

Changing Direction in Administrative Agency Rulemaking: “Reasoned Analysis,” The Roadless Rule Repeal, and the 2006 National Park Service Management Policies

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INTRODUCTION

Under a settled principle of administrative law, a federal agency may not announce a position that abruptly changes direction from prior agency pronouncements without providing a reasoned explanation for the change.¹ In *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.* ("*State Farm*"), the Supreme Court held that, when an agency changed course by rescinding a rule, it had an obligation to supply a reasoned analysis for that change.² Courts reviewing abrupt agency changes of direction apply this principle not only when an agency formally rescinds or revises an existing regulation,³ but also when the agency changes settled precedent in the course of adjudication,⁴ alters a prior interpretation of its own rules or governing statute,⁵ or makes a dramatic shift between a draft decisional document and the final document.⁶ A reasoned explanation for agency changes of direction ensures

¹ See *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) ("adjudication is subject to the requirement of reasoned decisionmaking"); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) ("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"); *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973) (an agency has a duty to "explain its departure from prior norms"); see generally Yoav Dotan, *Making Consistency Consistent*, 57 ADMIN. L. REV. 995 (2005) (describing meaning of consistency in administrative law and how courts have applied consistency requirement in judicial review of agency actions including policy revisions, consolidation of a rule or a policy, a change in precedent in administrative adjudication, or departure from a rule in an adjudication).

² *State Farm*, 463 U.S. at 42.

³ See, e.g., *id.* at 42, 46, 57; see generally ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 519-29 (2d ed. 2001) (describing *State Farm* and the "hard look" or "reasoned decisionmaking" doctrine of judicial review of agency change of course).

⁴ See, e.g., *Nat'l Fed'n of Fed. Employees v. FLRA*, 412 F.3d 119, 124-25 (D.C. Cir. 2005) (remanding Federal Labor Relations Authority decision because agency had departed from its precedent regarding interference with the right to assign work); *City of Anaheim v. FERC*, 723 F.2d 656, 659 (9th Cir. 1984) (noting that, in an adjudication, "agencies may not impose undue hardship by suddenly changing direction, to the detriment of those who have relied on past policy").

⁵ See, e.g., *N.Y. Pub. Interest Research Group v. Johnson*, 427 F.3d 172, 182-183 (2d Cir. 2005) (holding that EPA failed to provide a reasoned analysis for not requiring a compliance schedule in a permit renewal for a non-compliant Clean Air Act source when it had required a compliance schedule in an earlier permit renewal under the same regulation); *Lal v. INS*, 255 F.3d 998, 1008-09 (9th Cir. 2001) (invalidating an agency interpretation of a regulation because agency changed course from its settled policies).

⁶ See, e.g., *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005) (rejecting agency interpretation in a final rule that certain Clean Air Act regulations did not require monitoring where agency's proposed interim rule had interpreted the same provisions to require monitoring, describing change as an impermissible "surprise switcheroo"); *Sierra Club v. United States Army Corps of Eng'rs*, 772 F.2d 1043, 1043, 1047-48 (2d Cir. 1985) (upholding injunction against Army Corps of Engineers permit because Corps gave no explanation for changing its draft conclusion that Westway project's landfill in the Hudson River would have "significant adverse impact" on striped bass to a determination that project would have only "minor impacts," leading the court to express

consistency in agency decisionmaking and avoids upsetting the expectations of private parties through arbitrary agency action.⁷

The requirement of reasoned decisionmaking and consistency in administrative adjudications is an extension of the judicial principles of due process and *stare decisis* to administrative forums.⁸ In administrative rulemaking, the rationality requirement flows from the premise that changes to regulatory law should be based on reasoned analysis brought to bear on accumulated agency experience and expertise.⁹ Nevertheless, the Supreme Court has often acknowledged that a new executive administration may legitimately embody its policy preferences in revised regulations.¹⁰ Although a change in administration may properly influence agency rulemaking, courts have continued to engage in, and commentators to advocate, meaningful judicial review of agency changes of direction in rulemaking.¹¹

“disbelief”).

⁷ See *City of Anaheim*, 723 F.2d at 659 (holding that an agency may not change direction suddenly to detriment of those who relied on past policy); Dotan, *supra* note 1, at 996.

⁸ See Dotan, *supra* note 1, at 1000.

⁹ Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WIS. L. REV. 763, 820 (1994); see also Alfred C. Aman, Jr., *Administrative Law in a Global Era: Progress, Deregulatory Change, & the Rise of the Administrative Presidency*, 73 CORNELL L. REV. 1101, 1141-49 (1988) (discussing development of principle of judicial review requiring an agency to engage in rational decisionmaking and to take a “hard look” at issue before it). Agency expertise is one basis for the deference due to administrative statutory interpretations under *Chevron*, U.S.A., Inc. v. NRDC, 467 U.S. 837, 865 (1984).

¹⁰ See, e.g., *Rust v. Sullivan*, 500 U.S. 173, 186-87 (1991) (acknowledging that changed circumstances and policy revision may serve as a valid basis for changes in agency interpretations of statutes); *Chevron*, 467 U.S. at 863-64 (“The fact that the agency has from time to time changed its interpretation of the term ‘source’ does not, as respondents argue, lead us to conclude that no deference should be accorded the agency’s interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.”); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (agencies “must be given ample latitude to ‘adapt their rules and policies to the demands of changing circumstances’” (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968))); see also Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1047 & n.51 (2006) (noting that agencies change their statutory interpretations based both on changed circumstances and on a new administration’s political and regulatory priorities).

¹¹ See, e.g., *Rust*, 500 U.S. at 187 (finding that agency “amply justified” its change of interpretation by explaining that a prior policy failed to implement statute properly and that new regulations were more in keeping with the intent of statute); RICHARD J. PIERCE, JR. ET AL., *ADMINISTRATIVE LAW AND PROCESS* 384 (3d ed. 1999) (“[c]ourts have long held that agencies can change their policies, within the usually broad limits set by Congress, only if they recognize explicitly that they are changing a prior policy and only if they explain the basis for the change”); William F. Funk, *To Preserve Meaningful Judicial Review*, 49 ADMIN L. REV. 171, 177-78 (1997) (concluding that meaningful judicial review of regulatory process is necessary to ensure that agencies adhere to legal requirements and limitations); Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation to Legal Conclusions*, 48 RUTG. L. REV. 313, 326 (1996)

How robust must a reasoned analysis be to satisfy a court reviewing an agency's change of direction? The Supreme Court has acknowledged that the answer will vary according to the facts of a given case.¹² However, its decisions since *State Farm* involving agency changes of course have offered contradictory guidance regarding the scope of the inquiry.¹³ *State Farm* is a leading case on the review of agency rulemaking in general, containing one of the most-often cited formulations of the arbitrary and capricious review standard.¹⁴ Courts applying *State Farm* to agency changes of regulatory course often have not distinguished carefully between two principles in that case: first, the obligation that the agency explain its departure from the prior regulation, and second, the more general requirement that any agency rulemaking decision be reasonable in light of the administrative record.¹⁵ The deference due to an agency's permissible statutory interpretation under *Chevron, U.S.A., Inc. v. NRDC* further complicates any analysis of an agency change of direction.¹⁶ A lack of analytical clarity among the applicable standards of review characterizes

("even when an agency has chosen an interpretation of a statute that is reasonable under *Chevron*, firmly settled principles of administrative review independently require a careful examination of the process or method by which the agency formulated its reasonable interpretation").

¹² See *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993).

¹³ Compare *id.* ("the consistency of an agency's position is a factor in assessing the weight that position is due. As we have stated: 'An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is "entitled to considerably less deference" than a consistently held agency view.'" (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987))) with *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 125 S. Ct. 2688, 2699 (2005) ("Some of the respondents dispute this conclusion, on the ground that the Commission's interpretation is inconsistent with its past practice. We reject this argument. Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework. Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act.").

¹⁴ In *State Farm*, the Court defined the arbitrary and capricious test as asking whether "the agency has examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made" and "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *State Farm*, 463 U.S. at 43. A search of the WESTLAW Allfeds database on Oct. 30, 2006 indicated that over 1450 judicial decisions have cited *State Farm* for this principle.

¹⁵ See, e.g., *Sierra Club v. EPA*, 294 F.3d 155, 163 (D.C. Cir. 2002) (noting that promulgation of air quality implementation plans which omitted any reasonably available control measures was arbitrary and capricious, requiring a remand to agency "whether the result of inadvertence [in failing to consider a relevant factor] or of an unexplained change of course" (citing *State Farm*, 463 U.S. at 57)); see also *Seldovia Native Ass'n, Inc. v. Lujan*, 904 F.2d 1335, 1345 (D.C. Cir. 1992) (requiring the agency "to show not only that its new policy is reasonable, but also to provide a reasonable rationale supporting its departure from prior practice"); Patrick J. McCormick III & Sean B. Cunningham, *The Requirements of the "Just and Reasonable" Standard: Legal Bases for Reform of Electric Transmission Rates*, 21 ENERGY L.J. 389, 420 (2000) (noting that when an agency revises or rescinds a regulation administrative record "must not only provide sufficient justification for the new policy itself, but also for the change of policy").

¹⁶ *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 865 (1984).

Supreme Court, and lower court, jurisprudence.¹⁷ Supreme Court precedent thus provides little guidance in determining how searching a court's review of an agency's justification for a revision or rescission of a regulation must be.

