

# COMMENT

## THE APA AS AN ENVIRONMENTAL LAW

BY

ROSS A. STANSBERRY\*

*The Trump Administration took office with an environmental agenda focused on rolling back regulations promulgated by the Obama Administration. However, the Administrative Procedure Act (APA) has repeatedly stalled the Administration's rushed deregulatory agenda because the Administration failed to satisfy the APA's requirement to provide a reasoned explanation for its decisions. This is not the first time the APA has served as a roadblock to deregulatory administrations. The Bush Administration suffered its own setbacks due to noncompliance with the APA. This Comment analyzes the APA's requirement for a reasoned explanation and draws parallels between the Trump and Bush Administration's failures. The Comment also provides strategies administrations can use under the APA for resilient environmental rulemaking and effectively reversing the rules of their predecessors, as well as strategies for litigants seeking to challenge an administration's environmental policy reversal.*

I.	INTRODUCTION.....	806
II.	APA REQUIREMENTS FOR POLICY REVERSALS.....	809
	A. <i>Inadequate Explanation: State Farm</i> .....	810
	B. <i>Adequate Explanation: Fox</i> .....	814
III.	PROVIDING A REASONED EXPLANATION IN ENVIRONMENTAL POLICY REVERSALS.....	817
	A. <i>The Bush Administration: The Tongass Exemption</i> .....	818

---

\* J.D. cum laude Lewis & Clark Law School, 2019, member of the Cornelius Honor Society; B.S. University of Tennessee, 2014. This Comment received the Bernard F. O'Rourke Award from Lewis & Clark Law School's environmental, natural resources, and energy law faculty. The Author gives his sincere thanks to Professor Michael Blumm for the inspiration for this Comment and helpful input and guidance through its completion.

B.	<i>Trump Administration</i> .....	822
1.	<i>Arbitrary and Capricious Delay or Suspension</i> .....	822
a.	<i>The Chemical Disaster Rule</i> .....	822
b.	<i>The Methane Waste Prevention Rule</i> .....	825
2.	<i>Arbitrary and Capricious Reversal: The Keystone XL Pipeline</i> .....	828
IV.	STRATEGIES FOR RESILIENT DECISION MAKING AND CHALLENGING REVERSALS .....	831
A.	<i>Making Enduring Decisions</i> .....	831
B.	<i>Reversing Course</i> .....	833
C.	<i>Challenging Policy Reversals</i> .....	835
V.	CONCLUSION .....	836

## I. INTRODUCTION

In a familiar pendulum swing between changing administrations,<sup>1</sup> the Trump Administration took office promising to roll back environmental regulatory standards promulgated under the Obama Administration.<sup>2</sup> The Trump Administration has sought to fulfill this promise by setting its sights on more than eighty environmental policies and regulations for rollback.<sup>3</sup> The judicial branch has enjoined some of these regulatory rollbacks and permit decision reversals because of the Trump Administration’s failure to comply with the Administrative Procedure Act<sup>4</sup> (APA). Courts have found the Administration violated the APA’s prohibition on arbitrary and capricious agency action when suspending the 2017 Chemical

---

<sup>1</sup> See, e.g., RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 239–42 (2004) (describing the Bush Administration’s attempts to reverse environmental policy initiatives of the Clinton Administration); Kathryn A. Watts, *Proposing A Place for Politics in Arbitrary and Capricious Review*, 119 *YALE L.J.* 2, 9–10 (2009) (describing the Obama Administration’s intention to move away from the Bush Administration’s deregulatory approach toward more proactive regulation). See generally Michael C. Blumm, *The Bush Administration’s Sweetheart Settlement Policy: A Trojan Horse Strategy for Advancing Commodity Production on Public Lands*, 34 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,397 (2004) (discussing how the Bush Administration “signaled a sharp break from the conservationist policies of the Clinton Administration” by settling lawsuits brought by commodity interest groups and promising to adopt reforms advocated by those groups); Patrick L. Aitchison, *Examining the Bush Administration’s Record of Rulemaking Reversals in Environmental and Natural Resources Law: Does NEPA’s “Hard Look” Give Teeth to State Farm’s “Reasoned Analysis”?* (May 2009) (unpublished comment) (on file with author) (providing examples of the Bush Administration’s rulemaking reversals and drawing lessons for more effective reversals by the Obama Administration).

<sup>2</sup> See Justin Worland, *Donald Trump Promises to Cut Regulation on ‘Phony’ Environmental Issues*, *TIME* (May 26, 2016), <https://perma.cc/ZUS9-75MT> (reporting on a speech where then-presumptive-nominee Trump gave “a laundry list of commitments to radically change the trajectory of federal energy and environmental policy”).

<sup>3</sup> See Nadja Popovich et al., *83 Environmental Rules Being Rolled Back Under Trump*, *N.Y. TIMES*, <https://perma.cc/5DRX-REKZ> (last updated June 7, 2019) (listing environmental rollbacks completed, in progress, and failed).

<sup>4</sup> 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2012); see Juliet Eilperin, *The Trump Administration Keeps Losing Environmental Court Cases*, *WASH. POST* (Aug. 18, 2018), <https://perma.cc/7JTZ-N3AX> (listing some of the Administration’s court losses).

Disaster Rule,<sup>5</sup> suspending the 2016 Methane Waste Prevention Rule,<sup>6</sup> and reversing course in the State Department's 2017 decision to approve the Keystone XL Pipeline permit.<sup>7</sup> These judicial hang-ups demonstrate the challenges arbitrary and capricious review under the APA imposes on administrations seeking to suspend or reverse administrative decisions of their predecessors—particularly those administrations pursuing an accelerated deregulatory agenda.

This is not the first time courts have stymied or even stopped portions of an administration's agenda because of its failure to comply with the APA. The Bush Administration attempted a similarly ambitious deregulatory agenda when it took office after the Clinton Administration.<sup>8</sup> Like the present deregulatory efforts, the Bush Administration faced trouble when it sought to delay or roll back the previous Administration's environmental regulations, in part because the Bush Administration failed to follow the APA's procedural requirements or meet the substantive requirements of the arbitrary and capricious standard.<sup>9</sup> Given the current state of political polarization on environmental issues<sup>10</sup> and the frequent occurrence of "midnight regulation,"<sup>11</sup> administrations will continue to face problem of how to effectively undo the work of their predecessors.

Generally, deregulatory administrations have run into two kinds of problems of APA non-compliance: either 1) the suspensions of a previous administration's

---

<sup>5</sup> Air All. Houston v. Env'tl. Prot. Agency, 906 F.3d 1049, 1069 (D.C. Cir. 2018) (holding the Environmental Protection Agency's (EPA) suspension was arbitrary and capricious because it had "not engaged in reasoned decisionmaking"); see also Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act (Chemical Disaster Rule), 82 Fed. Reg. 4594 (Jan. 13, 2017) (final rule).

<sup>6</sup> California v. U.S. Bureau of Land Mgmt., 277 F. Supp. 3d 1106, 1122–23 (N.D. Cal. 2017) (concluding the Bureau of Land Management's reliance on the costs of the prior administration's rule without considering the benefits was arbitrary and capricious); see also Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule, 81 Fed. Reg. 83,008 (Nov. 18, 2016) (final rule).

<sup>7</sup> Indigenous Env'tl. Network v. U.S. Dep't of State, 347 F. Supp. 3d 561, 583–84 (D. Mont. 2018) (concluding the government failed to provide a reasoned explanation for its policy change from the previous permit denial).

<sup>8</sup> See LAZARUS, *supra* note 1, at 239 ("The [Bush] administration sought to reverse almost all of the major environmental initiatives promoted . . . under the Clinton administration.").

<sup>9</sup> See, e.g., Nat. Res. Def. Council v. Abraham, 355 F.3d 179, 206 (2nd Cir. 2004) (finding the Department of Energy's delay of a Clinton-era rule for efficiency of central air conditioners violated the APA because of lack of notice and comment); Organized Vill. of Kake v. U.S. Dep't of Agric., 795 F.3d 956, 969 (9th Cir. 2015) (concluding the Bush Administration's decision to allow an exemption from roadless rule was arbitrary and capricious for not providing a "reasoned explanation" for the change from previous decision not allowing the exemption). See generally Aitchison, *supra* note 1, at 9–31 (detailing a selection of the Bush Administration's environmental rulemaking reversals).

<sup>10</sup> See LAZARUS, *supra* note 1, at 238–39 (discussing the growing trend of political polarization around environmental issues); cf. Michael C. Blumm & Olivier Jamin, *The Trump Public Lands Revolution: Redefining "the Public" in Public Land Law*, 48 ENVTL. L. 311, 312–14 (2018) (detailing a selection of the Trump Administration's environmental policy reversals affecting public land law which started shortly after taking office).

<sup>11</sup> See generally Jack M. Beerermann, *Presidential Power in Transitions*, 83 B.U. L. REV. 947 (2003) (discussing the issue of "midnight regulation"). The term "midnight regulations" refers to presidential action at the end of an outgoing president's term. *Id.* at 948. Professor Beerermann notes that "[t]he increase in regulatory activity at the end of presidential terms has been well-documented going back to at least 1948." *Id.* at 949.

rules violated APA requirement to provide adequate notice and comment,<sup>12</sup> or 2) when reversing the rule of a previous administration, the agency under the new administration failed to provide a “reasoned analysis” to justify its reversal.<sup>13</sup> This Comment focuses on the reasoned analysis requirement, although the notice and comment requirement has also proven to be troublesome for the Trump Administration.<sup>14</sup>

The Supreme Court elaborated on the “reasoned analysis” requirement in the 1983 case of *Motor Vehicle Manufacturer’s Association of the U.S., Inc. v. State Farm Mutual Auto Insurance Co.*<sup>15</sup> (*State Farm*) and the 2009 case of *Federal Communications Commission v. Fox Television Stations, Inc.*<sup>16</sup> (*Fox*). In its review for reasonable analysis, the Court has considered whether the agency displayed awareness that it is changing position, showed that the new policy is permissible under the statute, believed the new policy is better, and provided good reasons for the new policy that include “a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy.”<sup>17</sup> While what satisfies the requirement for a reasoned analysis is arguably elusive,<sup>18</sup> this Comment explains the Court’s focus in the above-cited cases and explores these issues in environmental cases originating in administrations’ changing environmental (de)regulatory priorities.

This Comment analyzes the role of the APA in environmental deregulation, focusing on cases where administrations have failed the APA’s notice and comment or reasoned analysis requirements and presents some lessons learned from these failures. The Comment uses failure to meet the reasoned analysis requirement to provide lessons for agencies to create resilient policies or successfully reverse the efforts of their predecessors. Part I begins by providing background on the back-and-forth policy changes between administrations, introducing the problems those administrations faced attempting to reverse the regulations and policies of their predecessors. Part II explains the APA notice and comment requirements and explores the *State Farm* and *Fox* cases establishing the

---

<sup>12</sup> See 5 U.S.C. § 553 (2012).

<sup>13</sup> See *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.* (*State Farm*), 463 U.S. 29, 42 (1983) (“Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.”).

<sup>14</sup> See *S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959, 967 (D.S.C. 2018) (holding suspension of the 2015 Clean Water Rule violated APA notice and comment requirements); *Pineros y Campesinos Unidos del Noroeste v. Pruitt*, 293 F. Supp. 3d 1062, 1066 (N.D. Cal. 2018) (suspension of the 2017 pesticide rule).

<sup>15</sup> 463 U.S. 29 (1983).

<sup>16</sup> 556 U.S. 502 (2009).

<sup>17</sup> *Id.* at 515–16.

<sup>18</sup> See RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW* 85 (2nd ed. 2012) (“Since adequacy is in the eye of the beholder, an agency can not predict the results of judicial application of the *State Farm* test no matter how long and comprehensive the statement of basis and purpose the agency includes with its final rule.”). One scholar’s review of D.C. Circuit cases suggests that a judge’s political beliefs are a fairly good indicator of whether the judge will find an agency’s explanation to be adequate. See Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1719 (1997) (concluding a judge’s political “ideology significantly influences judicial decisionmaking on the D.C. Circuit” from a dataset of cases adjudicating challenges to EPA decisions).

