excluded or withdrawn from the docket and redirected to the appropriate EPA office. If the other agency's intent was to submit a public comment to the docket, the communication should be included in the docket as a public comment. You may, however, want to contact that agency in order to ensure that it did not inadvertently include any pre-decisional deliberative material in its comments.

**18. How do I treat documents that are protected by statute?**

Materials whose disclosure is protected by statute generally should not be included in the docket. You should consult your OGC or ORC attorney before placing such materials in the docket. Documents containing confidential business information (CBI) and other materials whose disclosure is protected by statute should be listed in the index to the docket, but the protected materials should not be placed in the docket. For documents containing CBI only in part, a redacted version of the document (the non-CBI portions) may be placed in the docket.

**19. What is the relationship between the supporting documents created for the final rule and those created for the proposed rule?**

Under section 553 of the Administrative Procedure Act (APA), a proposed rule must provide notice to the public that is sufficient to inform them of either the substance of the proposed rule or the subjects and issues under consideration by the agency. The proposed rule *Federal Register* notice together with supporting documents included in the docket should provide sufficient detail and rationale to permit interested parties to comment meaningfully. Note that CAA § 307(d) and TSCA § 411 contain specific requirements for proposals.

Supporting documents for the final rule include the materials that the agency directly or indirectly considered in making the decision, including the supporting documents for the proposed rule and the additional documents considered after the proposal. If portions of a final supporting document supersede statements in a supporting document created for the proposed rule, the final supporting document should make clear which positions have been changed or updated.

**20. What is an administrative record?**

A docket and an administrative record are not necessarily the same. See EPA's *Administrative Records Guidance, October 2011* ( [REDACTED]

[REDACTED]

**21. Why is the administrative record important?**

See EPA's *Administrative Records Guidance, October 2011*

[REDACTED]

**22. What is the relationship between the docket and the administrative record?**

In general, EPA's policy is to place in the docket the materials that provide the basis for the agency's decision. In turn, the documents that provide the basis for the agency's final decision are those that would be included in the "administrative record." Accordingly, your docket generally should contain documents that would be included in the administrative record. A docket and an administrative record are not necessarily the same, though. See EPA's *Administrative Records Guidance, October 2011* for more information

).

**23. Will a docket and administrative record have the same sets of documents?**

Unless a statute or regulation provides otherwise, the docket and the administrative record may contain slightly different sets of documents. Under some circumstances, some of the documents placed in the docket would not be included in the administrative record. For example, if the docket contains late comments received after the comment period, the administrative record should only include late comments if EPA considered the late comments.

**24. When would a document be excluded from the administrative record, but remain in the docket?**

Although generally included in the docket, E.O. 12866 materials documenting inter-agency review discussed in response to Question 10 are not included in the administrative record because these materials are considered pre-decisional and deliberative. CAA § 307(d)(7)(A) and

TSCA § 411(e) specifically exclude interagency review materials from the administrative record for actions subject to these provisions.

**25. What is an example of a document that may be in the administrative record and excluded from the docket?**

Under most EPA statutes, the administrative record may include documents that the decision-maker relied on in making the final decision, even if the documents were not physically placed in the docket at the time the rule document was signed. For example, a report cited in a final rule preamble and relied on by the decision-maker may be part of the administrative record even if it was not placed in the docket. In contrast, certain specific administrative record requirements apply to actions under CAA § 307(d) and TSCA § 411. Under these statutory provisions, the promulgated rule may not be based on any information which has not been placed in the docket. Generally, this means, that as of the date the final rule is signed, all materials that make up the administrative record for a rule issued under CAA § 307(d) or TSCA § 411 must be placed in the docket. See EPA's *Administrative Records Guidance, October 2011* for more information [REDACTED].

**26. When are documents required to be in the docket?**

The timing of placement of documents in the docket depends on the statutory authority under which the rule is being promulgated. While rules that are promulgated under section 307(d) of the Clean Air Act or 411 of the Toxic Substances Control Act have very specific docketing requirements, rules promulgated under other statutory authority have few docketing requirements.

- Statutory Requirements
  - CAA 307(d) and TSCA 411 rules: For proposed rules, all information and data upon which the proposed rule relies must be placed in the docket by the date of publication of the proposal. For final rules promulgated under these authorities, **all** information or data upon which the rule is based, in whole or in part, must be in the docket as of the date of promulgation. Consult with your OGC attorney to determine the “date of publication” or the “date of promulgation” for your rule.
  - Other rules: Generally, for other rules the only statutory docketing requirement is found in section 206 of the E-Government Act of 2002, which requires agencies to “ensure that a publicly accessible Federal Government website contains electronic dockets for rulemakings conducted under section 553 of the APA. Those electronic dockets must include all public comments submitted during the public comment period and other materials that the agency either by rule or practice includes in the rulemaking docket.
  - E.O. 12866: After the regulatory action (ANPRM, NPRM, or the final rule) is published in the *Federal Register*, the EO requires the agency to make the information described in Section 6(a)(3)(E) of the EO available to the public. (See FAQ #10) We do that by placing the information in the rulemaking docket. Although not required by the EO, it is EPA policy to place these documents in the docket prior to publication.