Courts have applied the dual principles of the *State Farm* analysis in various ways. Some lower courts have suggested the reasoned analysis principle requires that an agency give a good reason, not merely a rational or permissible one, for a change in regulatory direction.¹⁸ However, many decisions that have applied the *State Farm* reasoned analysis test to such a change have also discussed the requirement that the new regulation be a product of reasoned decisionmaking based on the rulemaking record.¹⁹ A reviewing court relying on the dual principles in *State Farm* must require that the agency offer a reasoned explanation of its departure from the former regulation, and also justify its new regulation in light of the underlying statute and the rulemaking record.²⁰ Courts

¹⁷ See William Funk, *Supreme Court News*, 27 ADMIN. & REGULATORY L. NEWS 8, 8-9 (2002) (noting that Supreme Court's decision in *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467 (2002) was "not the first instance of a court failing to clearly distinguish between a *Chevron* analysis, which in its original formulation was simply a question of whether a regulation as a matter of statutory interpretation is within statutory authority, and a *State Farm/Overton Park* analysis in which a regulation, on the basis of the rulemaking record, is assessed for its reasonableness in the sense of whether it will actually achieve its stated purpose" and concluding that "it would be helpful if courts recognized that there are two separate analyses involved, each of which uses different tools and asks different questions."); Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 998 (2000) (noting that "courts occasionally apply both *Chevron* and [the "hard look" doctrine] when reviewing administrative regulations, but rarely explain why they are invoking both doctrines, or how they fit together in any given case"); see also discussion *infra* notes 61-67 and accompanying text.

¹⁸ See *AMAN & MAYTON*, *supra* note 3, at 521 (citing *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)); Zellmer, *supra* note 17, at 998-1003 & 998 n.328 (collecting cases).

¹⁹ See, e.g., *State Farm*, 463 U.S. at 41-57 (reviewing agency's unexplained change of direction as well as adequacy of its decisionmaking); *Sierra Club*, 294 F.3d at 163 (remanding a new regulation because agency did not include available control measures in its regulation, either an inadvertent failure to consider a relevant factor or an unexplained change of course); *Seldovia Native Ass'n*, 904 F.2d at 1345 (requiring agency to provide both a rationale for its departure from prior practice and a showing that its new policy was reasonable).

²⁰ See, e.g., *Mullins v. United States Dep't of Energy*, 50 F.3d 990, 992 (Fed. Cir. 1995) ("It is well established that agencies have a duty to provide reviewing courts with a sufficient explanation for their decision so that those decisions may be judged against the relevant statutory standards, and that failure to provide such an explanation is grounds for striking down the action." (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 80 (1943)); see also *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 541 (2002) (Breyer, J., concurring and dissenting) (a reviewing court has an obligation to "determine, among other things, whether the Commission has 'abuse[d]' its statutorily delegated 'discretion' to create implementing rules" (quoting *State Farm*, 463 U.S. at 41)); McCormick & Cunningham, *supra* note 15, at 420 ("[T]he reasoned explanation for the new interpretation must include an acknowledgment and explanation for the departure. Without reasoned explanation for abrupt departures from prior agency positions, a reviewing court lacks a sufficient basis in the record for deferring to the expertise of the agency"); Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 553 (1985) (arguing that, in reviewing instances of agency deregulation, "the courts appear to be using hard look review to ferret out—and reject—agency

that have focused narrowly on the agency's obligation to provide a reasoned explanation for a regulatory change of course have generally upheld those agency explanations, except where the agency gave no explanation or where its explanation was unsupported by any evidence or defied logic.²¹

In the past two years, the United States Forest Service ("Forest Service") and National Park Service ("Park Service") have announced significant new policies for managing the nation's most pristine public lands which represent significant departures from previous policies. In May 2005, the Forest Service announced a final rule (the "Roadless Repeal")²² repealing the Roadless Area Conservation Rule ("Roadless Rule").²³ The Clinton Administration promulgated the final Roadless Rule in the waning days of its tenure in January 2001, protecting over 58 million acres of inventoried roadless areas in national forests.²⁴ In place of the Roadless Rule's uniform federal protection, the Roadless Repeal established a system whereby individual state governors could petition to have some or all of inventoried roadless areas within a state protected.²⁵ The agency justified the change based on concerns raised by "those most impacted by" the prohibition on extractive uses in the roadless areas under the Roadless Rule.²⁶ The agency also cited a single district court decision invalidating the prior rule.²⁷

In early 2001, the Park Service issued a revised set of management policies for the National Park System ("2001 Management Policies"), again in the last

actions motivated by considerations inconsistent with legislative purpose").

²¹ See, e.g., *Int'l Union, United Mine Workers of Am. v. United States Dep't of Labor*, 358 F.3d 40, 44 (D.C. Cir. 2004) (noting that one of agency's proffered explanations for withdrawing a proposed regulation, a "change in agency priorities," was, without additional explanation, "not informative in the least; it is merely a reiteration of the decision to withdraw the proposed rule"); see *infra* notes 78-79, 81-83, 90-91, 106-07, 119-20 and accompanying text (describing cases sustaining agency explanations), and *infra* notes 46-49, 108-17, 122-26 and accompanying text (describing cases setting aside agency regulatory changes).

²² Final Rule, Special Areas; State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. 25,654 (May 13, 2005) [hereinafter *Roadless Repeal*]. Although this new regulation also established new procedures by which individual states could petition the Forest Service for protection of roadless areas, see *infra* note 25 and accompanying text, this article focuses on the aspect of the May 2005 rule involving the repeal of the earlier Roadless Rule. The Roadless Repeal provided that, if the new regulation was set aside, the Forest Service did not "intend that the prior rule be reinstated, in whole or in part." *Id.* at 25,655; see also *infra* note 159 (describing district court holding that the May 2005 rule effected a substantive repeal of the Roadless Rule).

²³ Special Areas: Roadless Area Conservation, 66 Fed. Reg. 3,244 (Jan. 12, 2001) [hereinafter *Roadless Rule*].

²⁴ See generally Robert L. Glicksman, *Traveling in Opposite Directions: Roadless Area Management Under the Clinton and Bush Administrations*, 34 ENVTL. L. 1143 (2004) (describing enactment of Roadless Rule and trend in roadless area management under the Bush Administration that later culminated in Roadless Repeal).

²⁵ Roadless Repeal, 70 Fed. Reg. at 25,654, 25,661-62; Dan Berman, *Roadless Rule's Repeal Sparks a new Round of Battles*, GREENWIRE, May 6, 2005, <http://www.eenews.net/Greenwire/2005/05/06/archive/1/?terms=roadless>.

²⁶ Roadless Repeal, 70 Fed. Reg. at 25,654.

²⁷ *Id.* at 25,655.

month of the Clinton Administration.²⁸ The Park Service issued a set of draft Management Policies for public comment in October 2005, in response to claims that the Clinton-era regulations shifted the Park Service too far in the direction of conservation and away from public access and recreation.²⁹ The October 2005 draft represented the Park Service's second attempt at revising the policies, after the agency withdrew an abortive draft issued by deputy assistant secretary Paul Hoffman in August of that year.³⁰ After reviewing public comments, the Park Service issued yet another draft in June 2006.³¹ The agency then issued its final revised Management Policies ("2006 Management Policies") in August 2006.³² The 2001 Management Policies provided a clear and highly-protective interpretation of the no-impairment standard in the Park Service's Organic Act.³³ In contrast, the 2006 Management Policies create a more vague and apparently weaker standard for non-impairment.³⁴ They afford the Park Service more discretion to manage the parks to promote public access at the expense of conservation.³⁵ The Park Service does not explain in the new policies why it is changing course and adopting an apparently less-protective standard.³⁶

Both of these policy shifts changed the administrative regulations or policies governing these lands without a prior corresponding change in the underlying statutes. These administrative policy changes implicate the principle that an

²⁸ 2001 National Park Service Management Policies, available at <http://www.nps.gov/policy/mp/policies.html> [hereinafter 2001 Management Policies]. Although the law is unsettled, several courts have held that the Management Policies are binding on the Park Service. See discussion *infra* note 192. For purposes of this article, they will be treated as binding rules subject to the requirement that the agency provide a reasoned analysis for the change in direction. However, a litigant challenging the 2006 Management Policies would have to establish that they have the force and effect of law. See *id.*

²⁹ Dan Berman, *NPS Gives Revised Management Policy a "Prime Time" Launch*, LAND LETTER, Oct. 21, 2005, <http://www.eenews.net/Landletter/2005/10/20/archive/2/?terms=revised%20management%20policy>.

³⁰ *Id.*

³¹ National Park Service Management Policies Draft June 2006, available at <http://parkplanning.nps.gov/document.cfm?parkid442&projectid=13746&documentid=15714>.

³² Management Policies, The Guide to Managing the National Park System, available at <http://www.nps.gov/policy/MP2006.pdf> [hereinafter 2006 Management Policies]. Park Service Deputy Director Steve Martin noted that the 2006 Management Policies was "essentially the same document" as the draft released in June 2006. Dan Berman, *NPS Makes Few Changes in Final Management Policies*, GREENWIRE, Sept. 5, 2006, <http://www.eenews.net/Greenwire/2006/09/05/archive/19/?terms=management%20policies>.

³³ The Park Service must "conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. § 1 (2000); see *infra* notes 204-06, 213.

³⁴ See *infra* notes 202, 207-12, 214-19 and accompanying text.

³⁵ See *infra* notes 209-12 and accompanying text.