APA's reasoned analysis requirement. Part III analyzes issues of APA non-compliance faced by the current Trump Administration and draws some comparisons to similar issues faced by the Bush Administration. Part IV provides lessons for administrations seeking to create resilient decisions and administrations seeking to undo the work of their predecessors, and provides strategies for potential litigants against agency policy reversal. The APA requires agencies to provide a reasoned analysis by addressing any inconsistent factual findings central to their decisions and take consistent positions within their justifications. This Comment concludes that agencies seeking to effectively reverse policy must address the economic and environmental conclusions of the prior administration's policy, and that current administrations can use the APA's reasoned explanation requirement to make enduring decisions by forcing a future administration to address extensive factual findings.

## II. APA REQUIREMENTS FOR POLICY REVERSALS

Section 706 of the APA provides the statutory basis for courts to review an agency decision for a reasoned explanation.<sup>19</sup> The section provides that the "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>20</sup> The Supreme Court interpreted this language as requiring agencies to give adequate reasons for their decisions beginning with *Citizens to Preserve Overton Park, Inc. v. Volpe*<sup>21</sup> (*Overton Park*) in 1971.<sup>22</sup> Although *Overton Park* involved an agency's informal adjudication, the circuit courts quickly applied its requirement for adequate reasons to informal rulemaking as well.<sup>23</sup> In 1983, the Court confirmed the reasoned explanation requirement in its seminal decision in *State Farm* in the context of an agency's policy reversal.<sup>24</sup> A plurality of the Court clarified *State Farm* in the context of agency policy reversals in *Fox* in 2009 by stating that an agency may not necessarily need to give more explanation than is required in the first instance, but must address the conclusions underlying its previous position.<sup>25</sup> This Part explains *State Farm* and *Fox* and their significance for agencies seeking to justify policy reversals.

---

<sup>19</sup> 5 U.S.C. § 706 (2012).

<sup>20</sup> *Id.* § 706(2)(a).

<sup>21</sup> 401 U.S. 402 (1971).

<sup>22</sup> *See id.* at 420 (requiring an agency decision maker to provide an adequate explanation for his decision on remand); *cf.* WILLIAM F. FUNK ET AL., ADMINISTRATIVE PROCEDURE AND PRACTICE: A CONTEMPORARY APPROACH 167 (6th ed. 2018) ("The definition of 'arbitrary and capricious' as requiring 'adequate reasons' started in the 1970s.").

<sup>23</sup> FUNK ET AL., *supra* note 22, at 168.

<sup>24</sup> *See State Farm*, 463 U.S. 29, 43 (1983) (stating the agency "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made'" (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962))).

<sup>25</sup> *Fox*, 556 U.S. 502, 514–15 (2009).

*A. Inadequate Explanation: State Farm*

In *State Farm*, the Court addressed whether an agency acted arbitrarily and capriciously when it revoked a previous administration's requirement that new motor vehicles produced after 1982 be equipped with passive restraints—airbags or automatic seatbelts.<sup>26</sup> According to the Court, the regulation at issue bore “a complex and convoluted history.”<sup>27</sup> In the National Traffic and Motor Vehicle Safety Act of 1966<sup>28</sup> (Safety Act), Congress directed the National Highway Traffic Safety Administration (NHTSA) to issue standards for motor vehicle safety.<sup>29</sup> The Safety Act required the NHTSA to consider 1) relevant safety data; 2) whether the standards were “reasonable, practicable and appropriate;” and 3) the extent to which the standard would carry out the Safety Act's purpose to reduce the deaths and injuries resulting from traffic accidents.<sup>30</sup>

The NHTSA concluded use of passive restraint devices could effectively meet the purpose of the Safety Act.<sup>31</sup> The standard was formally proposed in 1969 and, after some amendments and extensions, the Jimmy Carter Administration issued a new regulation in 1977 phasing in passive restraints beginning in 1982 and requiring passive restraints in all vehicles manufactured in 1984.<sup>32</sup> Under the Carter Administration standard, automobile manufacturers could install either airbags or automatic seatbelts.<sup>33</sup> During the phase-in period, the NHTSA stated that use of passive restraint systems would save an estimated 9,000 lives and tens of thousands of serious injuries.<sup>34</sup>

In 1981, under the newly elected Reagan Administration, the NHTSA reversed course.<sup>35</sup> The NHTSA reopened the rulemaking, issued a one-year delay in applying the standard to large vehicles, and proposed rescission of the entire standard.<sup>36</sup> After notice and comment and public hearings, the NHTSA rescinded the passive restraint requirement.<sup>37</sup> The NHTSA based its decision on the belief that the automatic restraint requirement would no longer produce the significant safety benefits estimated in 1977.<sup>38</sup> The NHTSA reasoned that the automobile industry planned to install automatic seatbelts in 99% of new automobiles and that the majority of those automatic seatbelts could be detached and left that way

---

<sup>26</sup> *State Farm*, 463 U.S. at 34.

<sup>27</sup> *Id.* (“Over the course of approximately 60 rulemaking notices, the requirement has been imposed, amended, rescinded, reimposed, and now rescinded again.”).

<sup>28</sup> Pub. L. No. 89-563, 80 Stat. 718 (amended 1972).

<sup>29</sup> *State Farm*, 463 U.S. at 33.

<sup>30</sup> *Id.* at 33–34.

<sup>31</sup> *See id.* at 35 (“[P]assive restraints could prevent approximately 12,000 deaths and over 100,000 serious injuries annually.”).

<sup>32</sup> *Id.* at 35–37.

<sup>33</sup> *Id.* at 37.

<sup>34</sup> *Id.* at 37–38.

<sup>35</sup> *See id.* at 38. The Reagan Administration “rode into office on a platform that called for massive reform of the federal regulatory agencies.” Stuart Auerbach, *Conservative Study Faults Reagan Deregulation Effort*, WASH. POST (Jan. 16, 1983), <https://perma.cc/33K2-BCT3>.

<sup>36</sup> *State Farm*, 463 U.S. at 38.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

indefinitely.<sup>39</sup> Thus, reasoned the NHTSA, the effectiveness of airbags would not be realized, and the benefits of automatic belts would not be as effective.<sup>40</sup> Based on the predicted decrease in effectiveness, the NHTSA concluded the requirement was no longer reasonable or practicable.<sup>41</sup>

On direct review of the agency's decision, the United States Court of Appeals for the District of Columbia Circuit held the rescission of the passive restraint requirement was arbitrary and capricious.<sup>42</sup> The D.C. Circuit concluded that the NHTSA had put forth an insufficient basis for concluding that seatbelt usage would not increase under the standard and failed to "consider or analyze obvious alternatives."<sup>43</sup>

The Supreme Court, in an opinion written by Justice White, reached the same conclusion—that the NHTSA's rescission of the passive restraint standard was arbitrary and capricious—but under a different analysis than the Court of Appeals.<sup>44</sup> First, addressing the problem of which standard of review applied, the Supreme Court observed that the Safety Act stated the judicial review provisions of the APA "shall apply to all orders establishing, amending, or *revoking*" a standard.<sup>45</sup> Thus, the Safety Act required an identical scope of judicial review for promulgations or rescissions of standards.<sup>46</sup> Further, the Court stated that a revocation constitutes an agency's informed decision to reject its prior course.<sup>47</sup> The Court concluded that "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change."<sup>48</sup> Thus, when an agency's decisions are subject to APA review, a decision to rescind a regulation is subject to the arbitrary and capricious standard's requirement of reasoned analysis—the same standard that applies to initial promulgations of a regulation.

---

<sup>39</sup> *Id.* at 38–39.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 39.

<sup>42</sup> *State Farm Mut. Auto. Ins. Co. v. Dep't of Transp.*, 680 F.2d 206, 239 (D.C. Cir. 1982). Judge Mikva wrote the opinion joined by Judge Bazelon. *Id.* at 208. Judge Edwards concurred. *Id.*

<sup>43</sup> *Id.* at 230. Before reaching its holding, the court struggled with finding the proper scope of judicial review. *See id.* at 218 ("The appropriate scope of judicial review remains the most troublesome question in this case."). The court considered the argument that a challenge to an agency's rescission seems more akin to a challenge of an agency's failure to act. *Id.* The court concluded that it must first review the legislative history and legislative reaction to the agency's decision to determine the appropriate scope of judicial review. *Id.* at 222. After reviewing the history and reaction, the court found that the rescission was subject to a "thorough[,] probing" version of arbitrary and capricious review. *See id.* at 228. Conversely, the Supreme Court found no such difficulty in determining that the proper scope of review was arbitrary and capricious. *State Farm*, 463 U.S. at 40–41 ("Unlike the Court of Appeals, we do not find the appropriate scope of judicial review to be the 'most troublesome question' in these cases.").

<sup>44</sup> *State Farm*, 463 U.S. at 34, 44. The Court was unanimous in all but part V-B of the opinion—where the Court concluded the agency's view of detachable seatbelts was arbitrary and capricious. *Id.* at 57–58 (Rehnquist, J., dissenting). Justice Rehnquist, joined by Justices Powell, O'Connor, and Chief Justice Burger, concurred in part and dissented in part. *Id.* at 57.

<sup>45</sup> *Id.* at 41 (emphasis added) (quoting 15 U.S.C. § 1392(b)).

<sup>46</sup> *See id.* (stating the Safety Act "suggests no difference in the scope of judicial review depending upon the nature of the agency's action").

<sup>47</sup> *Id.* at 41–42.

<sup>48</sup> *Id.* at 42. The Court noted that agencies must be given "ample latitude" to adapt to changing circumstances, but concluded Congress intended the same reasoned analysis requirement to apply to reversals as to initial rulemaking. *Id.*

The Court observed that, under the arbitrary and capricious standard, a court could not substitute its judgment for that of the agency, but the agency must examine relevant data and give an adequate explanation for its decision, “including [making] a rational connection between the facts found and the choice made.”<sup>49</sup> The Court gave examples of situations in which an agency’s decision is arbitrary and capricious: 1) when it relies on factors that Congress did not intend for it to consider, 2) when it fails to consider an important aspect of the problem, or 3) when it offers an explanation running counter to the evidence or is implausible to the point where it cannot be ascribed to expertise or a difference in view.<sup>50</sup>

With the standard of arbitrary and capricious judicial review established, the Court turned to the question of whether the NHTSA’s rescission was lawful.<sup>51</sup> The Court determined the agency’s rescission was arbitrary and capricious because the agency failed to consider simply modifying the regulation to require use of airbags.<sup>52</sup> The NHTSA sought to justify its reversal by citing new evidence that 99% of vehicles would be equipped with detachable automatic seatbelts, which the agency deemed far less effective at achieving safety benefits because users could detach the belts indefinitely.<sup>53</sup> The Court concluded “the logical response” to this new evidence would be to modify the regulatory standard to require airbags and faulted the agency for not including “one sentence” discussing an airbags-only alternative.<sup>54</sup> In fact, a previous version of the proposed rule had required installation of airbags in all cars.<sup>55</sup> Noting that an agency is not required to consider all conceivable policy alternatives, the Court reasoned the airbag option was more than just any conceivable policy alternative because it was “within the ambit of the existing Standard.”<sup>56</sup> Thus, *State Farm* requires agencies to consider the obvious alternatives, especially when those alternatives have been previously contemplated, if the agency’s rescission or new rule is to withstand arbitrary and capricious review.

The Court then concluded the NHTSA’s dismissal of the effectiveness of detachable automatic seatbelts was arbitrary and capricious because it was not supported by the record before the agency.<sup>57</sup> The agency justified its decision that detachable automatic seatbelts would not be effective by citing “substantial uncertainty” whether detachable automatic seatbelts would lead to higher usage.<sup>58</sup> The NHTSA based its uncertainty of whether vehicle occupants would engage the detachable automatic belts on a previous failure with requiring manual seatbelts to be installed in cars, which proved ineffective because of their low use.<sup>59</sup> However,

---

<sup>49</sup> *Id.* at 43 (internal quotation marks omitted).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 46.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 38–39.

<sup>54</sup> *Id.* at 48.

<sup>55</sup> *Id.* at 46.

<sup>56</sup> *Id.* at 51.

