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When an Agency's Rationale Isn't the Real Reason

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All environmental practitioners have encountered situations in which they have been convinced that an executive agency is making a decision—a rulemaking, a permit grant or denial, a remedy selection—based on an expressed rationale that does not seem like the real reason. When does that go so far as to render the agency action infirm?

Recent events may have put this issue in mind. But, to be fair, many explanations of administrative agency decisions display some degree of disingenuousness. After all, any decision by an agency intentionally entails input from many people. The more consequential the decision the more people inside the agency, in other agencies, and outside the government are invited to weigh in. Different members of a bureaucracy may have different reasons for supporting or acquiescing in the decision. No single expressed rationale can possibly capture all their potentially inconsistent private views. Therefore, every expressed agency rationale will, at some level, be a constructed description of reasoning that does not fully disclose the internal and external discussions, politics or negotiations that led to the result.

At the federal level, most agency decisions are subject to judicial review under the Administrative Procedure Act and, as is familiar, will not be overturned by a court unless they are arbitrary, capricious, an abuse of discretion, or contrary to law; a different standard applies if the action is reached after a hearing on the record. In order to test whether the agency action fails that test, the agency must provide at least some reason for the action. Otherwise, there is nothing to find to be not arbitrary or capricious.

The Supreme Court long ago decided that agency decisions are entitled to a "presumption of regularity." See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971); see also *General Category Scallop Fishermen v. Secretary of the U.S. Department of Commerce*, 635 F.3d 106, 112 (3d Cir. 2011). That allows a lot of leeway to the agency to provide a rationale that may not entirely capture all of the individual reasons for agreeing of all the participants. But, that rationale has to be contemporaneous as reflected in the administrative record and not a post hoc explanation. In *Overton Park*, review of a decision to place a section of I-40 through a park was remanded because the district court review of the decision was based upon litigation affidavits from the agency, and not the record.

More recently, the Supreme Court established the rule that a stated rationale could not support a decision as not-arbitrary and not-capricious if the stated rationale was not the real reason for the action. *Department of Commerce v. New York*, 588 U.S. 752 (2019), considered the decision by the Bureau of the Census to include a citizenship question on the general survey for the 2020 decennial census. The stated reason was to support enforcement of the Voting Rights Act. The court agreed with the rulings below that the administrative record supported the Secretary's determination that the value of the information on citizenship to VRA could be said not-arbitrarily to outweigh the likelihood that the question would depress the response rate. However, the lower court had allowed supplementation of the administrative record, and that showed that the bureau had solicited requests for the question and concluded that the VRA rationale was a pretext. Because an agency's reasons are the basis for review, the court held that a pretextual rational could not support a decision and remanded the matter to the agency for further explication of its reasoning. See *McMahon v. New York*, 145 S. Ct. 2643, 2649 n.14 (2025)(Sotomayor, J., dissenting from grant of stay of layoffs from the Department of Education).

In recent months, various federal agencies have made decisions or reversed prior decisions based upon reasons that some commentators have characterized as pretexts. For example, on Inauguration Day the

President declared a national energy emergency, calling for relaxation of regulatory controls over energy and mineral development. See Executive Order 14156, 90 Fed. Reg. 8433 (2025). Some question whether an emergency actually exists, but others question whether the reason for relaxing regulatory standards is really the emergency.

More recently, as I noted in my January column, on Dec. 22 the Department of the Interior ordered five offshore wind projects that had received their approvals and were under construction to "pause" due to national security concerns. Three district courts have preliminarily enjoined that pause on the grounds that the national security concerns do not appear to be a sufficient rationale, especially against the background of the administrations stated antipathy to wind power. See *Virginia Electric Power v. U.S. Department of the Interior,* No. 2:25-cv-00830 (E.D. Va. Jan. 16, 2026); *Empire Leaseholder v. Burgum*, No. 1:26-cv-004 (D.D.C. Jan. 15, 2026); *Revolution Wind v. Burgum*, No. 1:25-cv-02999 (D.D.C. Jan. 12, 2026).

Nevertheless, showing that the agency had stated a pretextual rationale, would typically require a showing that the agency had procured the reason (as in *DOC v. New York*) or that it had previously stated a different reason (as in the offshore wind cases). That would typically call for supplementation of the administrative record. A court needs a reason to allow supplementation of the record, and, of course, the agency is entitled to the presumption of regularity.

The current federal administration has a habit of posting explanations for administrative actions on social media at variance from the reasons stated in the administrative record. Without those kinds of statements, one challenging administrative action may require discovery to prove pretext. That discovery is even harder to obtain than leave to supplement. So, if an agency could construct a pretextual rationale privately, the pretext might be unprovable as a practical matter. It would only be a subject for editorials. But constructing a pretextual rationale without leaving a record is hard, and very hard in in the age of social media.

In Pennsylvania, on the other hand, we have the somewhat idiosyncratic Environmental Hearing Board. Final actions of the Department of Environmental Protection are subject to de novo review, to be sure, under a deferential standard. Accordingly, the rationale for an action may, in fact, be the one proven in the EHB appeal, and not the one that originally motivated DEP. That much is unclear.

Regulations in Pennsylvania are typically not reviewable pre-enforcement, although there are exceptions. The challenge to the regulation comes when it is applied in some specific instance and that specific instance is challenged in the EHB.

We have each had the experience of being certain that what the agency says is the reason is not the real reason. The opinion pages suggest that much of what is going on is for a reason different from the stated one. Will we see many more cases challenging actions because the rationale is pretextual? The next few years will tell.

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