³⁶ See *infra* note 220 and accompanying text.

agency may not change course in its regulations without supplying a reasoned analysis and justification for that change. Critics charged that the revised rules have the effect of administratively lowering the protection of these lands which is required by the applicable statutes.³⁷ A district court recently set aside the Roadless Repeal in a suit brought by environmental plaintiffs and the States of California, Oregon, New Mexico and Washington challenging the repeal of the Roadless Rule and the new state petition process.³⁸ Although the court emphasized the Forest Service's failure to conduct obligatory environmental reviews under the National Environmental Policy Act ("NEPA") and the Endangered Species Act ("ESA"),³⁹ its opinion specifically identified one aspect of the agency's unexplained change of course—the absence of evidence for its conclusion that the Roadless Rule was no longer necessary—as a basis for the decision.⁴⁰ A plaintiff seeking to preserve the standards in the Park Service's 2001 Management Policies could challenge the final 2006 Management Policies based on a similar, unexplained change of direction.⁴¹

This article examines the principle of requiring reasoned explanations for changes of direction when agencies revise regulations and how that principle would apply to challenges to the Roadless Repeal and the Park Service's revised Management Policies. Section I describes the standard of review for abrupt agency changes of direction in rulemaking and considers how courts have applied this principle. Section II describes the development of the Roadless Rule and the Roadless Repeal, how the requirement of reasoned analysis in the rescission of an administrative regulation applies to the latter, and how the district court addressed this principle in its opinion setting aside the Roadless Repeal. Section III considers the potential application of the reasoned analysis requirement to the Park Service's 2006 revision of its Management Policies. The article concludes that the *State Farm* change-of-course standard is a sufficient ground for a court to overturn both changes of direction, because the Forest Service did not provide an adequate reasoned analysis for rescinding its

³⁷ Dan Berman, *Senate Panel to Judge NPS's New Management Policies Draft*, ENV'T & ENERGY DAILY, June 19, 2006, <http://www.eenews.net/EEDaily/2006/06/19/#9>; *Repeal of Clinton-era Roadless Rule - How's it Playing?*, GREENWIRE, May 11, 2005, [http://www.eenews.net/Greenwire/2005/05/11/archive/20/?terms="roadless%20rule"](http://www.eenews.net/Greenwire/2005/05/11/archive/20/?terms=).

³⁸ *California v. United States Dep't of Agric.*, Nos. C05-03508 EDL, C05-04038 EDL, 2006 WL 3006489 (N.D. Cal. Oct. 11, 2006).

³⁹ *Id.* at *15-*34.

⁴⁰ *Id.* at *25-*26 (holding that agency improperly "reversed course without citing any new evidence that would lead to a different conclusion or explaining why it had concluded that the protections of the Roadless Rule were no longer necessary for the reasons it had previously laid out in detail," citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983)).

⁴¹ *Cf. S. Utah Wilderness Alliance v. Nat'l Park Serv.*, 387 F. Supp. 2d 1178, 1187-94 (D. Utah 2005) (describing challenge by intervening off-road vehicle advocates to a provision of the 2001 Management Policies).

carefully-developed Roadless Rule, and because the Park Service's 2006 Management Policies provide no justification for the revision of its earlier standards.

I. REASONED ANALYSIS REVIEW OF AGENCY RESCISSION OR REVISION OF REGULATIONS

This section describes the Supreme Court's jurisprudence regarding agency revisions to regulations, discusses how the courts of appeals have reviewed agency changes of direction, and considers two recent district court cases which illustrate review of rule revisions in environmental cases. Courts have relied on the reasoned analysis requirement to reject rescissions or revisions of regulations because the agency did not give an adequate explanation for a change of course.⁴² However, there appears to be no established test for what constitutes an adequate explanation.⁴³ Courts have sometimes included inadequate explanation for a change as one element in a more comprehensive arbitrary and capricious review of a new agency regulation.⁴⁴ These courts have not distinguished the agency's failure to explain its change of direction from the agency's failure to consider important factors or its unreasonable interpretation of its governing statute.⁴⁵

A. *State Farm and Subsequent Supreme Court Reasoned Analysis Jurisprudence*

Although *State Farm* is the leading case on agency change of direction in rulemaking, the Court has analyzed regulatory revisions in several other cases without conclusively stating how persuasive an agency's explanation of a change of course must be to survive judicial review. The Court's decisions provide conflicting guidance, but generally suggest that the threshold for satisfying the reasoned analysis standard is relatively low.

1. *State Farm*: Two Analytical Standards for Judicial Review of an Agency Change in Regulatory Direction

In *State Farm* the Supreme Court reviewed a decision by the National Highway Traffic Safety Administration rescinding a regulatory requirement that

⁴² See *infra* notes 46-49, 108-117, 122-32 and accompanying text.

⁴³ See *infra* Sections I.A.3, I.B & I.C.

⁴⁴ See *infra* notes 97-107, 127-32, 183-85 and accompanying text.

⁴⁵ See *infra* notes 97-107, 127-32, 183-85 and accompanying text (discussing *N.Y. Council, Ass'n of Civilian Techs. v. FLRA*, 757 F.2d 502 (2d Cir.1985); *Fund for Animals v. Norton*, 294 F. Supp. 2d 92 (D.D.C. 2003); *California v. United States Dep't of Agric.*, Nos. C05-03508 EDL, C05-04038 EDL, 2006 WL 3006489 (N.D. Cal. Oct. 11, 2006)).

new motor vehicles be equipped with passive restraints.⁴⁶ The Court held that the agency's rescission was arbitrary and capricious because the agency gave no consideration to requiring airbags in place of passive restraints, there was no evidence in the administrative record to support the agency's conclusions that detachable automatic seatbelts would not lead to increased usage, and the agency failed to articulate a basis for rejecting non-detachable automatic belts.⁴⁷ The Court noted that "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."⁴⁸ Although "[a]n agency's view of what is in the public interest may change, either with or without a change in circumstances," the Court concluded that "an agency changing its course must supply a reasoned analysis," and that the agency had not done so.⁴⁹

The *State Farm* Court emphasized that the agency's obligation to supply a reasoned analysis for its rescission of the regulation requiring passive restraints rested on the principle that

[r]evocation [of a regulation] constitutes a reversal of the agency's former views as to the proper course. A 'settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to.'⁵⁰

Stressing the agency's obligation to articulate a reason for its change based on the administrative record, the Court also noted that there is a presumption "against changes in current policy that are not justified by the rulemaking record."⁵¹

State Farm also articulates the elements of "arbitrary and capricious" review of agency rulemaking.⁵² Under this standard, an agency issuing a regulation must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found the choice made.'"⁵³ A court reviewing the agency decision must consider whether the decision was based on relevant factors and ensure that the decision does not

⁴⁶ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 38 (1983).

⁴⁷ *Id.* at 49-50, 55-57.

⁴⁸ *Id.* at 42.

⁴⁹ *Id.* at 57.

⁵⁰ *Id.* at 41-42 (quoting *Atchison, Topeka & Santa Fe R.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-808 (1973)).

⁵¹ *Id.* at 42 (emphasis in original).

⁵² See *supra* notes 14-15 and accompanying text.

⁵³ *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962)).

represent a clear error of judgment.⁵⁴ An agency regulation is arbitrary and capricious where (1) the agency has relied on factors that Congress did not intend it to consider, (2) entirely failed to consider an important aspect of the problem, (3) offered an explanation for its decision that runs counter to the evidence before it, or (4) is so implausible that it could not be the result of a difference in view or agency expertise.⁵⁵ This standard is concerned with whether the agency has followed an appropriate decisionmaking process in arriving at its decision.⁵⁶

The Supreme Court's opinion in *State Farm* thus sets out two standards an agency must meet when rescinding or revising a regulation. The first is narrowly applicable to those circumstances: an agency must provide a reasoned analysis for its change of direction.⁵⁷ The second is applicable to any administrative rulemaking decision: the agency must consider the relevant factors, examine the relevant data, and articulate a satisfactory explanation for its decision, including a rationale connecting the facts found to the decision made.⁵⁸ Subsequent judicial opinions have cited the second standard far more frequently than the first, which is applicable in a more limited set of circumstances.⁵⁹ Although these inquiries are analytically distinct, a court reviewing an agency decision to rescind or revise a regulation could potentially apply both to the agency's decision. As illustrated below, courts considering agency changes of course do not always carefully separate their review of the agency's explanation for the regulatory revision from the broader question of the quality of the agency's decisionmaking process.⁶⁰

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See Craig Allen Nard, *Deference, Defiance, and the Useful Arts*, 56 OHIO ST. L.J. 1415, 1474-75 (1995) (describing *State Farm* arbitrary and capricious test as involving three components—consideration of relevant factors, clear error of judgment, and agency's decisionmaking process—and noting that under last of these components an agency decision could be reversed either because agency's rationale was inadequate or agency failed to consider alternatives); Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 437-38 (1987) (arguing that *State Farm* "makes clear that the proper focus for review is not the result reached by an agency, but rather the reasons given to support that result").

⁵⁷ *State Farm*, 463 U.S. at 42.

⁵⁸ *Id.* at 42-43.

⁵⁹ A search of the WESTLAW Allfeds database on Oct. 30, 2006 indicated that over 900 cases have cited the *State Farm* description of the factors to consider in determining whether an agency action was arbitrary. By contrast, only 113 decisions have cited the principle that an agency must give a reasoned analysis for its change of course when rescinding a regulation. Many of the latter cases involved applications of the general principle of consistency articulated in *State Farm* to other forms of agency decisionmaking. See, e.g., *Torrington Extend-A-Care Empl. Ass'n v. NLRB*, 17 F.3d 580, 589 (2d Cir. 1994) (applying the principle that an agency must supply a reasoned analysis for a change in statutory interpretation to a National Labor Relations Board adjudication).

⁶⁰ See *infra* notes 97-107, 127-32, 183-85 and accompanying text.