<sup>57</sup> *See id.* at 51–52.

<sup>58</sup> *Id.* at 51. In its first iteration in 1967, the regulation at issue simply required installation of manual seatbelts in all automobiles. *Id.* at 34. The NHTSA found this regulation ineffective because drivers and occupants failed to use the seatbelts in requisite numbers to be effective. *Id.*

<sup>59</sup> *See id.* at 53–54.



the Court reasoned the agency's concern about inertia—the failure to actively engage a manual seatbelt—actually worked in favor of increased use of the detachable automatic seatbelt because the automatic belt required an action to disengage, as opposed to manual seatbelts that required an action to engage.<sup>60</sup> Thus, *State Farm* indicates that agencies' decisions seeking to rescind old rules must be supported by the record and must address evidence conflicting with the agencies' finding. The Court's conclusion also demonstrated the significant burden an agency faces under the APA because the standard of arbitrary and capricious review allows a court to probe the reasoning underlying an agency's factual and statistical determinations.

Lastly, the Court concluded the NHTSA failed to articulate a basis that offered a rational connection between facts presented and the decision made with its decision to not require nondetachable automatic seatbelts.<sup>61</sup> The agency apparently failed to consider nondetachable belts by themselves, but instead chose to lump their consideration into the category of “use-compelling features,” along with an ignition lock system that prevented use of the vehicle when a safety belt was not engaged.<sup>62</sup> The agency stated it did not consider the use-compelling features because of an anticipated adverse public reaction.<sup>63</sup> The agency pointed to the adverse public reaction to another use-compelling feature, the ignition interlock, which prevented the vehicle from starting until the seatbelt was engaged.<sup>64</sup> It also stated the nondetachable belt could complicate emergency removal of an occupant from a car.<sup>65</sup> However, NHTSA had previously found that nondetachable belts were as safe as detachable ones.<sup>66</sup> The Court reasoned the agency failed to offer an explanation for its belief that the public would react adversely to the nondetachable belt because the ignition interlock and nondetachable belt were not comparable approaches.<sup>67</sup> The Court concluded the evidence before the agency did not justify its belief that a nondetachable belt would complicate emergency removal of an occupant.<sup>68</sup> The Court observed that, although the agency could change its view, the APA required the agency to provide an explanation for its reasons for doing so, which it had failed to provide.<sup>69</sup> *State Farm* requires an agency to explain distinguishable alternatives separately and explain the discrepancy between its past and present positions.

*State Farm* explained the considerations that agencies seeking to reverse course from a previous administration must take into account. First, courts review agency actions reversing course under the arbitrary and capricious standard. Second, under arbitrary and capricious review, courts inquire whether the agency

---

<sup>60</sup> *Id.* at 53–54, 54 nn.18–19 (discussing NHTSA studies finding that 38% would welcome automatic seatbelts and 25% would tolerate them).

<sup>61</sup> *Id.* at 55–56.

<sup>62</sup> *Id.* (quoting 46 Fed. Reg. 53,424 (1981)).

<sup>63</sup> *Id.* at 56.

<sup>64</sup> *Id.* at 35–37, 56.

<sup>65</sup> *Id.* at 56.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* (stating that the agency did not provide a “rational connection” between the facts surrounding the seatbelt and its determination that the seatbelt would complicate an emergency extraction).

<sup>69</sup> *Id.*

has provided a reasoned analysis for its decision. To meet this reasoned analysis requirement of the APA, the agency must 1) only rely on factors that Congress intends it to consider, 2) consider all important aspects of the problem, and 3) offer an explanation that accounts for discrepancies in the evidence and, if the agency reverses course from a past decision, its reversal must be plausibly ascribed to expertise or a difference in view. An agency's reversal can be ascribed to a difference in view, but an agency cannot make conflicting factual findings to support its view without a reasoned explanation for the new findings. Although the APA does not require an agency to consider all possible alternatives, an agency must consider alternatives contemplated within the old rule to adequately provide a reasoned analysis for the new rule. It must also not lump together dissimilar alternatives in its analysis, like the NHTSA did by lumping its consideration of requiring nondetachable belts into the same category of use-compelling features including the ignition interlock. Additionally, an agency must have support for its decision in the record and explain the discrepancies, addressing any conflicting evidence.

### *B. Adequate Explanation: Fox*

In 2009, the Supreme Court revisited the adequate analysis requirement from *State Farm* in the context of agency policy reversals in its *Federal Communications Commission v. Fox Television Stations, Inc* opinion. The case arose out of a decision by the Federal Communications Commission (Commission) to begin enforcing against broadcasters for indecent language that the Commission had previously declined to enforce.<sup>70</sup> In the Public Telecommunications Act of 1992,<sup>71</sup> Congress granted the Commission authority to enforce federal law prohibiting the broadcasting of indecent language.<sup>72</sup> Through enforcement actions, the Commission gradually expanded its view of what constituted impermissible indecent language.<sup>73</sup> Importantly, the Commission had previously declined to enforce isolated or fleeting, nonliteral broadcasts of the "F-Word."<sup>74</sup> However, changing position, the Commission issued an order of apparent liability against Fox Television Stations for isolated, non-literal expletives in two broadcasts.<sup>75</sup>

---

<sup>70</sup> See *Fox*, 556 U.S. 502, 505–10 (2009).

<sup>71</sup> Public Telecommunications Act of 1992, Pub. L. 102-356, 106 Stat. 949 (1992).

<sup>72</sup> *Fox*, 556 U.S. at 506.

<sup>73</sup> *Id.* at 506–10. The Commission defined indecent language as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs." *Id.* at 506–07 (quoting *In re Citizen's Complaint Against Pacifica Foundation Station WBAI (FM)*, 56 F.C.C.2d 94, 98 (1975)).

<sup>74</sup> *Id.* at 509–10 (quoting *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of "Golden Globe Awards" Program*, 19 FCC Rcd. 4975, 4978 (2004)).

<sup>75</sup> *Id.* at 510. The first instance involved a broadcast where the singer Cher stated, "So f\*\*\* 'em," about her music critics upon receiving a music award; the second instance involved a guest on another music award show asking the audience, "Have you ever tried to get cow s\*\*\* out of a Prada purse? It's not so f\*\*\*ing simple." *Id.* (quoting Brief for Petitioners at 9–10, *Fox*, 556 U.S. 502 (2009) (No. 07-582)). The Commission justified its finding of liability because both broadcasts involved use of the "F-Word" and the second broadcast involved a description of excrement. *Id.* at 511. According to the Commission, both broadcasts had used "one of the most vulgar, graphic, and explicit words for sexual activity in the English language." *Id.* (quoting *In re Complaints Regarding Various Television*

Fox appealed the order to the United States Court of Appeals for the Second Circuit.<sup>76</sup> The Second Circuit decided that the Commission's order was arbitrary and capricious under the APA due to inadequate explanation for the change in agency policy.<sup>77</sup> The Court of Appeals reasoned that 1) the Commission failed to justify its position that fleeting expletives were harmful and therefore warranted regulation, 2) the agency's position was unnecessarily broad, and 3) the agency's belief that a per se exemption for fleeting expletives would cause an increase in broadcast of fleeting expletives was unsupported by the evidence.<sup>78</sup>

The Supreme Court reversed in a 5–4 vote, concluding the Commission had adequately explained its shift in policy in a plurality opinion written by Justice Scalia.<sup>79</sup> The plurality rejected the notion that an agency reversing course is subject to a more heightened review than an agency engaging in an initial action.<sup>80</sup> The plurality decided that the APA's text did not differentiate between changing course and engaging in an initial action; it simply stated agency action was subject to the arbitrary and capricious standard.<sup>81</sup> However, the plurality concluded that the reasoned explanation requirement, implicit in arbitrary and capricious review, “would ordinarily demand” that the agency express its awareness that it was changing position,<sup>82</sup> reasoning the Commission had acknowledged its change in position by stating its new position had “broken new ground” and by “explicitly disavowing” its prior position.<sup>83</sup> While Justice Scalia pronounced that agencies face no higher burden of scrutiny when changing position, he also stated that the Court will consider whether the agency acknowledged its change in position.<sup>84</sup>

The plurality stated an agency does not have to demonstrate that the new policy is better than the old one; instead “it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better.”<sup>85</sup> Once again stating that the APA does not require more explanation just because there is a policy change, the plurality explained that sometimes more explanation might be needed when the policy change is based on factual findings that contradict previous factual findings, or the affected parties have placed substantial reliance on the previous policy.<sup>86</sup> Thus, what arbitrary and capricious review requires is contextual. Concluding that the Commission's reasons for expanding enforceable uses of indecent language were rational, the plurality upheld the Commission's reversal from its prior position not to enforce occurrences

---

Broadcasts Between Feb. 2, 2002, and Mar. 8, 2005 (*Remand Order*), 21 FCC Rcd. 13299, 13305, 13324 (2006)) Cher's statement had used a sexual act as means of expressing hostility towards critics, while the second broadcast had used a “vulgar and shocking” description of handling excrement along with gratuitous use of the “F-Word.” *Id.* (quoting *Remand Order*, 21 FCC Rcd. at 13305).

<sup>76</sup> Fox Television Stations, Inc. v. Fed. Comm. Comm'n, 489 F.3d 444 (2nd Cir. 2007).

<sup>77</sup> *Id.* at 454.

<sup>78</sup> *See id.* at 457–62.

<sup>79</sup> *See Fox*, 556 U.S. at 530.

<sup>80</sup> *Id.* at 514.

<sup>81</sup> *Id.* at 514–16.

<sup>82</sup> *Id.* at 515.

<sup>83</sup> *Id.* at 517. The Court further pointed to the Commission's decision not to assess penalties on Fox as further evidence the Commission knew it was changing position. *Id.* at 517.

<sup>84</sup> *Id.* at 515–16.

<sup>85</sup> *Id.* at 515 (emphasis in original).

<sup>86</sup> *Id.* at 515–16.

of isolated, non-literal use of indecent language.<sup>87</sup> The plurality accepted the Commission's determination that its prior position was no longer the best policy, based on the Commission's new belief that even isolated, non-literal use of the "F-Word" could be harmful to children.<sup>88</sup> The plurality also accepted the Commission's new belief that a policy of not enforcing instances of isolated, indecent language could lead to more widespread use—due to broadcaster's knowledge the Commission would not bring an enforcement action—and the Commission's reasoning that technological advances made it easier for broadcasters to bleep out offending words.<sup>89</sup> The plurality relied on these reasons as adequate explanations for the agency's reversal in policy, indicating that agencies seeking to reverse policy may do so if they put forth good reasons.<sup>90</sup> These good reasons can include advances in technology and a logical belief that a different method of regulation is more effective at achieving statutory goals.<sup>91</sup>

Justice Kennedy, who supplied the fifth vote in *Fox*, wrote a concurring opinion amplifying what is required of an agency that changes its decision based on changed factual findings.<sup>92</sup> Justice Kennedy opined that the question of whether an agency must give a more detailed explanation when changing policy was not susceptible to one easy answer.<sup>93</sup> He reasoned that advances in technology and scientific discoveries could legitimately lead an agency to believe a new course was proper in some cases.<sup>94</sup> In these cases, the agency may have a substantial body of factual findings from data and experience, which it will need to explain when changing policy if the prior factual findings conflict with its new factual findings.<sup>95</sup> Justice Kennedy also expressed that an agency must demonstrate that its new policy rests on principles that are both rational and *neutral*—based on agency expertise, not political changes.<sup>96</sup> He based the neutrality requirement on the "amorphous character" of administrative agencies' position in the constitutional scheme and the grant of judicial review in the APA.<sup>97</sup> Justice Kennedy stated that "the role and position of the agency, and the exact locus of its powers, present questions that are delicate, subtle, and complex," and permitting an agency "unbridled discretion" could violate constitutional separation of powers and checks and balances.<sup>98</sup> Justice Kennedy opined that, to ensure agencies stayed within their constitutional parameters, the APA imposed a "check" on agencies through

---

<sup>87</sup> *Id.* at 517.

<sup>88</sup> *See id.* at 517–18.

<sup>89</sup> *Id.* at 518.