27. **Based on the stage of my action, is there a specific time at which my docket should be complete?**

Yes, generally, you should follow these guidelines:

- ANPRM: Documents that the public needs to review in order to provide meaningful comments should be placed in the docket by the date the ANPRM is published in the *Federal Register* or soon thereafter.
- NPRM: For CAA 307(d) and TSCA 411 rules, all information and data upon which the proposed rules relies must be placed in the docket by the date of publication of the proposal. Consult your OGC attorney to determine the “date of publication” for your rule. For all other rules, documents that the public needs to review in order to provide meaningful comments should be placed in the docket by the date the NPRM is published in the *Federal Register* or soon thereafter.

Failure to make documents available to the public in a timely manner could result in a challenge to the final rule on the basis that the public was not provided with sufficient information to allow for meaningful comments.

- Final Rules: For rules under CAA 307(d) and TSCA 411, documents and other information that the agency based the rule on must be placed in the docket no later than the date of promulgation.

For other rules, there is no requirement that documents and other information be placed in the docket before promulgation. For all rules, it is important that all documents that the agency considers or relies on in developing the rule, including the response to comments document, be completed prior to signature, even if they are placed in the docket at a later time. This is because we can only include in the administrative record for the rule documents that were in existence at

the time of signature. Documents that are completed after signature cannot be included in the administrative record and, therefore, will not be considered by the court if the rule is challenged.

**28. When should I have my administrative record completed?**

See EPA's *Administrative Records Guidance, October 2011*

[REDACTED]

**29. How do I determine if my docket is complete?**

Your docket is complete when every item cited in the *Federal Register* documents associated with the rulemaking is either included or generally accessible to the public in such a way that public notices and access are adequate (such as through widely available publications). Before you exclude cited items from the docket you should check with your OGC or ORC attorney.

**30. What are my other responsibilities for my docket?**

You should ensure:

- Your docket is in good condition. If submitting paper copies, make sure that pages are not illegible or crooked, since they will be copied. If possible, do not submit loose-leaf or spiral binder items (automatic feeders or copiers do not feed such papers).
- You used the proper formatting for your docket. The preferred format for electronic docket material files is PDF Searchable Image. This type of PDF adds a text layer below the image, enabling full text searchability.



If you believe that changes should be made to a document that has already been made available to the public in a docket, consult your docket staff and OGC or ORC attorney regarding the approval process for revising, removing or replacing the document.

### **31. How are public comments handled?**

Individuals submit public comments on a proposed rulemaking, or other document as discussed in Question 7 under “general dockets” to the EPA Docket Center, either through Regulations.gov or by other methods, such as mail, email, facsimile or hand delivery. Commenters who use Regulations.gov submit their comments online directly to the docket they select. Public comments are received, indexed, and incorporated in the appropriate docket file by EPA Docket Center staff. Comments submitted electronically to the rulewriter directly, instead of the EPA Docket Center, are forwarded to the appropriate docket manager in the EPA Docket Center. Hard copy comments sent to the rulewriter directly are sent via interoffice mail to the Docket Center, or arrangements can be made to pick them up at the EPA Docket Center.

### **32. How does the public view my “Docket?”**

The public can use the Internet to access docket materials available electronically in Regulations.gov. Individuals can also view and copy documents at the EPA Docket Center. For current information on docket location, telephone numbers and hours of operation, go to <http://www.epa.gov/epahome/dockets.htm>.

It is important to include EPA’s procedures regarding access and availability of docket materials in the Supplementary Information section of your *Federal Register* document. Templates for preparing this section of your document can be found in the “Introductory

Templates” and “Non-Rulemaking Notices” sections of this Intranet page:

[REDACTED]

### **33. Where can I get more information on docketing?**

For more information on how to create your docket, please visit the FDMS information website: [REDACTED]. If you need information on a docket already created and to which you have access you may visit: <http://www.fdms.gov>. For information on all publicly available dockets, you may visit: <http://www.regulations.gov>.

If you have specific questions on this guidance and the information contained here, you may consult your program office RSC representative or RRC, your OGC or ORC attorney, or your Program Desk Officer in the Regulatory Management Division of EPA’s Office of Policy. For a list of these contacts, you may visit the Action Development Process Library website:

[REDACTED].