2. The *Chevron* Decision and Review of Agency Change of Course

A few months after its decision in *State Farm*, the Supreme Court decided *Chevron*, another case involving an agency change of direction. The Court in *Chevron* expressly acknowledged that an agency may change course based on policy, and that the standard of review in such situations is the familiar *Chevron* two-step.⁶¹ *Chevron*'s contribution to judicial review of agency rulemaking is the principle that an agency's interpretation of an ambiguous statute is due deference if it is a permissible construction of the statute.⁶² Yet the *Chevron* Court also analyzed whether the agency had offered a sufficient "reasoned analysis" of its change of direction, and concluded that it had.⁶³ Unlike the *State Farm* analyses, which are concerned with the agency's decisionmaking process, *Chevron*'s permissible construction test focuses on the outcome of that process: whether the agency's rule is a valid interpretation of the statute, as a matter of statutory analysis.⁶⁴ Thus a reviewing court could find an agency's regulation permissible under *Chevron*, but nevertheless arbitrary and capricious under *State Farm* because of flaws in the decisionmaking process.⁶⁵ Accordingly, an agency regulatory revision that satisfies *Chevron* review could be deficient under the first *State Farm* standard for failing to adequately articulate a reason for the agency's change in direction.⁶⁶

The easy-to-state principles of judicial review in *State Farm* and *Chevron* have proved difficult for courts to reconcile and apply to administrative actions,

⁶¹ See *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984) (explaining that if intent of Congress is clear, the court and agency must give effect to the unambiguously expressed congressional intent, but that if Congress has not directly addressed the precise question, court must review whether agency's interpretation is a permissible construction of statute).

⁶² *Id.* at 843.

⁶³ *Id.* at 857-59, 863.

⁶⁴ *Arent v. Shalala*, 70 F.3d 610, 615-17 (D.C. Cir. 1995) (describing *Chevron* as principally concerned with whether an agency has authority to act under statute, whereas *State Farm* is concerned with whether discharge of that authority was reasonable and whether agency's decision was based on requisite reasoned decisionmaking); Funk, *supra* note 17, at 8-9; Zellmer, *supra* note 17, at 998-1002.

⁶⁵ See, e.g., *Gamboa v. Rubin*, 80 F.3d 1338, 1343-44 (9th Cir. 1996), *vacated on other grounds*, 101 F.3d 90 (9th Cir. 1996) (stating that courts must give "significant deference" to regulations under *Chevron*, but also "searching and careful" review under *State Farm* and *Citizens to Preserve Overton Park Inc. v. Volpe*, 401 U.S. 402 (1971)); *Republican Nat'l Comm. v. Fed. Election Comm'n*, 76 F.3d 400, 407 (D.C. Cir. 1996) (acknowledging that *Chevron* and *State Farm* sometimes overlap, but that "a permissible statutory construction under *Chevron* is not always reasonable. . . . [W]e might determine that although [an interpretation is] not barred by statute, an agency's action is arbitrary and capricious because the agency has not considered certain relevant factors or articulated any rationale for its choice") (citations omitted).

⁶⁶ See, e.g., *Int'l Union, United Mine Workers of Am. v. U.S. Dep't of Labor*, 358 F.3d 40, 43-44 (D.C. Cir. 2004) (holding that an agency's withdrawal of a proposed regulation based on a "change in agency priorities," without further explanation, did not satisfy *State Farm* reasoned analysis requirement for a change of direction, even though the *Chevron* analysis concluded that the agency had the statutory authority to withdraw the regulation).

and courts do not always distinguish or explain the tests they are applying.⁶⁷ Although both *State Farm* and *Chevron* remain viable precedent, addressing different aspects of an agency's decision in issuing, rescinding or revising a regulation,⁶⁸ Supreme Court cases since *State Farm* have offered contradictory statements on the scope of review appropriate for agency changes of direction.

3. Supreme Court Decisions on Regulatory Change of Direction After *Chevron*

In *INS v. Cardoza-Fonseca*,⁶⁹ one of the first post-*Chevron* cases to consider a regulatory change of course, the Supreme Court struck down a newly-created agency regulation.⁷⁰ The Court held that the new regulation was irreconcilable with the pre-existing statutory norm that regulation purported to interpret.⁷¹ In doing so, the Court noted that an additional reason for its decision was that "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view."⁷² However, four years after the 1987 *Cardoza-Fonseca* decision, the Court repudiated this position in *Rust v. Sullivan*,⁷³ confirming that *Chevron* rejected the argument that an agency interpretation is not due deference merely because it is a departure from a prior interpretation.⁷⁴

Notwithstanding this holding, *Rust* expressly confirmed the agency's obligation under *State Farm* to supply a reasoned analysis for its change of direction, but found that the agency satisfied that test.⁷⁵ In 1988, the Department of Health and Human Services issued revised regulations under the Public Health Service Act, limiting the ability of recipients of federal family planning funds to engage in abortion-related activities.⁷⁶ The *Rust* Court noted that *Chevron* had rejected any argument that an agency's sharp break with a prior statutory interpretation entitles the new regulation to less deference.⁷⁷ The Court

⁶⁷ See, e.g., Ronald M. Levin, *Judicial Review and the Uncertain Appeal of Certainty on Appeal*, 44 DUKE L.J. 1081, 1085-86 (Apr. 1995) (noting that "pronouncements such as those in *Chevron* and *State Farm* are particularly susceptible to indeterminacy"); see also *supra* note 17 and accompanying text.

⁶⁸ See *infra* notes 70-79, 84-91 and accompanying text.

⁶⁹ 480 U.S. 421 (1987).

⁷⁰ *Id.* at 432.

⁷¹ See *id.*

⁷² *Id.* at 446 n.30 (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)); see also *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 698 (1991) (noting that case for judicial deference is less compelling with respect to "agency positions that are inconsistent with previously held views").

⁷³ 500 U.S. 173 (1991).

⁷⁴ *Id.* at 186.

⁷⁵ See *id.* at 186-87.

⁷⁶ *Id.* at 177-78.

⁷⁷ *Id.* at 186.

then held that, under *State Farm*, the agency had “amply justified” its change.⁷⁸ It concluded that the prior policy did not properly implement the statute or provide clear guidance to recipients, and that the Secretary had “determined that the new regulations are more in keeping with the original intent of the statute” and were “supported by a shift in attitude against the ‘elimination of unborn children by abortion.’”⁷⁹

The Court’s 1993 decision in *Good Samaritan Hospital v. Shalala*⁸⁰ added another nuance to how searching the review of an agency change of direction should be. In reviewing the Secretary of Health and Human Service’s decision to update its reimbursable cost regulations, the Court first noted that an agency may properly change its mind.⁸¹ However, the Court noted that “the consistency of an agency’s position is a factor in assessing the weight that position is due,” citing *Cardoza-Fonseca* for the proposition that an interpretation in conflict with an earlier interpretation should receive considerably less deference.⁸² Nevertheless, the Court upheld the agency’s revised interpretation, concluding that “where the agency’s interpretation of a statute is at least as plausible as competing ones, there is little, if any, reason not to defer to its construction. We should be especially reluctant to reject the agency’s current view which, as we see it, so closely fits ‘the design of the statute as a whole and... its object and policy.’”⁸³ The Court’s own comparison of the revised interpretation to the design, object and policy of the underlying statute supported its decision to uphold the new interpretation.

Two more recent cases suggest that the applicability of *Cardoza-Fonseca* to an analysis of an agency change of regulatory direction is limited. In dicta in *Smiley v. Citibank (S.D.), N.A.*,⁸⁴ the Supreme Court confirmed that “[s]udden and unexplained change” or “change that does not take account of legitimate reliance on prior interpretation” might be arbitrary and capricious.⁸⁵ However, a change in agency position, standing alone, was not grounds for lesser deference to a new agency regulation.⁸⁶ The Court found that there had been no prior settled agency position from which the new regulations departed, and accordingly upheld the regulations based on *Chevron* alone.⁸⁷ In *National Cable*

⁷⁸ *Id.* at 187.

⁷⁹ *Id.*

⁸⁰ 508 U.S. 402 (1993).

⁸¹ *Id.* at 417.

⁸² *Id.*

⁸³ *Id.* at 417-18 (quoting *Crandon v. United States*, 494 U.S. 152, 158 (1990)).

⁸⁴ 517 U.S. 735 (1996).

⁸⁵ *Id.* at 742 (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46-57 (1983) and *United States v. Penn. Indus. Chem. Corp.*, 411 U.S. 655, 670-675 (1973)).

⁸⁶ *Id.*

⁸⁷ *See id.* at 742-43.

& *Telecommunications Ass'n v. Brand X Internet Services* ("Brand X"),⁸⁸ the Court again rejected agency inconsistency as a basis for affording less deference under *Chevron*, emphasizing that unexplained inconsistency would still be a valid reason for holding a new interpretation to be arbitrary and capricious under *State Farm*.⁸⁹ The agency justified treating cable internet providers differently than wire-based DSL service, based on an analysis of new market conditions and the fact that the cable industry had not before been subject to the particular regulation.⁹⁰ That justification satisfied the Court.⁹¹ Although unexplained change may lead a court to invalidate a regulation under *State Farm*, these cases indicate that a court should not consider an agency's inconsistency when determining whether a new regulation is permissible under *Chevron*.

The Supreme Court has suggested in some cases, in dicta, that less deference might be due to agency-revised regulations that are inconsistent with earlier regulations. In *Good Samaritan Hospital*, the Court suggested that the arbitrary and capricious review might compare the revised regulation to the former regulation to determine which is a better fit with the design, object and policy of the underlying statute.⁹² However, the Court has retreated from these statements in other cases.⁹³ It is nonetheless clear that the *State Farm* reasoned analysis test continues to be the proper standard for reviewing agency changes of direction in rescinding or revising regulations. It is also clear that the Court expects an agency to provide a reasoned justification for the change, even in light of the deference due to an agency's interpretation under *Chevron*.⁹⁴ Although the *State Farm* reasoned analysis test remains valid, the Court has not provided any clear standard for how adequate an agency's explanation of a change of course must be. Instead, the Court has applied ad-hoc reasoning to the facts before it, generally concluding that the agency has offered a sufficient explanation.⁹⁵ As a result, the Supreme Court's precedent suggests that the explanatory threshold is low.⁹⁶

⁸⁸ 545 U.S. 967, 125 S. Ct. 2688 (2005).

⁸⁹ *See id.* at 2699.