<sup>90</sup> *Id.* at 515.

<sup>91</sup> *Id.* at 517–18.

<sup>92</sup> *See id.* at 535–39 (Kennedy, J., concurring); *see also* *Organized Vill. of Kake v. U.S. Dep't of Agric. (Organized Village)*, 795 F.3d 956, 966 (9th Cir. 2015) (relying on Justice Kennedy's concurrence because he supplied the fifth vote).

<sup>93</sup> *See Fox*, 556 U.S. at 535 (Kennedy, J., concurring).

<sup>94</sup> *Id.* at 535–36.

<sup>95</sup> *See id.* at 535–37 (discussing an agency's substantial body of factual findings and then stating an agency may not disregard contrary or inconvenient factual findings made in the past).

<sup>96</sup> *See id.* at 536–37 (stating one of the constraints imposed by the APA is "the duty of agencies to find and formulate policies that can be justified by neutral principles and a reasoned explanation").

<sup>97</sup> *See id.*

<sup>98</sup> *Id.* at 536.

arbitrary and capricious review, which requires agencies to “formulate policies that can be justified by neutral principles and a reasoned explanation.”<sup>99</sup>

Justice Kennedy’s concurrence pointed out the conflict between the plurality’s insistence that nothing more is required of agencies reversing course than would be required in initial actions, and the reality that agencies reversing course likely must address large bodies of data with inconsistent factual findings. Justice Kennedy’s neutrality requirement seems to reject the notion that agencies can justify reversing course based on new administrative priorities,<sup>100</sup> but rather must base their decisions on expertise, statutory mandate, and scientific principles.<sup>101</sup> Given that Justice Kennedy was the deciding vote in the plurality and the Ninth Circuit’s favorable consideration of his opinion in 2015,<sup>102</sup> discussed in Part III.A, agencies seeking to reverse course would be wise to justify their decisions with politically neutral terms—grounded in agency expertise in pursuit of the statutory mandate—and explicitly address the changing factual circumstances before them.

Both the plurality and Justice Kennedy’s concurrence indicate that an agency must address the reasons and factual circumstances underlying its prior position. Thus, the *Fox* court’s assertion that agencies are subject to no greater scrutiny when reversing course may prove to be cold comfort to an agency because of the likely difficult task of reconciling a new position with old data. Agencies seeking to justify their reversal decisions may find some help in *Fox*’s suggestion that advances in technology and a logical belief that a new regulation may be more effective at achieving statutory goals can be sufficient reasons for changing policy. Perhaps most obviously given the other requirements, *Fox* states agencies must clearly express their awareness they are changing position.<sup>103</sup>

### III. PROVIDING A REASONED EXPLANATION IN ENVIRONMENTAL POLICY REVERSALS

This Part discusses failures by the Bush and Trump Administrations to roll back Clinton- and Obama-era environmental decisions, due in part to the Administrations’ failure to meet the requirements of *State Farm* and *Fox*. These cases show that, while the APA gives an agency discretion to change policies under a new administration, it requires an agency to address any inconsistent factual findings central to its decision and take consistent positions within its justification.

---

<sup>99</sup> *Id.* at 537.

<sup>100</sup> Some have argued for allowing explicit political considerations in agency decision making. *See, e.g., State Farm*, 463 U.S. 29, 59 (1983) (Rehnquist J., concurring in part and dissenting in part) (“A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations.”); Watts, *supra* note 1, at 8 (“[W]hat count as ‘valid’ reasons under arbitrary and capricious review should be expanded to include certain political influences from the President, other executive officials, and members of Congress, so long as the political influences are openly and transparently disclosed in the agency’s rulemaking record.”).

<sup>101</sup> *Fox*, 556 U.S. at 537 (Kennedy, J., concurring) (“If an agency takes action not based on neutral and rational principles, the APA grants federal courts power to set aside the agency’s action as arbitrary or capricious.”) (internal quotations omitted).

<sup>102</sup> *Organized Village*, 795 F.3d 956, 966 (9th Cir. 2015) (relying on Justice Kennedy’s concurrence because he supplied the fifth vote).

<sup>103</sup> *See Fox*, 556 U.S. at 517.

*A. The Bush Administration: The Tongass Exemption*

In 2015, the United States Court of Appeals for the Ninth Circuit decided *Organized Village of Kake v. U.S. Department of Agriculture*<sup>104</sup> (*Organized Village*), arising from the Bush Administration's reversal of a rule promulgated in the waning days of the Clinton Administration.<sup>105</sup> The Bush Administration's failure to roll back the Clinton-era rule in *Organized Village* foreshadowed some of the same failures to give a reasoned explanation that have plagued the Trump Administration's regulatory rollback attempts of Obama-era rules. These failures evident in *Organized Village* include failure to reasonably explain contrary factual findings in the new rule, taking inconsistent positions within the new rule's justification, and simply pointing to litigation over the previous rule.

"Inventoried roadless areas" (IRAs) are "large, relatively undisturbed landscapes [that] have a variety of scientific, environmental, recreational, and aesthetic attributes and characteristics unique to roadless areas"—so-called "roadless values."<sup>106</sup> IRAs make up approximately 58.5 million acres—about one-third of the National Forest System.<sup>107</sup> Historically, the United States Department of Agriculture (USDA) managed IRAs pursuant to local- and forest-level plans.<sup>108</sup> Due to the costly litigation of managing these areas pursuant to local plans, USDA considered taking a "whole picture" approach to management of roadless areas across the Forest System.<sup>109</sup> In May 2000, the USDA issued a notice of proposed rulemaking for a national "roadless rule" prohibiting road construction and timber harvesting in most IRAs.<sup>110</sup> The proposed rule recommended exempting the Tongass National Forest (Tongass) in Southeastern Alaska from its requirements because of concerns about the negative effects on the local economy dependent on timber harvests.<sup>111</sup> The USDA received more than 517,000 comments and held 187 public meetings on the proposed rule.<sup>112</sup>

In January 2001, eight days before the inauguration of President Bush, the USDA published its record of decision promulgating the "Special Areas; Roadless Area Conservation" rule (2001 ROD).<sup>113</sup> Contrary to the recommendation in the proposed rule, the 2001 ROD included the Tongass within the national roadless

---

<sup>104</sup> 795 F.3d 956 (9th Cir. 2015).

<sup>105</sup> See *id.* at 959.

<sup>106</sup> *Id.* (internal quotation marks omitted).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> See Special Areas; Roadless Area Conservation, 65 Fed. Reg. 30,276 (May 10, 2000) (notice of proposed rulemaking).

<sup>111</sup> See *Organized Village*, 795 F.3d at 959–60; 65 Fed. Reg. at 30,280. "The Tongass is vitally important to the economy of Southeast Alaska; it supports significant timber and mining activity as well as commercial and recreational fishing, hunting, recreation, and tourism. The Tongass is also part of the Pacific coast ecoregion, which encompasses one fourth of the world's coastal temperate rainforests. The Tongass has a very high degree of ecosystem health, and a higher percentage of inventoried roadless acreage than any Forest Service region in the contiguous United States." *Organized Village*, 795 F.3d at 959 n.1 (citation omitted).

<sup>112</sup> *Organized Village*, 795 F.3d at 960.

<sup>113</sup> *Id.* at 959; Special Areas; Roadless Area Conservation (2001 ROD), 66 Fed. Reg. 3244, 3244 (Jan. 12, 2001) (to be codified at 36 C.F.R. 294).

rule.<sup>114</sup> The 2001 ROD expressly acknowledged the roadless rule presented a significant risk of negative economic effects on Southeastern Alaska, but explained exempting the Tongass from the roadless rule—returning it to management under the local Tongass Forest Plan—“would risk the loss of important roadless area values.”<sup>115</sup> However, the 2001 ROD included several exceptions to mitigate the economic effects imposed on the region.<sup>116</sup>

In July 2003, two-and-a-half years later, under the Bush Administration, the USDA reversed course, proposing a rule permanently exempting the Tongass from the roadless rule.<sup>117</sup> In December 2003, the USDA published a record of decision (2003 ROD), exempting the Tongass from the 2001 roadless rule and reinstating its management under the Tongass Forest Plan.<sup>118</sup> The 2003 ROD relied on the same environmental impact statement as the 2001 ROD, stating there was no substantial difference in the decision-making picture, and concluding that the Tongass Forest Plan would adequately protect the roadless values of the area.<sup>119</sup> In 2009, plaintiff Organized Village of Kake, among others, filed in the United States District Court for the District of Alaska, alleging the 2003 ROD violated the APA and NEPA.<sup>120</sup> The State of Alaska intervened as a defendant.<sup>121</sup>

In *Organized Village of Kake v. U.S. Department of Agriculture*<sup>122</sup> (*Organized Village II*) Judge John W. Sedwick of the District of Alaska decided the 2003 ROD violated the APA because the USDA failed to give a reasoned explanation for its policy change.<sup>123</sup> The USDA, then under the Obama Administration, declined to appeal the decision, but the State of Alaska appealed.<sup>124</sup> A divided three-judge panel of the Ninth Circuit reversed the district court, deciding that the USDA’s reversal in the 2003 ROD was rational under the APA.<sup>125</sup> But the Ninth Circuit granted the plaintiffs’ petition for rehearing en banc, vacating the previous Ninth Circuit decision.<sup>126</sup>

---

<sup>114</sup> *Organized Village*, 795 F.3d at 960.

<sup>115</sup> *Id.* at 960, 968 (quoting 66 Fed. Reg. at 3254).

<sup>116</sup> *Id.* at 960–61. The merits of the 2001 ROD are still being litigated. *See* Alaska v. U.S. Dep’t of Agric., 273 F. Supp. 3d 102, 112, 126 (D.D.C. 2017) (ruling in favor of the 2001 ROD) (appeal filed). Alaska petitioned the USDA for an exemption in January 2018, which is under consideration. *See* Roadless Area Conservation; National Forest System Lands in Alaska, 83 Fed. Reg. 44,252 (Aug. 30, 2018) (notice of intent to prepare an environmental impact statement).

<sup>117</sup> *See Organized Village*, 795 F.3d at 962; Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska, 68 Fed. Reg. 41,865, 41,866 (Jul. 15, 2003) (notice of proposed rulemaking).

<sup>118</sup> *Organized Village*, 795 F.3d at 962; Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska, 68 Fed. Reg. 75,136, 75,136 (Dec. 30, 2003) (final rule and record of decision).

<sup>119</sup> *Organized Village*, 795 F.3d at 962.

<sup>120</sup> *Id.*; *Organized Vill. of Kake v. U.S. Dep’t of Agric. (Organized Village II)*, 776 F. Supp. 2d 960, 967 (D. Alaska 2011).

<sup>121</sup> *Organized Village II*, 776 F. Supp. 2d at 961.

<sup>122</sup> *Id.* at 960.

<sup>123</sup> *Id.* at 974.

<sup>124</sup> *See Organized Village*, 795 F.3d at 963.

<sup>125</sup> *Organized Vill. of Kake v. U.S. Dep’t of Agric. (Organized Village III)*, 746 F.3d 970, 980 (9th Cir. 2014). Judge Bea wrote the majority opinion, joined by Judge Hawkins. *Id.* at 973. Judge McKeown dissented. *Id.*

<sup>126</sup> *Organized Vill.*, 795 F.3d at 963.

The en banc panel affirmed the district court by a six-to-five vote in an opinion written by Judge Andrew D. Hurwitz.<sup>127</sup> The majority decided that the USDA's reversal with the 2003 ROD violated the APA.<sup>128</sup> The majority concluded the 2003 ROD was based on factual findings contradicting the factual findings in the 2001 ROD; thus, the USDA did not meet its burden to provide a "more substantial justification" or reasoned explanation mandated by *Fox*.<sup>129</sup>

The Ninth Circuit derived a four-part test from *Fox*:

[A] policy change complies with the APA if the agency (1) displays "awareness that it is changing position," (2) shows that "the new policy is permissible under the statute," (3) "believes" the new policy is better, and (4) provides "good reasons" for the new policy, which, if the "new policy rests upon factual findings that contradict those which underlay its prior policy," must include "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy."<sup>130</sup>

The court concluded that first three requirements were met.<sup>131</sup> The agency expressed awareness that it was changing position because it expressly acknowledged that the 2003 ROD "treat[ed] the Tongass differently."<sup>132</sup> The agency asserted that "the new policy [was] permissible" under the relevant statutes, and the court assumed that the agency believed the new policy to be better.<sup>133</sup> The case, however, turned on the fourth requirement—whether the agency provided "good reasons" for the new policy.<sup>134</sup> Since the 2003 ROD was grounded in facts contradicting those in the 2001 ROD, the APA required the USDA to provide a reasoned explanation for the discrepancy.<sup>135</sup>

Noting the USDA's greater emphasis on socioeconomic concerns in the 2003 ROD was "well within an agency's discretion," the court found that the agency had run afoul of the APA by discarding the 2001 ROD's factual findings without a reasoned explanation.<sup>136</sup> The court explained that the 2001 ROD explicitly concluded the roadless rule was necessary to maintain the roadless values in the Tongass, because returning the area to management under the Tongass Forest Plan "would risk the loss of important roadless area values."<sup>137</sup> Conversely, the 2003 ROD concluded that the Tongass Forest Plan sufficiently protected roadless values,

---

<sup>127</sup> See *id.* at 959. The majority opinion was joined by Chief Judge Thomas, and Judges Pregerson, Fletcher, Christen, Nguyen, and Hurwitz. Judge Christen also filed a concurring opinion, which Chief Judge Thomas joined. Judge Callahan filed a dissenting opinion. Judge Smith filed a dissenting opinion joined by Judges Kozinski, Tallman, Clifton, and Callahan. Judge Kozinski also filed a dissenting opinion.

<sup>128</sup> *Id.* at 967.

<sup>129</sup> *Id.* (quoting *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015)).

<sup>130</sup> *Id.* at 966 (quoting *Fox*, 556 U.S. 502, 515–16 (2009)).

<sup>131</sup> *Id.* at 967.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> See *id.*

<sup>135</sup> See *id.*

<sup>136</sup> *Id.* at 968 ("The 2003 ROD did not simply rebalance old facts to arrive at the new policy.").

<sup>137</sup> *Id.* (quoting 66 Fed. Reg. at 3254).



so applying the roadless rule to the Tongass was unnecessary.<sup>138</sup> The court thought this contradiction “was a critical underpinning” to the USDA’s new position; the agency determined the socioeconomic benefits of exempting the Tongass outweighed the benefit to roadless values *because* the 2003 ROD characterized the risk of loss of roadless values under the Tongass Forest Plan as “minor.”<sup>139</sup> But both RODs were based on the same EIS, yet came to different factual conclusions about the environmental benefits of the roadless rule.<sup>140</sup> Because the 2003 ROD made factual findings contradicting the 2001 ROD, the APA required the USDA to provide a reasoned explanation for the contradiction.<sup>141</sup> The court could find no explanation for the contradicting factual findings; the agency simply announced a contrary factual finding.<sup>142</sup> Thus, *Organized Village* provides guidance as to what constitutes a permissible agency reversal; the agency may reweigh the same facts and come to a different policy conclusion, but it may not use contradicting facts when reweighing its decision without a reasoned explanation.

The court also considered two other rationales for the 2003 ROD proffered by the USDA: 1) that the 2003 ROD arose out of critical comments received on the proposed rule; and 2) litigation over the 2001 ROD.<sup>143</sup> The court decided that the agency’s attempt to justify the 2003 ROD based on receiving new comments conflicted with its own statements in the 2003 ROD that the “comments raised no new issues.”<sup>144</sup> The court was similarly unpersuaded by the agency’s rationale that litigation over the 2001 ROD justified issuing the 2003 ROD because there was no rational expectation that the 2003 ROD would resolve litigation issues in the 2001 ROD, and the 2003 ROD had itself spawned more litigation.<sup>145</sup> The court’s rejection of these rationales foreshadowed two flaws in justifying policy reversals that have stymied the Trump Administration: 1) an agency may not take inconsistent positions within its own justification, and 2) simply citing litigation over the old rule is not, by itself, enough to adequately explain a policy reversal.

The USDA’s failure to provide a reasoned explanation for the Tongass exemption demonstrates the challenge for an agency seeking to reverse course, but still base its decision on prior factual findings—in the case of *Organized Village*, the same EIS. An agency has discretion to give more weight to economic development concerns than environmental concerns, but it must not “rebalance” these concerns by downplaying the prior administration’s findings regarding environmental impact, unless the agency provides an explanation for the contradiction. Agencies may find this prohibition on downplaying environmental impacts without reasoned explanation difficult. If the agency wants to downplay environmental effects, it likely must take the time to conduct the necessary factual evaluations to support its position. On the other hand, if an agency opts to stay within the boundaries of its permissible APA discretion, and simply state that it

---

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *See id.*

<sup>141</sup> *Id.* at 968–69.

<sup>142</sup> *Id.*

<sup>143</sup> *See id.* at 969–70.

<sup>144</sup> *Id.* at 969 (quoting 68 Fed. Reg. at 75,139).

<sup>145</sup> *Id.* at 969–70.

reweighed the costs and benefits to find the economic concerns more important, the agency is stuck with acknowledging the environmental consequences of its actions. Fully acknowledging adverse environmental effects may be politically damaging, even for Republican administrations running on deregulatory platforms.<sup>146</sup>

### *B. Trump Administration*

The Trump Administration's setbacks in delaying or reversing Obama-era environmental regulations are due to a lack of reasonable explanation similar to the Bush Administration's lack of reasonable explanation in *Organized Village*. This Part explores some of the Trump Administration's repeated failures to satisfy the APA's prohibition against arbitrary and capricious agency action. This Part first details two unsuccessful attempts by the Trump Administration to delay Obama-era rules, then details the unsuccessful reversals of permitting decisions. The common threads of these three cases are that agency action is arbitrary and capricious when it fails to adequately address the factual findings underlying prior agency decisions, takes inconsistent positions within its own justification, and ineffectively cites litigation or possible regulatory rescission as a justification for delay.

#### *1. Arbitrary and Capricious Delay or Suspension*

An administration seeking to undo recent promulgations by its predecessor may first seek to delay the effectiveness of the existing rule while working on its justification for rescission and formulating a new rule. However, the Trump Administration's setbacks in *Air Alliance Houston v. Environmental Protection Agency (Air Alliance)* and *State v. Bureau of Land Management* indicate that the APA requires a reasoned explanation even in decisions to delay compliance dates for the existing rule. This Part addresses both cases.

##### *a. The Chemical Disaster Rule*

In the 2018 case of *Air Alliance*, the United States Court of Appeals for the District of Columbia Circuit held the Trump Administration's suspension of the Chemical Disaster Rule, promulgated in the waning days of the Obama Administration, was arbitrary and capricious.<sup>147</sup> The court stated EPA's so-called "Delay Rule" was arbitrary and capricious because EPA's explanation for why it changed position was inadequate under *State Farm* and *Fox*.<sup>148</sup> *Air Alliance* indicates the reasoned explanation requirement extends to an agency's choice to delay rules, and that agencies must explain any departure from the previous rule's effective date, addressing the factual findings underlying the prior effective date and taking a consistent position on the effect of a delay.

---

<sup>146</sup> Cf. Erik W. Johnson & Philip Schwadel, *Political Polarization and Long-Term Change in Public Support for Environmental Spending*, SOC. FORCES, Jan. 22, 2019, at 1, 19, <https://perma.cc/M79D-MYSK> (finding Republican voter support for environmental spending rises when there is a Republican president).

<sup>147</sup> See *Air All. Houston v. Env'tl. Prot. Agency*, 906 F.3d 1049, 1069 (D.C. Cir. 2018).

<sup>148</sup> *Id.* at 1066.

In the 1990 amendments to the Clean Air Act<sup>149</sup> (CAA) Congress authorized EPA to promulgate regulations aimed at preventing accidental releases of a listed substance or extremely hazardous substances.<sup>150</sup> The statute authorized EPA to promulgate regulations with release prevention, detection, and correction requirements, as well as regulations for emergency response by owners and operators to such releases.<sup>151</sup> Responding to a petition for rulemaking in 2012 and an executive order in 2013, EPA issued its notice of proposed rulemaking for the chemical disaster rule in 2016.<sup>152</sup> In the proposed rule, EPA estimated the annual cost of onsite damages from chemical releases was \$274.7 million annually, while the cost of the proposed rule, at \$131.2 million annually, was less than half of that.<sup>153</sup> EPA stated it was unable to quantify the specific reductions in damages resulting from the proposed requirements, but nevertheless anticipated the proposed requirements would reduce the frequency and magnitude of damages from releases.<sup>154</sup> After a notice and comment period that “specifically solicited comments on proposed compliance and effective dates for the various requirements,” EPA promulgated a final rule on January 13, 2017, just seven days before the end of the Obama Administration.<sup>155</sup> The final rule set its effective date as March 14, 2017, with some provisions taking effect in one year from the effective date, and remaining provisions taking effect in 2021 and 2022.<sup>156</sup>

Six days after the inauguration of President Trump, and less than two weeks after promulgation of the rule, the Trump Administration began a series of delays of the rule.<sup>157</sup> The final of these delays was a “delay rule” promulgated on June 14, 2017, delaying the effective date of the chemical disaster rule until February 2019.<sup>158</sup> EPA justified the delay by stating it allowed the agency to conduct a reconsideration proceeding—industry groups and some states had petitioned for reconsideration upon inauguration of the Trump Administration—and to consider other issues that could benefit from additional comment.<sup>159</sup> EPA also justified the delay by stating it could consider revising or rescinding the Chemical Disaster Rule, expressing doubts as to the benefits of the standard, and explaining that a delay would allow review of objections without imposing compliance and

---

<sup>149</sup> 42 U.S.C. §§ 7401–7671q (2012).

<sup>150</sup> *Air All. Houston*, 906 F.3d at 1053.

<sup>151</sup> *Id.*

<sup>152</sup> *See id.* at 1053–55; *see also* Accidental Release Prevention Requirements: Risk Management Under the Clean Air Act, 81 Fed. Reg. 13,638, 13,638 (Mar. 14, 2016) (proposed rule). In 2013, several high profile chemical accidents occurred, including the explosion of a fertilizer plant in West, Texas and the explosion of a chemical plant in Geismar, Louisiana. *Air All. Houston*, 906 F.3d at 1054. The West, Texas, explosion killed fifteen people and was later found to be caused by arson. Manny Fernandez, *Fire That Left 15 Dead at Texas Fertilizer Plant is Ruled Intentional*, N.Y. TIMES (May 11, 2016), <https://perma.cc/U87J-B65V>.

<sup>153</sup> *Air All. Houston*, 906 F.3d at 1055.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 1056.

<sup>157</sup> *Id.* at 1056–57.

<sup>158</sup> *Id.*; *see also* Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date, 82 Fed. Reg. 27,133, 27,133 (June 14, 2017) (final rule).

<sup>159</sup> *Air All. Houston*, 906 F.3d at 1056–57.

implementation costs.<sup>160</sup> Environmental groups and some states petitioned for review of the delay rule in the D.C. Circuit.<sup>161</sup>

The D.C. Circuit's opinion, filed per curiam, concluded EPA's action in delaying the Chemical Disaster Rule violated the APA because it was arbitrary and capricious.<sup>162</sup> The court faulted EPA's explanation for changing position on the effective and compliance dates under *Fox* and *State Farm*.<sup>163</sup>

First, the court addressed EPA's justification that the delay allowed for time to consider public comment on the Chemical Disaster Rule and consider revision or rescission.<sup>164</sup> The court reasoned that reconsideration, by itself, did not give EPA "a sufficient basis to delay promulgated effective dates specifically chosen by EPA on the basis of public input and reasoned explanation."<sup>165</sup> The court explained that EPA gave no explanation as to how the rule's implementation would impede its ability to reconsider the rule.<sup>166</sup> The opinion also noted that the CAA required an expeditious timeframe for regulations like the Chemical Disaster Rule; the statute required "assuring compliance as expeditiously as practicable."<sup>167</sup> Thus, *Air Alliance* indicated that administrations seeking to undo the work of their predecessors cannot simply use the fact of reconsideration as a justification for delaying the rules they seek to undo. Instead, they will need to spend time to justify their decision to delay a rule, when the delay itself is probably partly due to the need to provide time to justify a rescission.