⁹⁰ *See id.* at 2710-11.

⁹¹ *See id.*

⁹² *See supra* notes 82-83 and accompanying text.

⁹³ *See supra* notes 86, 89 and accompanying text.

⁹⁴ *See supra* notes 75-79, 88-91 and accompanying text.

⁹⁵ *See supra* notes 46-49, 78-79, 81-83, 90-91 and accompanying text.

⁹⁶ *See Nat. Cable & Telecom. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 125 S. Ct. 2688, 2699, 2710-11 (2005) (noting an extension of regulation to new industry and changed market conditions were satisfactory explanations); *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 857-59, 863 (1984) (an agency explaining its change in course as better way to achieve purpose of statute satisfied Court); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) (holding an agency providing no explanation whatsoever did not meet reasoned analysis requirement).

B. Courts of Appeals Review of Agency Revisions to Regulations

While the Supreme Court has not provided consistent guidance on the standard for reviewing agency changes of direction under *State Farm*, the courts of appeals have provided some additional clarity. However, decisions invoking *State Farm* for the principle that an agency must supply a reasoned analysis for a regulatory revision sometimes also address the agency's separate obligation to show that the new statutory interpretation is reasonable and effective in implementing the statute, without distinguishing the two standards.⁹⁷

An early post-*State Farm* case in the Second Circuit, *New York Council, Ass'n of Civilian Technicians v. FLRA*,⁹⁸ offers a good example of how a court might conflate the two standards found in *State Farm*. In *New York Council*, the court of appeals reasoned from *State Farm* that a reviewing court must be satisfied "that the agency knows it is changing course, has given sound reasons for the change, and has shown that the rule is consistent with the law that gives the agency authority to act."⁹⁹ The first two clauses of this reasoning correspond to the *State Farm* analysis for reviewing an agency change of direction. The third—that the agency has shown the rule is consistent with the underlying law—derives more from the arbitrary and capricious analysis in *State Farm* and from the *Chevron* test for whether an agency interpretation is permissible.¹⁰⁰ The court's further references to the applicable standards also mix elements of the various analyses. It required the agency to "consider reasonably obvious alternatives and, if it rejects those alternatives, it must give reasons for the rejection."¹⁰¹ This again appears to move beyond what *State Farm* required for a change of course analysis and picks up aspects of the ordinary arbitrary and capricious review.

In *New York Council*, the Second Circuit claimed that it was not applying a heightened standard of scrutiny. Yet it specified that "the agency must explain why the original reasons for adopting the rule or policy are no longer dispositive."¹⁰² Although this standard may be an extension of the "reasoned analysis" standard, it suggests that the agency must provide a specific explanation for why the prior regulation was no longer appropriate, rather than a more general "reasoned" explanation for its decision. In its final statement of

⁹⁷ See, e.g., *N.Y. Council, Ass'n of Civilian Techs. v. FLRA*, 757 F.2d 502, 508-10 (2d Cir. 1985).

⁹⁸ *N.Y. Council*, 757 F.2d 502 (2d Cir. 1985).

⁹⁹ *Id.* at 508 (internal quotation and citations omitted); see also *NLRB v. Indianapolis Mack Sales and Serv., Inc.*, 802 F.2d 280, 284 (7th Cir. 1986) ("When an agency changes course, a reviewing court must be satisfied that the agency was aware of, and has given sound reasons for, the change, and that it has shown that the new rule is consistent with the statutory duties.").

¹⁰⁰ *Chevron*, 467 U.S. at 843; *State Farm*, 463 U.S. at 42-43.

¹⁰¹ *N.Y. Council*, 757 F.2d at 508.

¹⁰² *Id.*

the applicable legal principles, the court echoed *Chevron* in noting that an agency is free to change course on the basis of a new analysis of policy.¹⁰³ However, the court announced that “such a flip-flop must be accompanied by a reasoned explanation of why the new rule effectuates the statute as well as or better than the old rule.”¹⁰⁴ With this statement, the Second Circuit went beyond *State Farm* in requiring a very specific form of explanation, namely why the new interpretation is better than the one being replaced. Few courts in the past twenty years have followed this standard. Instead, they have required simply that the new regulatory interpretation be reasonable, not necessarily better—an interpretation closer to the ordinary arbitrary and capricious review set out in *State Farm*.¹⁰⁵

The Second Circuit set out legal standards beyond what the Supreme Court apparently required in *State Farm* for reviewing agency regulatory changes of direction. However, the court’s analysis of the agency action did not place as heavy a burden on the agency as its announced standards would apparently require. The court found that that the Federal Labor Relations Authority (“FLRA”) had adequately explained an order reversing a rule allowing National Guard civilian technicians to wear civilian clothing and instituting a requirement that the technicians wear uniforms.¹⁰⁶ The court upheld the FLRA change of direction because it was based on a rational relation between National Guard attire and its function as a military organization and because Congress had specifically directed the newly-created FLRA to change the policies of its predecessor agency.¹⁰⁷

The D.C. Circuit has reversed agency changes of direction for lack of a reasoned explanation for the change in several cases. For example, in *AFL-CIO v. Brock*, the court of appeals rejected a Department of Labor rule covering temporary alien agricultural workers.¹⁰⁸ The court of appeals held that a departure from a two-decades-old policy that changed the interpretation of a statute designed to protect American workers from the adverse effect of temporary foreign workers lacked a reasoned explanation.¹⁰⁹ The agency had argued, without additional explanation, that new statutory language required the change and that the existing calculation methodology was difficult to apply.¹¹⁰

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See, e.g., *Nat. Cable & Telecom. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 125 S. Ct. 2688, 2710-11 (2005) (affirming agency regulation where agency provided reasonable explanation for its change of course); *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417-18 (1993) (upholding revised regulatory interpretation where it was “plausible”).

¹⁰⁶ *N.Y. Council*, 757 F.2d at 510.

¹⁰⁷ *Id.*

¹⁰⁸ *AFL-CIO v. Brock*, 835 F.2d 912 (D.C. Cir. 1987).

¹⁰⁹ *Id.* at 917-20.

¹¹⁰ *Id.* at 918-19.

However, the court found the agency's explanations incredible: the altered immigration statute retained unchanged the portion of the statute upon which the regulations were based, and the agency gave no cogent explanation of how methodological difficulties justified a total abandonment of the earlier policy.¹¹¹ The court remanded the regulation to the agency because its stated rationale fell short of logically explaining the "fundamental change" in the interpretation of its governing statute.¹¹²

In other cases, the D.C. Circuit has noted the absence of any explanation for the change of course in the administrative record. In *Troy Corp. v. Browner*, the court remanded an EPA determination to add a pesticide, Bronopol, to the Toxic Release Inventory under the Emergency Planning and Community Right to Know Act.¹¹³ The court determined that the agency failed to give any explanation whatsoever for its different treatment of an analogous chemical in an earlier regulation.¹¹⁴ In 2001, in *AT&T Corp. v. FCC*, the D.C. Circuit invalidated a Federal Communications Commission rule because the agency "ha[d] considered this question on several occasions, each time applying a test different from that applied" in the case before the court.¹¹⁵ In the latest iteration of its policy, the Commission departed from its prior analysis of market share calculation without providing any explanation of why it was doing so.¹¹⁶ The court noted that the decision was also arbitrary because the Commission had not explained the basis for its new policy that market share data was necessary to evaluate a carrier's market power.¹¹⁷

It is not unusual for courts to reverse agency decisions for lack of an adequate rationale.¹¹⁸ However, there are surprisingly few cases where an unexplained change of direction, by itself, resulted in a rejection of an agency's revised regulation. Instead, where the agency provides a rational analysis and explanation for the change of course, the courts of appeals routinely uphold

¹¹¹ *See id.*

¹¹² *Id.* at 920; *see also* *Int'l Union, United Mine Workers of Am. v. United States Dep't of Labor*, 358 F.3d 40, 44 (D.C. Cir. 2004) (noting that agency statement justifying withdrawal of proposed regulation based on "change in agency priorities," without further explanation, did not satisfy *State Farm* reasoned analysis requirement).

¹¹³ *Troy Corp. v. Browner*, 120 F.3d 277, 291 (D.C. Cir. 1997).

¹¹⁴ *Id.*

¹¹⁵ *AT&T Corp. v. FCC*, 236 F.3d 729, 736 (D.C. Cir. 2001).

¹¹⁶ *Id.* at 737.

¹¹⁷ *Id.*

¹¹⁸ *See, e.g.*, Patricia M. Wald, *The Contribution of the D.C. Circuit to Administrative Law*, 40 ADMIN. L. REV. 507, 528 (1988) (explaining that, in D.C. Circuit, "in just under a third of the direct agency appeal opinions this past year (April 1987-April 1988) in which we reversed or remanded (58 reversals or remands out of a total of 159 opinions), we did so on the basis that the agency's rationale was inadequate," and that most common agency failure was to explain departure from prior precedents).

agency changes of course in rescinding or revising regulations.¹¹⁹ Most courts reviewing regulatory changes or rescissions look only to whether the agency has articulated a reasoned explanation, and are usually satisfied that the agency has done so.¹²⁰ Those that have rejected agency explanations have done so because the agency provided no explanation, or because the explanation did not logically justify the rescission or replacement of the previous regulation.¹²¹

C. *Recent District Court Decisions in Environmental Cases*

Two recent district court cases provide good illustrations of how the *State Farm* reasoned analysis standard can serve as a brake on environmental agencies' arbitrary changes of regulatory direction. However, the second of these cases again illustrates the lack of analytical clarity in the courts' approach to reviewing revisions or rescissions of regulations.