Second, the D.C. Circuit concluded that EPA failed to explain its change in position.<sup>168</sup> The court stated EPA had considered comments about the effective dates when promulgating the Chemical Disaster Rule and explained why it accepted or rejected those comments in the final rule.<sup>169</sup> However, in the delay rule, EPA failed to explain why it was departing from its previous conclusions about the appropriate effective dates.<sup>170</sup> The court reasoned that EPA failed to explain its determination that the benefits estimated when promulgating the existing Chemical Disaster Rule were suddenly only speculative, and the agency also failed to explain why a complete delay was necessary, as opposed to delaying certain provisions.<sup>171</sup> The court concluded that these failures to explain violated the requirement of a reasoned explanation established in *Fox* and *State Farm* "for disregarding facts and circumstances that underlay or were engendered by the prior policy."<sup>172</sup>

---

<sup>160</sup> *Id.* at 1057.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 1066. The court also found the delay rule violated rulemaking procedures in the CAA. *Id.* at 1053. The panel consisted of Judges Rogers, Kavanaugh, and Wilkins. *Id.* at 1052. However, Judge Kavanaugh did not participate in the opinion, likely because it was written during his nomination for the Supreme Court. *See id.*

<sup>163</sup> *Id.* at 1066.

<sup>164</sup> *Id.* at 1066–67.

<sup>165</sup> *Id.* at 1067.

<sup>166</sup> *Id.* at 1066–67.

<sup>167</sup> *Id.* at 1067.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *See id.* (quoting *Fox*, 556 U.S. 502, 515–16 (2009)).

The court also decided that EPA's argument that the delay merely maintained the status quo was disingenuous because EPA had simultaneously argued the delay was necessary due to substantial compliance costs if the Chemical Disaster Rule were to go into effect.<sup>173</sup> The court explained that "[e]ither there would be 'substantial compliance and implementation' efforts by the regulated parties absent the Delay Rule, or the rule . . . does nothing more than maintain the status quo with 'speculative but likely minimal . . . foregone benefits.'"<sup>174</sup> Thus, *Air Alliance* demonstrated the precarious position of administrations seeking to suspend rules; they must address the explanations for the effective date of the previous rule to adequately justify extending the rule. Yet in doing so, they must be careful to avoid the EPA's mistake in *Air Alliance*: downplaying the effect of delaying the rule while simultaneously pointing to substantial costs if the rule were to go into place.

*b. The Methane Waste Prevention Rule*

The Trump Administration's attempts to delay and suspend the 2016 Methane Waste Prevention rule reinforced the APA's burden on an agency seeking to suspend the rule of a predecessor administration while the agency formulates a new rule. In *State v. Bureau of Land Management (State II)*, the United States District Court for the Northern District of California found that the Bureau of Land Management's (BLM) reliance on conclusions with no factual basis was arbitrary and capricious.<sup>175</sup>

Because the history, litigation, and revision efforts of the methane rule is the most convoluted of all the rules discussed in this Comment,<sup>176</sup> the Comment only discusses the relevant procedures and litigation history. The BLM began developing the waste prevention rule in 2014, responding to views within the agency and the Government Accountability Office that the old rules, over three decades old, were "insufficient and outdated."<sup>177</sup> The rule was to replace regulations from 1979 governing venting, flaring, leaks, and royalty-free use of gas on federal and most Indian leases.<sup>178</sup> After multiple rounds of notice and comment, conducting a series of forums, meetings, and calls with various interested groups, the BLM published the final rule in November 2016.<sup>179</sup> Various states immediately challenged the waste prevention rule in United States District Court for the District

---

<sup>173</sup> *Id.* at 1068.

<sup>174</sup> *Id.* (quoting Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date, 82 Fed. Reg. 27,133, 27,139 (June 14, 2017) (final rule)).

<sup>175</sup> 286 F. Supp. 3d 1054, 1065–68 (N.D. Cal. 2018).

<sup>176</sup> See Hana Vizcarra, *BLM Methane Waste Prevention Rule*, HARVARD, <https://perma.cc/3UHK-7QTW> (detailing the history of the rule and tracking current challenges and revisions).

<sup>177</sup> See Waste Prevention, Production Subject to Royalties, and Resource Conservation, 81 Fed. Reg. 83,008, 83,008–10 (Nov. 18, 2016) (final rule).

<sup>178</sup> *Id.* at 83,008.

<sup>179</sup> See *State v. U.S. Bureau of Land Mgmt. (State I)*, 277 F. Supp. 3d 1106, 1111 (N.D. Cal. 2017) (summarizing the rule's history).

of Wyoming, first seeking a preliminary injunction, which the court denied in January 2017.<sup>180</sup> The waste prevention rule took effect later that month.<sup>181</sup>

Two months after taking office, President Trump issued an executive order in March 2017 instructing agencies to “suspend, revise, or rescind those [regulations] that unduly burden the development of domestic energy resources.”<sup>182</sup> In June 2017, BLM issued a notice postponing compliance dates for parts of the waste prevention rule.<sup>183</sup> The Northern District of California decided BLM’s postponement of compliance dates violated the APA on multiple grounds, including lacking a reasoned explanation.<sup>184</sup> Sent back to the drawing board, BLM proposed a suspension of the waste prevention rule (suspension rule) in October 2017, and issued the final suspension rule in December 2017.<sup>185</sup> California, New Mexico, conservation groups, and tribes again filed in the Northern District of California, seeking to preliminarily enjoin the suspension rule, claiming it was arbitrary and capricious.<sup>186</sup>

Judge William H. Orrick granted the preliminary injunction, deciding BLM’s reasoning behind the suspension rule was untethered to the evidence; thus, the plaintiffs were likely to prevail on the merits of their claim that BLM’s reversal was arbitrary and capricious.<sup>187</sup> BLM sought to rationalize the suspension rule by stating it had “concerns regarding the statutory authority, cost, complexity, feasibility, and other implications of the waste prevention rule, and therefore want[ed] to avoid imposing temporary or permanent compliance costs on operators for requirements that might be rescinded or significantly revised in the near future.”<sup>188</sup> BLM also stated its conclusion that the waste prevention rule would “add considerable regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation.”<sup>189</sup> However, this was squarely at odds with BLM’s prior conclusion under the Obama Administration in November 2016—that the waste prevention rule contained “economical, cost-effective, and reasonable measures . . . to minimize gas waste.”<sup>190</sup> Because BLM’s new finding that the costs and benefits of the rule was contrary and inconsistent with the prior finding, the court found that the agency violated the APA, because *Fox* required BLM to “provide a more detailed justification than what would suffice for a new policy created on a blank slate.”<sup>191</sup>

---

<sup>180</sup> *Wyoming v. U.S. Dep’t of the Interior*, No. 2:16-CV-0280-SWS, 2017 WL 161428, at \*12 (D. Wyo. Jan. 16, 2017).

<sup>181</sup> *State I*, 277 F. Supp. 3d at 1111.

<sup>182</sup> *See* Promoting Energy Independence and Economic Growth, Exec. Order No. 13,783, 82 Fed. Reg. 16,093, 16,093 (Mar. 31, 2017).

<sup>183</sup> *State I*, 277 F. Supp. 3d at 1112.

<sup>184</sup> *See id.* at 1117–23.

<sup>185</sup> *See State II*, 286 F. Supp. 3d 1054, 1058–59 (N.D. Cal. 2018); *see also* Waste Prevention, Production Subject to Royalties, and Resource Conservation; Delay and Suspension of Certain Requirements, 82 Fed. Reg. 58,050, 58,050 (Dec. 8, 2017) (final rule).

<sup>186</sup> *State II*, 286 F. Supp. 3d at 1057.

<sup>187</sup> *See id.* at 1068, 1076.

<sup>188</sup> *Id.* at 1065 (quoting 82 Fed. Reg. at 58,050).

<sup>189</sup> *Id.* (quoting 82 Fed. Reg. at 58,050).

<sup>190</sup> *Id.* (quoting 81 Fed. Reg. at 83,009).

<sup>191</sup> *Id.* (quoting *Fox*, 556 U.S. 502, 515 (2009)).

The court concluded BLM's justification fell short of the *Fox* court's requirement for a more detailed explanation because its justification was not factually based.<sup>192</sup> BLM argued there was "newfound concern" that the waste prevention rule imposed a significant regulatory burden on operators of marginal or low-producing wells, but the court decided that BLM had no basis for its newfound concern and pointed to no facts casting doubt on the previous administration's assumption.<sup>193</sup> BLM argued that, because it merely suspended the waste prevention rule, rather than revoking or revising it, the agency had no burden to point to any data supporting its new concerns.<sup>194</sup> The court concluded BLM's argument was "contrary to the law and standard set forth" by *Fox*.<sup>195</sup> Thus, when an agency wishes to justify a new rule based on newfound concerns, it must give factual support for those new concerns in order to provide a reasoned explanation.

The suspension rule also suffered from conflicting positions within its own justification, similar to the problem of conflicting positions in *Air Alliance*<sup>196</sup> and *Organized Village*.<sup>197</sup> The Regulatory Flexibility Act<sup>198</sup> (Flexibility Act) required BLM to evaluate the economic effects of the suspension rule on small entities, whether beneficial or detrimental.<sup>199</sup> If BLM determined the suspension rule would have significant economic effects, either adverse or beneficial, on a substantial number of small entities, the Flexibility Act required the agency to conduct a regulatory flexibility analysis.<sup>200</sup> Pursuant to its Flexibility Act obligations, BLM, in issuing the suspension rule, estimated the suspension rule would potentially reduce compliance costs in the amount of \$60,000 for small entities, "result[ing] in an average increase in profit margin of 0.17 percentage points."<sup>201</sup> The agency concluded that the suspension rule would not substantially affect small entities within the meaning of the Flexibility Act; thus, a regulatory flexibility analysis was unnecessary.<sup>202</sup> However, in justifying the suspension rule, BLM simultaneously stated that the suspension rule was necessary because the waste prevention rule would have "a disproportionate impact on small operators."<sup>203</sup> The court concluded BLM took "entirely inconsistent" positions when stating the waste prevention rule would disproportionately affect small operators, while also stating it was not required to perform a regulatory flexibility analysis because the suspension rule would not substantially affect small operators.<sup>204</sup> Either the suspension rule was necessary to save small operators from the large costs of the waste prevention rule, or the suspension rule was insignificant because of the low costs of the waste prevention rule; BLM could not have it both ways. *State II* reiterated the need for

---

<sup>192</sup> *Id.* at 1066.

<sup>193</sup> *See id.* at 1065–66 (quoting 82 Fed. Reg. at 58,050).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 1066.

<sup>196</sup> *See supra* notes 182–183 and accompanying text.

<sup>197</sup> *See supra* notes 148–149 and accompanying text.

<sup>198</sup> 5 U.S.C. §§ 601–612 (2012).

<sup>199</sup> *State II*, 286 F. Supp. 3d at 1066.

<sup>200</sup> *See id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* (quoting 82 Fed. Reg. at 58,051).

<sup>204</sup> *Id.*

agencies to take consistent positions within the justification of a new rule, established by *State Farm* and similarly followed by *Organized Village*. Agencies cannot downplay the economic effect of their new rule for one purpose, while simultaneously characterizing the same economic effect as substantial to justify their new rule for other purposes.

*State II* gave one justification that agencies reversing course could potentially employ successfully. The court noted that “[p]erhaps the BLM’s best justification” for the suspension rule was its concern that provisions of the Obama-era waste prevention rule might not survive judicial review in the District of Wyoming case.<sup>205</sup> In its order denying a preliminary injunction, that court expressed concern that provisions of BLM’s waste prevention rule had usurped EPA’s authority under the CAA, and that the waste prevention rule’s justification using environmental and societal benefits, as opposed to resource conservation benefits, was inappropriate.<sup>206</sup> The Northern District of California opined that BLM’s concern about judicial review was grounded in a federal judge’s “reasoned skepticism” outlined in a judicial order.<sup>207</sup> However, the court concluded that this concern justified only the particular provisions addressed by the District of Wyoming, not a blanket suspension of the entire waste prevention rule.<sup>208</sup> Since many environmental rules undergo court challenges in new administrations, *State II* indicates an administration seeking to suspend a prior rule could use a court’s indication that the prior rule may not survive litigation as a justification to suspend provisions at issue in litigation.<sup>209</sup> However, *State II* does not indicate that agencies may simply point to the litigation as justification to delay or suspend the entire rule; instead it must point to something, like a judicial order, that shows the rule’s provisions may not survive judicial review and must tailor the suspension to only those provisions.<sup>210</sup>

## 2. Arbitrary and Capricious Reversal: The Keystone XL Pipeline

The 2018 case of *Indigenous Environmental Network v. U.S. Department of State* reflected how the APA’s prohibition on arbitrary and capricious action can require an agency to address a previous administration’s factual findings on climate change. In *Indigenous Environmental Network*, Judge Brian Morris of the United States District Court of the District of Montana held that the United States Department of State (State Department) violated the APA by issuing a pipeline permit, denied by the previous administration, without providing a reasoned explanation for disregarding its prior factual findings regarding climate change.<sup>211</sup> Given the current Administration’s denial or “alternative views” of the impacts of

---

<sup>205</sup> *Id.* at 1067.

<sup>206</sup> *Id.*; see *Wyoming v. U.S. Dep’t of the Interior*, No. 2:16-CV-0280-SWS, 2017 WL 161428, at \*9, \*10 (D. Wyo. 2017).

<sup>207</sup> *State II*, 286 F. Supp. 3d at 1068.

<sup>208</sup> *Id.*

<sup>209</sup> See *id.*

<sup>210</sup> See *id.* (stating the concern was “grounded in a federal judge’s *reasoned skepticism outlined in a judicial order*” (emphasis added)); see also *supra* note 152 and accompanying text.

<sup>211</sup> *Indigenous Envtl. Network v. U.S. Dep’t of State*, 347 F. Supp. 3d 561, 591 (D. Mont. 2018).



climate change,<sup>212</sup> explaining a reversal from a previous policy based on climate change impacts will continue to be a hurdle for the Trump Administration and any future administrations that take a similar denial approach. More broadly, *Indigenous Environmental Network* showed an agency may not simply ignore its previous findings when reversing course.

In 2008, TransCanada, a Canadian company, applied for a presidential permit to expand its current pipeline system in Canada across the border into the United States.<sup>213</sup> Named the Keystone XL pipeline, the proposed pipeline would transport up to 830,000 barrels per day of crude oil from Canada and Montana to a facility in Nebraska.<sup>214</sup> Crossing the border required TransCanada to obtain a presidential permit.<sup>215</sup> Previously, in a 2004 executive order, President George W. Bush granted the State Department authority to issue presidential permits if they would “serve the national interest.”<sup>216</sup> Any decision by the State Department regarding the permit was considered a “major federal action” under NEPA, thus requiring the agency to at least conduct an environmental assessment.<sup>217</sup> The State Department issued a proposed environmental impact statement (EIS) in April 2010, a supplemented EIS in April 2011, and a final EIS in August 2011.<sup>218</sup> After Congress passed a statute requiring the State Department to make its determination within sixty days,<sup>219</sup> the agency denied the permit, stating that the “arbitrary” sixty-day deadline did not give adequate time to consider the pipeline’s potential environmental impacts.<sup>220</sup> TransCanada reapplied for a permit in May 2012, and upon further consideration of the environmental impacts, the State Department released a final supplemental environmental impact statement in January 2014 (2014 FSEIS).<sup>221</sup> The State Department, under Secretary John Kerry, then denied the permit in a record of decision in November 2015 (2015 ROD), determining the pipeline was not in the national interest.<sup>222</sup>

---

<sup>212</sup> See Alejandro De La Garza, *President Trump Renews Climate Change Denial Days After Defense Department Releases Daunting Report on Its Effects*, TIME (Jan. 20, 2019), <https://perma.cc/DDW7-JWLF> (“Through his candidacy and presidency, Trump has routinely dismissed climate change, calling it a ‘hoax.’”); Andrew Revkin, *Does the U.S. Need a ‘Presidential Climate Security Committee’?*, NAT’L GEOGRAPHIC (Feb. 22, 2019), <https://perma.cc/X8ZF-VDD9> (detailing a Trump Administration plan, originating from an advisor who believes carbon dioxide emissions are good for the planet, to create a committee tasked with adversarial review of climate change reports).

<sup>213</sup> *Indigenous Envtl. Network v. United States Dep’t of State*, No. CV-17-29-GF-BMM, 2017 WL 5632435, at \*1 (D. Mont. Nov. 22, 2017).

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> See Exec. Order No. 13,337, 69 Fed. Reg. 25,299, 25,300 (May 5, 2004).

<sup>217</sup> See *Indigenous Envtl. Network*, 2017 WL 5632435, at \*5.

<sup>218</sup> *Id.* at \*1.

<sup>219</sup> See Temporary Payroll Cut Continuation Act of 2011, 12 U.S.C. § 4547 (2012).

<sup>220</sup> *Indigenous Envtl. Network*, 2017 WL 5632435, at \*2.

<sup>221</sup> *Id.*

<sup>222</sup> *Indigenous Envtl. Network v. U.S. Dep’t of State*, 347 F. Supp. 3d 561, 583–84 (D. Mont. 2018); see also DEP’T OF STATE, RECORD OF DECISION AND NATIONAL INTEREST DETERMINATION: TRANSCANADA KEYSTONE PIPELINE, L.P. APPLICATION FOR PRESIDENTIAL PERMIT 9 (2015), <https://perma.cc/7ZCY-JRLZ>.

After a change in administration, President Trump invited TransCanada to reapply for the permit in a presidential memorandum.<sup>223</sup> The memorandum directed the State Department to make a final decision within sixty days of TransCanada's reapplication and to consider the 2014 FSEIS to satisfy its NEPA obligations.<sup>224</sup> After TransCanada's reapplication, the State Department issued a record of decision in March 2017 (2017 ROD), but did not supplement or revise the 2015 ROD.<sup>225</sup> Plaintiffs filed suit in the District of Montana, challenging the 2017 ROD as arbitrary and capricious under the APA, among other claims.<sup>226</sup>

The district court held that 2017 ROD was arbitrary and capricious, failing to provide a reasoned explanation because it ignored the 2015 ROD's climate change considerations and the role of the United States as a leader on climate change action.<sup>227</sup> The district court consequently vacated the 2017 ROD and remanded to the State Department with instructions to provide a reasoned explanation for the change in policy.<sup>228</sup> In determining the 2017 ROD was arbitrary and capricious, the district court employed the Ninth Circuit's four-part *Organized Village* test,<sup>229</sup> finding that the case turned on the fourth factor—whether “the agency provides good reasons for the new policy.”<sup>230</sup>

The State Department argued the 2017 ROD was “a mere policy shift,” stating “there have been numerous developments related to global action to address climate change,” and “a decision to approve the proposed Project would support U.S. priorities relating to energy security, economic development, and infrastructure.”<sup>231</sup> The court noted the agency had the authority to place greater emphasis on energy security in 2017, but concluded the agency's “about-face” constituted more than “a mere policy shift.”<sup>232</sup> The court determined that the agency had reversed course, completely ignoring the 2015 ROD's section on “Climate Change-Related Foreign Policy Considerations.”<sup>233</sup> Noting “[t]he 2017 ROD initially tracked the 2015 ROD nearly word-for-word[,]” the court decided that the 2017 ROD had omitted, without explanation, the 2015 ROD's climate change findings.<sup>234</sup> The court thought this omission was significant because the section in the 2015 ROD discussed the United States' global leadership in climate change action, scientific support for “a need to keep global temperature below two degrees Celsius above pre-industrial levels,” evidence that humans were a dominant cause of climate change, severe weather effects of climate change, and the United States' place in the world as the second-largest greenhouse gas

---

<sup>223</sup> *Indigenous Envtl. Network*, 2017 WL 5632435, at \*2; see also Construction of the Keystone XL Pipeline, 82 Fed. Reg. 8,663, 8,663 (Jan. 30, 2017).

<sup>224</sup> *Indigenous Envtl. Network*, 2017 WL 5632435, at \*2.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Indigenous Envtl. Network*, 347 F. Supp. 3d at 583–84.

<sup>228</sup> *Id.* at 591.

<sup>229</sup> See *supra* note 137 and accompanying text.

<sup>230</sup> *Id.* at 582–83 (citing *Organized Vill. of Kake*, 795 F.3d 956, 966 (9th Cir. 2015)).

<sup>231</sup> *Id.* at 583.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*; see also DEP'T OF STATE, *supra* note 222, at 26–29.

<sup>234</sup> *Indigenous Envtl. Network*, 347 F. Supp. 3d at 584.

emitter.<sup>235</sup> In light of this record, the State Department's conclusory statement that "there have been numerous developments related to global action to address climate change" fell far short of a reasoned explanation for rejecting the prior administration's climate findings.<sup>236</sup> Just as an agency may not contradict its prior factual findings without a reasoned explanation, it may not ignore its previous factual findings without a reasoned explanation.

*Indigenous Environmental Network* showed how the APA's requirement for a reasoned explanation can affect an administration seeking to reverse a prior administration's policy that was based on climate findings. Simply ignoring climate science and considerations cited by the prior administration will not satisfy the APA's requirement for a reasoned explanation. The district court cited Justice Kennedy's concurrence in *Fox*: "[a]n agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate."<sup>237</sup> If an agency wishes to reverse a prior administration's policy that was based on climate findings, it must squarely address the underlying climate science in the prior policy and provide a reasoned explanation for changing position. This requirement presents a problem for an administration wishing to simply deny climate science. On the other hand, an agency wishing to create a lasting rule based on climate science must incorporate climate science as an integral part of its reasoning, like the State Department's 2015 ROD. Perhaps reflecting the burden this climate-science based reasoning imposes on an administration seeking to undo a previous agency's action that was based on climate science, in March 2019, the Trump Administration opted to circumvent the NEPA and APA requirements by revoking the 2017 permit and issuing TransCanada a permit directly from the Office of the President.<sup>238</sup>

#### IV. STRATEGIES FOR RESILIENT DECISION MAKING AND CHALLENGING REVERSALS

There are lessons from the Bush and Trump administrations' failures. This Part explains strategies for agencies and administrations wishing to make enduring environmental agency actions, and administrations seeking to successfully undo the work of their predecessors. This Part closes with strategies for potential litigants challenging an agency's policy reversal.

##### *A. Making Enduring Decisions*

Agencies that wish to take lasting environmental actions need to base their decisions in robust factual records. The Trump and Bush administrations' inability

---

<sup>235</sup> *Id.* at 583–84.

<sup>236</sup> *See id.* at 584 ("Once again, this conclusory statement falls short of a factually based determination, let alone a reasoned explanation, for the course reversal.").

<sup>237</sup> *Id.* at 584 (quoting *Fox*, 556 U.S. 502, 537 (2009) (Kennedy, J., concurring)).

<sup>238</sup> *See* Hannah Northey & Tim Cama, *Trump Permit Revives Pipeline Work*, E&E NEWS PM (Mar. 29, 2019), <https://perma.cc/8ZKN-967P> ("The permit appears intended to shield the Keystone XL decision from judicial scrutiny and from being overturned by federal courts. Instead of being issued by the State Department after an environmental review under the National Environmental Policy Act, the new permit cites only Trump's authority as president."). NEPA and the APA only apply to agency action, not actions by the President.

to reverse or delay prior decisions was, in large part, due to inadequately addressing prior factual findings. Regulations or other actions aimed at environmental protection should be grounded in extensive factual findings about the environmental benefits. Like the decision to apply the national roadless rule to the Tongass, or the Obama State Department's decision to deny the Keystone XL permit, an agency seeking environmental protection must offer scientific evidence in its record of decision and make express factual findings about the necessity of its decision to protect the environment. If a later administration seeks to reverse course, a reviewing court will require the agency to address those prior factual findings. If the record contains inconvenient facts about the necessity of the prior action for environmental protection, the agency will either be forced to provide a reasoned explanation for disregarding those facts if it wishes to dispute the environmental benefits, or expressly state that the environmental benefits are a concern, outweighed by the economic effects. Putting extensive and explicit factual findings about the benefits of the rule in the record, like the USDA's finding in *Organized Village* that the national roadless rule was necessary to maintain roadless values,<sup>239</sup> or the BLM's finding that its Methane Waste Prevention rule imposed "economical, cost-effective, and reasonable measures" in *State II*,<sup>240</sup> will ensure subsequent administrations cannot ignore those conclusions when rescinding the rule. Thus, current administrations can use the APA's requirement for reasoned decision making as a tool to force future administrations to confront the factual findings of the current administration.