In *West Harlem Environmental Action v. EPA*, the district court rejected the agency explanation for a 2001 regulatory amendment rescinding certain 1998

¹¹⁹ See, e.g., *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 509 n.24 (2d Cir. 2005) (noting EPA adequately justified changing discharges from concentrated animal feeding operations from "industrial" to "agricultural" under the Clean Water Act because of manure wastewater's value as crop fertilizer); *Nat'l Home Equity Mortgage Ass'n v. Office of Thrift Supervision*, 373 F.3d 1355, 1360 (D.C. Cir. 2004) (holding that OTS had supplied necessary reasoned analysis for its revised regulation based on concerns that creditors were engaging in predatory pricing and because revised regulation returned to agency's original regulatory interpretation of the statute between 1983 and 1996); *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1296-97 (D.C. Cir. 2004) (holding that Nuclear Regulatory Commission's "detailed analysis" supporting its decision to evaluate Yucca Mountain waste depository based on the barrier system's overall performance, rather than on performance of individual subsystems as in the previous regulation, satisfied the *State Farm* reasoned analysis requirement); *Prometheus Radio Project v. FCC*, 373 F.3d 372, 425 (3d Cir. 2004) (upholding FCC decision to change how it defined radio markets based on the Commission's explanation that 1996 ownership rule changes had led to distorted markets and imperfect measures of competition under previous definitions); *Paralyzed Veterans of Am. v. Sec'y of Veterans Affairs*, 345 F.3d 1334, 1352-53 (D.C. Cir. 2003) (holding that agency sufficiently explained a change in regulations giving some, lesser assistance to claimants seeking to reopen previously-denied claims because agency had no statutory obligation to give any assistance in these circumstances); *United States Air Tour Ass'n v. FAA*, 298 F.3d 997, 1006-07 (D.C. Cir. 2002) (holding that National Park Service supplied a reasonable explanation for its revision to Grand Canyon noise evaluation methodology); *Nat'l Coal Ass'n v. Lujan*, 979 F.2d 1548, 1553-54 (D.C. Cir. 1992) (finding agency's "concise statement" of explanation for a regulatory revision to be sufficient and noting that "the burden of explanation derived from *State Farm* is relatively light"); *Seldovia Native Ass'n v. Lujan*, 904 F.2d 1335, 1342-1346 (9th Cir. 1990) (determining that agency's explanation of its revised definition of "valid existing rights" was adequate because agency explained that new interpretation was consistent with similar provisions in other federal statutes and regulations); *Mobil Oil Corp. v. EPA*, 871 F.2d 149, 154 (D.C. Cir. 1989) (finding that an agency had offered a cogent explanation for its reinterpretation of statutory language which represented a change in agency policy).

¹²⁰ See *supra* notes 78-79, 81-83, 90-91, 106-07, 119 and accompanying text (describing cases upholding agency explanations for changes of course).

¹²¹ See *supra* notes 46-49, 108-17 and accompanying text.

child safety measures for rodenticides.¹²² The court relied on *State Farm* and limited its discussion to whether the agency had provided a reasoned explanation for its change of course.¹²³ The EPA's explanation for one of the changes was based primarily on the unavailability of a suitable product to meet the 1998 regulatory requirement that rodenticides contain a bittering agent to help prevent children from eating poison, an explanation which the court held to be inadequate.¹²⁴ The court concluded that

“[i]n short, the EPA lacked even the proverbial ‘scintilla’ of evidence justifying its reversal of the requirement it had imposed, after extensive study, only a few years before.... The few sentences in the Amendment that purport to explain the reason for the agency’s reversal of the bittering agent requirement largely consist of references to a presumed ‘potential’ for reduced bait acceptance and the ‘strong beliefs’ of certain [Rodenticide Stakeholder Workgroup] members that such a potential has been realized. Such ipse dixit cannot take the place of analysis of whether these beliefs were reasonable or whether the ‘potential’ was actually realized.”¹²⁵

The court’s biting scrutiny held EPA strictly to the *State Farm* reasoned analysis standard, on facts as bereft of administrative analysis as those in *State Farm* itself.¹²⁶

In *Fund for Animals v. Norton*, the district court invalidated a Park Service regulation permitting snowmobiles in Yellowstone National Park.¹²⁷ The district court based its decision on the agency’s inadequately explained “180 degree reversal” between snowmobile regulations issued in 2001 and revised regulations issued in 2003.¹²⁸ The court rolled both *State Farm* principles into a single analysis, reviewing not only the government’s explanation for its change, but also comparing the new regulation to the underlying statute.¹²⁹ Citing *State Farm*, the district court noted that the 2001 regulations were based on a finding that snowmobiling adversely affected wildlife and other park resources to such an extent that snowmobiles had to be phased out, and that the Park Service’s Organic Act had conservation as its primary purpose.¹³⁰ The court asserted, without citation, that “an explanation for this abrupt change, and the court’s

¹²² *West Harlem Env'tl. Action v. EPA*, 380 F. Supp. 2d 289, 295 (S.D.N.Y. 2005).

¹²³ *See id.* at 293-95.

¹²⁴ *Id.* at 293-95.

¹²⁵ *Id.* at 295.

¹²⁶ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46-47, 52-55, 57 (1983); *see supra* notes 47, 49 and accompanying text.

¹²⁷ *Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 105-08 (D.D.C. 2003), *partial relief from judgment granted*, 323 F. Supp. 2d 7 (D.D.C. 2004).

¹²⁸ *Id.*

¹²⁹ *See id.*

¹³⁰ *See id.* at 105-106.

review of that change, must be made in view of the statutory mandate that governs the agency's actions."¹³¹ The court held the Park Service's explanations for its change—technological improvements and mitigation measures—were inadequate in light of the agency's conservation obligation in the Organic Act and its earlier finding of environmental harm from snowmobiles.¹³² Like the Second Circuit in *New York Council*,¹³³ *Fund for Animals* illustrates how courts have concurrently analyzed the agency's obligation to explain its change of direction and the reasonableness of its chosen course. At least one commentator has described the district court's analysis in *Fund for Animals* as applying a "heightened 'reasoned analysis' standard" from *State Farm*.¹³⁴ However, any heightened standard for an agency's explanation of change of direction alone is foreclosed by the Supreme Court decisions in *Chevron*, *Rust*, *Brand X*, and *State Farm*.¹³⁵ Rather than a "heightened standard," the requirement that an agency give a reasoned explanation for a change of course is an additional obligation, beyond the ordinary requirement of reasoned decisionmaking.¹³⁶ Agencies ordinarily have little trouble providing a reasoned explanation that satisfies a reviewing court.¹³⁷

Some courts roll their analysis of change of direction into the more general arbitrary and capricious review, and consider the explanation for the change of course as one aspect of whether the new regulation as a whole is arbitrary.¹³⁸ These courts make it difficult to assess how robust an agency's explanation must be to survive review. Nevertheless, the case law, beginning with *State Farm*, is clear that an agency decision that provides no explanation, or an irrational one, for a change of course, is subject to reversal.¹³⁹ The threshold is quite low. A court will generally find an agency's explanation adequate unless the agency fails to provide one, the explanation is unsupported by any evidence whatsoever, or the explanation defies logic.¹⁴⁰ Reversal is more likely if the agency's

¹³¹ *Id.* at 105.

¹³² *Id.* at 108.

¹³³ *N.Y. Council, Ass'n of Civilian Techs. v. FLRA*, 757 F.2d 502, 508-10 (2d Cir.1985); see *supra* notes 98-105 and accompanying text.

¹³⁴ Hillary Prugh, *To Sled or Not to Sled: The Snowmobiling Saga in Yellowstone National Park*, 11 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 149, 166-71 (2005) (describing *Fund for Animals* decision and explaining that *State Farm* "reasoned analysis" test for agency changes of course "required more than a rational connection between facts presented and decision made").

¹³⁵ See *supra* notes 57-59, 74, 89 and accompanying text; see also *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 45 (1983) (holding that decision to deregulate, like initial decision to regulate, is subject to arbitrary and capricious review).

¹³⁶ See *supra* notes 57-59 and accompanying text.

¹³⁷ See *supra* notes 78-79, 90-91, 106-07, 119 and accompanying text.

¹³⁸ See *supra* notes 97-107, 127-32, *infra* notes 183-85 and accompanying text.

¹³⁹ See *supra* notes 46-49, 108-17, 122-32 and accompanying text.

¹⁴⁰ See *Nat'l Coal Ass'n v. Lujan*, 979 F.2d 1548, 1553-54 (D.C. Cir. 1992) (noting that "the burden of explanation derived from *State Farm* is relatively light"); see *supra* notes 46, 49, 109-12,

decision involves not only an inadequate explanation, but also other hallmarks of arbitrariness, such as a failure to consider relevant factors or otherwise to articulate a reasonable connection between the agency's decisions and the underlying facts.¹⁴¹ Yet, remarkably, the Roadless Rule Repeal and the Park Service's 2006 Management Policies may be invalid solely on the basis of their lack of a reasoned explanation for the changes of policy embodied in them.

II. THE ROADLESS RULE REPEAL

In October 1999, the Forest Service issued its notice of intent to promulgate a regulation protecting inventoried roadless areas in the national forests from road construction or exploitation except in limited, exceptional circumstances.¹⁴² The Roadless Rule became final in early 2001.¹⁴³ The purpose of the new rule was to "prohibit[] road construction, reconstruction, and timber harvest in inventoried roadless areas because they have the greatest likelihood of altering and fragmenting landscapes, resulting in immediate, long-term loss of roadless area values and characteristics."¹⁴⁴ The Roadless Rule protected 58.5 million acres of roadless forests, some of the last unspoiled yet unprotected areas in the public lands system.¹⁴⁵

The rulemaking which led to the Roadless Rule was one of the most extensive in U.S. history, involving more than 15 months of review, 600 public hearings, and 1.6 million public comments.¹⁴⁶ The Roadless Rule was supported by a four volume Final Environmental Impact Statement ("FEIS"), totaling over 700 pages.¹⁴⁷ The Forest Service justified the Roadless Rule as consistent with the agency's statutory obligations for managing the national forests in several ways. It asserted that preserving roadless forests accorded with the Organic Administration Act's instruction that the agency regulate the "occupancy and use and... preserve the forests... from destruction."¹⁴⁸ The Roadless Rule focused in particular on preventing activities which could harm vulnerable natural resources in roadless areas.¹⁴⁹ The Forest Service also noted that

114, 116-17, 125-26 and accompanying text.

¹⁴¹ See *State Farm*, 463 U.S. at 42-43 (listing factors courts consider in evaluating arbitrariness of agency decisions); *Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 105-108 (D.D.C. 2003).

¹⁴² Glicksman, *supra* note 24, at 1154 (citing National Forest System Roadless Areas, 64 Fed. Reg. 56,306, 56,307 (Oct. 19, 1999)).

¹⁴³ Roadless Rule, 66 Fed. Reg. at 3,244.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 3,245; see Glicksman, *supra* note 24, at 1143.

¹⁴⁶ Roadless Rule, 66 Fed. Reg. at 3,247-48.

¹⁴⁷ *Id.* at 3,244; see *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1118 (9th Cir. 2002) (describing Roadless Rule FEIS).

¹⁴⁸ 16 U.S.C. § 551 (2000); see Roadless Rule, 66 Fed. Reg. at 3,252.

¹⁴⁹ See Roadless Rule, 66 Fed. Reg. at 3,245 (describing high quality of undisturbed soil, air and water and diversity of animal and plant communities existing in roadless areas).

inventoried roadless areas, which account for 2% of the U.S. land base, occur in 661 watersheds in national forests.¹⁵⁰ The national forests provide 14% of the nation's water flow, and protecting roadless areas thus promotes another express statutory purpose: securing favorable conditions of water flows.¹⁵¹

The Forest Service offered two additional justifications for the Roadless Rule that went beyond its consistency with the governing statutes. First, the size of the existing national forest road system had led to a maintenance backlog of approximately \$8.4 billion on existing roads.¹⁵² The Forest Service considered the Roadless Rule to be a way of avoiding future construction and maintenance costs that would further increase the economic burden on the agency.¹⁵³ Second, the Forest Service concluded that the obligation to protect roadless area values in the forest system required a uniform, national rule, rather than managing roadless areas on a forest-by-forest basis.¹⁵⁴

One week after the Roadless Rule became final, President Bill Clinton left office. The incoming administration of George W. Bush immediately instructed agencies to withdraw any regulations finalized but not yet published in the Federal Register and temporarily postponed the effective date of published regulations that had not yet gone into effect.¹⁵⁵ The new administration delayed the effective date of the Roadless Rule until May 12, 2001,¹⁵⁶ and many groups opposed to roadless area protection challenged the rule in court.¹⁵⁷ After a district judge in Idaho enjoined implementation of the Roadless Rule, the Forest Service published interim directives reserving to the Chief of the Forest Service the authority to approve construction and extractive activities in inventoried roadless areas.¹⁵⁸

¹⁵⁰ *Id.* at 3,246.

¹⁵¹ 16 U.S.C. § 475 (2000); see Roadless Rule, 66 Fed. Reg. at 3,246 (describing roadless area watersheds as sources of clean water for drinking, agricultural, and industrial uses, for maintaining healthy fish and wildlife populations, and for outdoor recreation).

¹⁵² Roadless Rule, 66 Fed. Reg. at 3,245.

¹⁵³ *Id.* at 3,246.

¹⁵⁴ *Id.*

¹⁵⁵ See Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7,702, 7,702 (Jan. 24, 2001); see generally William M. Jack, Notes & Comments, *Taking Care That Presidential Oversight of the Regulatory Process is Faithfully Executed: A Review of Rule Withdrawals and Rule Suspensions Under the Bush Administration's Card Memorandum*, 54 ADMIN. L. REV. 1479 (2002) (discussing Card Memorandum and effect of incoming administration's withdrawal and suspension of regulations).

¹⁵⁶ Special Areas; Roadless Area Conservation: Delay of Effective Date, 66 Fed. Reg. 8,899, 8,899 (Feb. 5, 2001).

¹⁵⁷ See Roadless Repeal, 70 Fed. Reg. at 25,655 (describing nine federal lawsuits challenging Roadless Rule); Glicksman, *supra* note 24, at 1167.

¹⁵⁸ Roadless Area Protection; Interim Direction, 66 Fed. Reg. 44,111, 44,112 (Aug. 22, 2001); Glicksman, *supra* note 24, at 1167 & n.143; see *Kootenai Tribe of Idaho v. Veneman*, No. CV01-10-N-EJL, 2001 WL 1141275, at * 2 (D. Idaho May 10, 2001) (enjoining implementation of Roadless Rule), *rev'd*, 313 F.3d 1094 (9th Cir. 2002). Although the Ninth Circuit reversed the Idaho district

In May 2005, the Forest Service finally announced the rescission of the Roadless Rule in the Roadless Repeal.¹⁵⁹ The agency replaced the previous administration's regulation with a process whereby state governors could petition for protection of roadless areas on a state-by-state basis.¹⁶⁰ However, the Roadless Repeal left the ultimate decision on the petitions to the Forest Service.¹⁶¹ In the event a state did not submit a petition, or the Forest Service rejected a state petition, the agency would manage roadless areas under local forest plans, potentially subjecting those roadless areas to development, extractive use, and road construction.¹⁶²

The Forest Service justified the Roadless Repeal on several grounds. The agency first acknowledged the need to protect roadless areas and "address those activities having the greatest likelihood of altering, fragmenting, or otherwise degrading roadless area values and characteristics."¹⁶³ The preamble noted concerns about the process by which the prior administration developed the Roadless Rule, as well as the intent of the new rule to provide a "responsible and balanced approach to re-examining the roadless rule in an effort to address those concerns while enhancing roadless area values and characteristics."¹⁶⁴ The preamble also recited that the Roadless Rule was subject to extensive litigation and had been invalidated by a district court.¹⁶⁵ However, the agency's principal justification for the change was its view that the new state petitioning process would allow cooperation with states on long-term strategies for managing roadless areas, ensuring "balanced management decisions that maintain the most important characteristics and values of those areas."¹⁶⁶

In striking down the Roadless Repeal, Magistrate Judge Elizabeth Laporte of the United States District Court for the Northern District of California focused on the Forest Service's failure to conduct the environmental impact assessments and consultation required under NEPA and the ESA for actions that might

court decision, *Kootenai Tribe*, 313 F.3d at 1126, another federal judge in Wyoming later held that the Roadless Rule violated the National Environmental Policy Act ("NEPA") and the Wilderness Act, and enjoined its implementation. *Wyoming v. United States Dep't of Agric.*, 277 F. Supp. 2d 1197, 1239 (D. Wyo. 2003), *vacated and remanded as moot*, 414 F.3d 1207 (10th Cir. 2005).

¹⁵⁹ Roadless Repeal, 70 Fed. Reg. at 25,654. The district court in *California v. United States Department of Agriculture* held that the provision in the Roadless Repeal that specified that the Forest Service did not intend that the Roadless Rule be reinstated if the new state petition process was set aside constituted a substantive repeal of the Roadless Rule. *California v. United States Dep't of Agric.*, Nos. C05-03508 EDL, C05-04038 EDL, 2006 WL 3006489, at *18-20 (N.D. Cal. Oct. 11, 2006); *see also supra* note 22 (describing no-reinstatement provision of Roadless Repeal).

¹⁶⁰ Roadless Repeal, 70 Fed. Reg. at 25,654.

¹⁶¹ *See Berman, supra* note 25.

¹⁶² Roadless Repeal, 70 Fed. Reg. at 25,658-59; *see also Berman, supra* note 25 (describing consequences if no state petition is filed).

¹⁶³ Roadless Repeal, 70 Fed. Reg. at 25,654.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 25,655.

¹⁶⁶ *Id.*

significantly effect the environment or jeopardize the continued existence of listed species.¹⁶⁷ The district court cited *State Farm's* change of course standard on one narrow issue: that the Forest Service improperly changed course without "explaining why it had concluded that the protections of the Roadless Rule were no longer necessary for the reasons it had previously laid out in detail."¹⁶⁸ Although the district court specifically addressed only this aspect of the Forest Service's change of course, the agency's proffered explanations left the Roadless Repeal vulnerable to invalidation for several reasons related to the *State Farm* reasoned explanation requirement.

As an initial matter, there were no changed circumstances or amendments to the controlling statutes that justified a change of course.¹⁶⁹ In addition, the Multiple-Use Sustained-Yield Act of 1960 requires not only forest management for multiple use, but also that "due consideration *shall* be given to the relative values of the various resources in particular areas."¹⁷⁰ The Forest Service insisted in the Roadless Repeal that the new rule was intended to protect "roadless area values."¹⁷¹ However, as the district court recognized, the agency did not explain why it departed from the carefully-crafted protection afforded those values in the Roadless Rule.¹⁷² The Roadless Repeal merely stated that the new petition process was a "better means to achieve protection of roadless area values," with no elaboration to explain how the agency would actually

¹⁶⁷ *California v. United States Dep't of Agric.*, Nos. C05-03508 EDL, C05-04038 EDL, 2006 WL 3006489, at *16-*30 (N.D. Cal. Oct. 11, 2006) (holding that Forest Service was required to prepare an environmental impact statement on effects of Roadless Repeal); *see also id.* at *30-*34 (holding that Forest Service was required to consult with federal fish and wildlife management agencies regarding effects of Roadless Repeal on listed species).