Similarly, if an agency's decision involves factual findings on climate change, those findings should be squarely presented in the record. In *Indigenous Environmental Network*, the Trump State Department attempted to simply ignore the prior administration's findings on the negative climate impacts of approving the Keystone XL pipeline.<sup>241</sup> The APA's requirement for reasoned decision making prohibited disregarding those findings.<sup>242</sup> Where appropriate, agencies should include climate considerations in their environmental decisions because it will force a subsequent deregulatory administration to address those findings.

On the other hand, administrations pursuing a deregulatory agenda need to include extensive evidence about the economic prices of stricter regulation and make explicit factual findings about the necessity of lighter regulation for economic development. Just as the APA requires agencies to address the environmental consequences cited by their predecessors, the APA requires a subsequent more environmentally-minded administration to address the economic costs cited by the deregulatory administration.

On either side, agencies should also include extensive factual findings about the costs of their rule in the record of decision. In *State II*, the Northern District of California declared that the types of "good reasons" for decision reversals sought by the APA were "new facts or evidence coming to light [or] considerations [the

---

<sup>239</sup> *Organized Village*, 795 F.3d 956, 968 (9th Cir. 2015).

<sup>240</sup> See *State II*, 286 F. Supp. 3d 1054, 1065 (N.D. Cal. 2018) (quoting 81 Fed. Reg 83,009 (Nov. 18, 2016)).

<sup>241</sup> See *supra* notes 233–236 and accompanying text.

<sup>242</sup> See *supra* notes 233–236 and accompanying text.

agency] left out in its previous analysis.”<sup>243</sup> An agency wishing to make enduring decisions needs to include factual findings covering all of the relevant concerns, including economic costs, to prevent a future agency decision that can be justified on the grounds that the prior decision left out facts or considerations. In *State II* and *Air Alliance*, the APA prohibited the Trump Administration from finding a higher economic cost of Obama-era rules without a reasoned explanation because the Obama-era rules made explicit findings about the costs in the record.<sup>244</sup> Because the Trump Administration’s findings of economic cost differed from the Obama-era findings, the APA required the Trump Administration to explain the discrepancy.<sup>245</sup> Thus, current administrations can use the APA to complicate a future administration’s quick reversal based on concerns about economic costs by including factual findings about economic costs in the record. If future administrations must provide a reasoned explanation for their conflicting findings about cost, it will inevitably take time to build a record to support the conflicting findings, which may dissuade those more interested in taking quick action. Ultimately, this dissuasion should be a good thing because it ensures that agency action based on reasoned decision making endures.

### B. Reversing Course

The four-factor test established by *Organized Village* gave a blueprint for an agency seeking to reverse course from a prior decision: 1) the agency must display awareness that it is changing position, 2) show its new policy is permissible under the statute, 3) believe the new policy is better than the old one, and 4) provide “good reasons” for the new policy, which must include a reasoned explanation “if the ‘new policy rests upon factual findings that contradict those which underlay its prior policy.’”<sup>246</sup> An agency should have no difficulty meeting the first three requirements, as long as its policy is permissible under the governing statutes.<sup>247</sup> Agencies seeking to reverse course from a previous administration’s environmental decision essentially have two options to meet the fourth requirement: 1) characterize the reversal as a policy shift, without making conflicting factual findings, or 2) base the reversal on conflicting factual findings and provide a reasoned explanation for those conflicting findings.<sup>248</sup> This reasoned explanation should include new information, explain changed circumstances, or both.

In some instances, an agency may prefer to characterize the reversal as a policy shift so it can benefit from the expediency of using the same record to fulfill its APA and NEPA obligations. If an agency chooses this option, it must avoid

---

<sup>243</sup> *State II*, 286 F. Supp. 3d at 1068.

<sup>244</sup> See *supra* notes 170–174, 196–204 and accompanying text.

<sup>245</sup> See *supra* notes 170–174, 196–204 and accompanying text.

<sup>246</sup> *Organized Village*, 795 F.3d 956, 966 (9th Cir. 2015) (quoting *Fox* 556 U.S. 502, 515–16 (2009)).

<sup>247</sup> See, e.g., *id.* at 967 (easily finding the agency met the first three requirements and assuming the agency believed the new policy was better).

<sup>248</sup> *Id.* at 968 (reasoning that an agency giving more weight to socioeconomic concerns than it had in the past was “well within an agency’s discretion,” but stating an agency may not disregard prior factual findings without a reasoned explanation (quoting *Nat’l Ass’n of Home Builders v. Env’t Prot. Agency*, 682 F.3d 1032, 1038 (D.C. Cir. 2012))).

making new factual findings that conflict with the prior findings and may not simply ignore inconvenient facts from the prior decision. In *Organized Village*, the USDA sought to characterize its policy change as a mere shift in policy within its discretion, but the court found that the reversal was more than a mere policy shift because the agency made conflicting factual findings about the necessity of the roadless rule to protect roadless values in the Tongass.<sup>249</sup> Similarly, in *Indigenous Environmental Network*, the State Department simply ignored previous factual findings about climate change and merely stated there had been “numerous developments.”<sup>250</sup> In both cases, the agencies violated the APA by either making conflicting factual findings or simply ignoring previous factual findings. An agency seeking to successfully reverse course by using the same factual findings of the previous agency must address all factual findings in its decision and not make conflicting findings without a reasoned explanation. Of course, some of those prior factual findings, especially about environmental effects, may be inconvenient. In cases where an agency is uncomfortable with the possible political consequences of basing its decision on a record that predicts distasteful environmental damage, the agency must spend the requisite time and resources to compile a record explaining why it now believes the environmental consequences will be less dire.

*State II* gave examples of what kinds of justifications can satisfy the APA’s requirement for a reasoned explanation when reversing course: “[n]ew facts or evidence coming to light, considerations that [the agency] left out in its previous analysis, or some other concrete basis supported in the record.”<sup>251</sup> To present new facts, evidence, or considerations the prior decision left out, an agency should supplement the factual record to provide a reasoned explanation. In *State II*, BLM tried to present new concerns about the regulatory burden of the rule it was seeking to suspend, but did not supplement the factual conclusions, which included an express finding that the waste prevention rule was economical and cost-effective.<sup>252</sup> To justify its newfound concern about the regulatory burden of the waste prevention rule, BLM should have supplemented the record to provide factual support for its belief that the waste prevention rule imposed a burden on small entities. Likewise, an agency cannot simply use the same record before it if it intends to make conflicting factual conclusions.

An agency must also take a consistent position within its reasoning for reversal. Inconsistent positions contributed to the vacatur of agency decisions in *Organized Village* and *State II*.<sup>253</sup> In *Organized Village*, the USDA stated the comments received about its proposal to reverse its decision raised no new issues, but simultaneously stated its reversal was based on receiving new comments.<sup>254</sup> In *State II*, the BLM sought to avoid Flexibility Act obligations to prepare a regulatory flexibility analysis by concluding its suspension rule would not substantially affect small entities, but simultaneously justified the suspension rule

---

<sup>249</sup> See *supra* notes 136–142 and accompanying text.

<sup>250</sup> See *Indigenous Envtl. Network*, 347 F. Supp. 3d 561, 584 (D. Mont. 2018) (quoting Dep’t of State, 2017 Record of Decision, at 2518 (2017)).

<sup>251</sup> *State II*, 286 F. Supp. 3d 1054, 1068 (N.D. Cal. 2018).

<sup>252</sup> See *supra* notes 196–204 and accompanying text.

<sup>253</sup> See *supra* notes 144, 199–204 and accompanying text.

<sup>254</sup> See *supra* note 144 and accompanying text.

based on its conclusion that the waste prevention rule would have disproportionate impact on small operators.<sup>255</sup> These cases demonstrate that the APA prohibits an agency from downplaying effects of its reversal for one purpose, while magnifying the same effects for another purpose.

Lastly, if an agency wishes to delay the effectiveness of a prior administration's rule, it must do more than simply point to litigation or its intention to revise the rule to justify its delay. In *Organized Village*, the Ninth Circuit rejected USDA's reasoning that litigation over the roadless rule was a justification for rescinding the rule.<sup>256</sup> In *State II*, the Northern District of California rejected BLM's justification pointing to litigation over the Methane Waste Prevention rule because the agency did not tailor its suspension rule to the specific issues in the litigation.<sup>257</sup> In *Air Alliance*, the D.C. Circuit found that EPA gave no explanation about how the Chemical Disaster Rule taking effect would impede the agency's ability to reconsider the rule.<sup>258</sup> Thus, an agency needs to offer more than the possibility of rule rescission or judicial review to delay the rule. An agency should point to substantial compliance costs, environmental loss, evidence showing rescission is near, or a judge's skepticism the prior rule might not survive judicial review. Additionally, the agency needs to tailor the delay to these issues.

### C. Challenging Policy Reversals

Challengers to environmental policy reversals should look for the same types of failures that plagued the Bush and Trump Administrations discussed in Part III. These include taking inconsistent positions within a reversal's justification, failing to address inconsistent factual determinations between the prior rule and the new rule, ignoring inconvenient factual determinations in the prior rule, or citing to possible rescission or litigation as a justification. Especially in the case of a new administration, orders to act quickly may force agencies to make decisions without fully addressing the factual record the prior decision was based on. In these circumstances, challengers can successfully stop a reversal with the APA.

Challengers should look through the records of the previous rule and the reversal rule, looking for any factual determinations the agency makes as to environmental or economic effects. If there are discrepancies between the two, such as the conflicting conclusions as to the necessity of the roadless rule's application to the Tongass,<sup>259</sup> or a complete failure to address an important aspect of the problem, such as the State Department's failure to consider climate change effects of the Keystone XL permit,<sup>260</sup> challengers should point those out to the court as arbitrary and capricious in an APA challenge. Similarly, potential challengers should look for inconsistency within the reversal justification itself, such as BLM's conclusion that suspension of the methane waste prevention rule was necessary because of negative economic effects on small operators, but simultaneously

---

<sup>255</sup> See *supra* notes 199–204 and accompanying text.

<sup>256</sup> See *supra* note 145 and accompanying text.

<sup>257</sup> See *supra* notes 205–208 and accompanying text.

<sup>258</sup> See *supra* notes 164–167 and accompanying text.

<sup>259</sup> See *supra* notes 136–142 and accompanying text.

<sup>260</sup> *Indigenous Envtl. Network*, 347 F. Supp. 3d 561, 584 (D. Mont. 2018).

concluding that a suspension rule would not significantly affect small operators under the Flexibility Act.<sup>261</sup> If the agency has given no reasoned explanation for changed factual conclusions, these inconsistencies in the record can be used to stymie agency action through the APA.

#### V. CONCLUSION

If administrations wish to make enduring environmental regulations or successfully rescind the regulations of their predecessors, they must provide a reasoned explanation. Under the APA, an agency does have discretion to change policies under a new administration. However, the APA requires an agency to address any inconsistent factual findings central to its decision and take consistent positions within its justification. Current administrations can use these APA requirements to force future administrations to address the current administrations' factual conclusions. Policies supported by comprehensive factual findings in the record can be more resistant to reversal because of the considerable time and resources to adequately address the prior factual findings required by the APA. Litigants can also successfully use these APA requirements to challenge agency policy reversals when agencies make inconsistent factual findings.

---

<sup>261</sup> See *supra* notes 199–204 and accompanying text.