¹⁶⁸ *Id.* at *26; *see also supra* note 40 and accompanying text. Part of the reason for the district court's limited discussion of the Forest Service's change of direction may be that agency was not expressly repealing an old regulation and reissuing a new one under an express statutory authority. As the court noted, a claim that an agency action is arbitrary and capricious cannot be a "stand-alone" claim, but rather must be brought based on some other substantive statute. *California*, 2006 WL 3006489, at *34. Ordinarily, where a rule and its rescission or replacement are based on a specific statute, this requirement is easily satisfied. *See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 33-38 (1983) (describing rescission of a regulation expressly based on National Traffic and Motor Vehicle Safety Act of 1966 and its subsequent amendments). In the case of the Roadless Repeal, the Forest Service included only a vague reference to its contention that "the National Forest Management Act (NFMA) and other statutes provide the necessary legal authority to implement the final rule." Roadless Repeal, 70 Fed. Reg. at 25,657. The absence of a clear statutory basis for the new petitioning procedure established in the Roadless Repeal made fashioning a claim of change of regulatory course more difficult.

¹⁶⁹ *See AFL-CIO v. Brock*, 835 F.2d 912, 918 (D.C. Cir. 1987) (rejecting agency's explanation for its change of course in part because there had been no change in underlying statute). The Roadless Rule explained that the Forest Service's Organic Act of 1897, the Multiple-Use Sustained-Yield Act of 1960, and NFMA were the statutory bases for that rule. Roadless Rule, 66 Fed. Reg. at 3,249-50, 3,252.

¹⁷⁰ 16 U.S.C. § 529 (emphasis added).

¹⁷¹ Roadless Repeal, 70 Fed. Reg. at 25,654.

¹⁷² *California*, 2006 WL 3006489, at *26.

fulfill that obligation under the new rule, or why it was abandoning a rule that the agency developed four years earlier precisely to protect those values.¹⁷³ At most, the agency identified a weakness in the prior regulation, and explained how its new rule rectified that weakness, without explaining why it decided to completely abandon the prior regulation. Given that both rules were supposedly meant to protect roadless area values reflected in the underlying statutory mandate, this explanation was inadequate.¹⁷⁴

The Forest Service's justification that it was forced to institute the Roadless Repeal because a court had enjoined the Roadless Rule¹⁷⁵ was particularly weak. The injunction issued by the district court in Wyoming in 2003 conflicted on many points with the Ninth Circuit's decision in 2002 upholding the Roadless Rule.¹⁷⁶ Consequently, it was unlikely that the district court's injunction could have a nationwide effect, despite the purported nationwide permanent injunction issued by the Wyoming district court.¹⁷⁷ A single adverse court decision does not automatically justify the complete repeal of a regulation.¹⁷⁸

Finally, in contrast to the Roadless Rule, which was based on a massive administrative record, including a 700-page environmental impact statement, the Roadless Repeal involved no environmental impact assessment.¹⁷⁹ This fact was central to the district court's determination that the Roadless Repeal was arbitrary and capricious.¹⁸⁰ The court relied on both *State Farm* standards in

¹⁷³ Roadless Repeal, 70 Fed. Reg. at 25,656.

¹⁷⁴ See *AFL-CIO*, 835 F.2d at 918-19 (holding agency's explanation of its change of course to be inadequate because agency provided no cogent explanation of how the reason it identified for change—methodological difficulties—justified completely abandoning original regulation); see also *Huntington Hosp. v. Thompson*, 319 F.3d 74, 79-80 (2d Cir. 2003) (rejecting new Department of Health and Human Services regulation because agency "offered no explanation for the inconsistent interpretation of the same statute reflected in two separate regulations").

¹⁷⁵ See *supra* note 165 and accompanying text.

¹⁷⁶ *Compare, e.g., Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1115-24 (9th Cir. 2002) (addressing NEPA claims and finding that Roadless Rule satisfied NEPA) with *Wyoming v. United States Dep't of Agric.*, 277 F. Supp. 2d 1197, 1218-26 (D. Wyo. 2003) (addressing NEPA claims and holding that Roadless Rule violated NEPA).

¹⁷⁷ *Wyoming*, 277 F. Supp. 2d at 1239.

¹⁷⁸ See *Int'l Union, United Mine Workers of Am. v. United States Dep't of Labor*, 358 F.3d 40, 44 (D.C. Cir. 2004) (noting that one of agency's proffered explanations for withdrawing a proposed regulation, a court of appeals decision that cast doubt on regulation's validity, was not adequate unless agency explored ways to craft a rule that would have met that court's objections).

¹⁷⁹ Roadless Repeal, 70 Fed. Reg. at 25,660; see *supra* note 147 and accompanying text (describing environmental analysis associated with Roadless Rule).

¹⁸⁰ See, e.g., *California v. United States Dep't of Agric.*, Nos. C05-03508 EDL, C05-04038 EDL, 2006 WL 3006489, at *25-*26, *28, *30 (N.D. Cal. Oct. 11, 2006) (describing failure to prepare a new environmental impact statement despite likely effects of the Roadless Repeal on environment in roadless areas, changes in environmental baseline conditions in four years between promulgation of Roadless Rule and Roadless Repeal, and proper timing of environmental impact statement in this case).

addressing the Forest Service's decision not to prepare a new NEPA analysis.¹⁸¹ Like the court in *Fund for Animals*,¹⁸² the district court did not draw a bright distinction in its citations to *State Farm* between the general requirement that an agency's action not be arbitrary and capricious and the obligation of an agency to supply a reasoned analysis for a change of course.¹⁸³ According to the court, the Forest Service's decision not to analyze the environmental consequences of the Roadless Repeal represented a failure to consider an important aspect of the issue under the standard arbitrary and capricious test.¹⁸⁴ The court applied the other *State Farm* principle in holding that the lack of a NEPA analysis meant that the agency had given no explanation for why the scientific basis for a national rule explained in the Roadless Rule and its FEIS was no longer valid.¹⁸⁵

In addition to the district court's reasoning for characterizing the Roadless Repeal as an unexplained change of direction, it reasonably could have concluded that the Forest Service's explanations for its reversal of course were illogical in light of the facts before the agency. Under *State Farm*, there is a presumption against changes in policy that are not justified by the rulemaking record.¹⁸⁶ The absence of an environmental analysis and the lack of any explanation in the record whatsoever for the abandonment of the Roadless

¹⁸¹ See *id.* at *15 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise")); see also *id.* at *25 (quoting *State Farm*, 463 U.S. at 41-42 ("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"))).

¹⁸² See *supra* notes 127-32 and accompanying text.

¹⁸³ For example, the district court quoted *State Farm*'s requirement that "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change," but then noted that, while an agency is entitled to change policy directions, "before revoking a regulation 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 choices made.'" *California*, 2006 WL 3006489, at *25 (quoting *State Farm*, 463 U.S. at 41, 43). The latter statement from *State Farm* describes an agency's obligation in any rulemaking, rather than the character of the explanation the agency must provide for a change of course. See *supra* notes 52-58, 136 and accompanying text.

¹⁸⁴ *Id.* at *25 (holding that the Forest Service's decision not to prepare an environmental analysis for the Roadless Repeal "fails the [*State Farm*] test because it ignores relevant factors and is infected with a clear error of judgment"); see also *supra* notes 52-56 and accompanying text (describing arbitrary and capricious test and probability of court overturning regulation for failure to consider relevant factors).

¹⁸⁵ *California*, 2006 WL 3006489, at *26 ("the Forest Service reversed course without citing any new evidence that would lead to a different conclusion or explaining why it had concluded that the protections of the Roadless Rule were no longer necessary for the reasons it had previously laid out in detail"); see also *AT&T Corp. v. FCC*, 236 F.3d 729, 737 (D.C. Cir. 2001) (remanding agency decision for failure to supply any explanation whatsoever for revision of its regulation); *Troy Corp. v. Browner*, 120 F.3d 277, 291 (D.C. Cir. 1997) (same).

¹⁸⁶ *State Farm*, 463 U.S. 29, 42 (1983).

Rule's scientific justification implicated this presumption against unjustified changes. The justification that objections from states and local stakeholders required the new petitioning process was inadequate because that explanation provided no reason why the Forest Service decided to completely abandon its carefully-developed rule for protecting roadless area values, even though the agency acknowledged in both the Roadless Rule and the Roadless Repeal that it had an obligation to do so.¹⁸⁷ Finally, the Forest Service's explanation that the Wyoming district court's injunction justified the Roadless Repeal seemed little more than pretext in light of the earlier Ninth Circuit decision upholding the Roadless Rule.¹⁸⁸ Although the Forest Service offered some justifications for its regulatory rescission, those justifications could not satisfy the "reasoned analysis" standard for agency changes of direction.

III. THE 2006 NATIONAL PARK SERVICE MANAGEMENT POLICIES

The Park Service manages the crown jewels of the federal public lands pursuant to the Organic Act, which created the Park Service in 1916.¹⁸⁹ Under the Organic Act, the agency must "conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."¹⁹⁰ Like the Roadless Rule,¹⁹¹ the Clinton Administration adopted the 2001 version of the Management Policies shortly before the end of its term in office.¹⁹²

¹⁸⁷ See *Huntington Hosp. v. Thompson*, 319 F.3d 74, 79-80 (2d Cir. 2003) (rejecting new Department of Health and Human Services regulation because agency "offered no explanation for the inconsistent interpretation of the same statute reflected in two separate regulations"); *AFL-CIO v. Brock*, 835 F.2d 912, 918-19 (D.C. Cir. 1987) (holding an agency's explanation of its change of course to be inadequate because agency provided no cogent explanation of how the reason it identified for change—methodological difficulties—justified completely abandoning original regulation); see also *supra* notes 163-64, 166, 171 and accompanying text (describing Forest Service's statements in the Roadless Repeal of the importance of protecting roadless area values).

¹⁸⁸ See *supra* note 158.

¹⁸⁹ 16 U.S.C. § 1 (2000).

¹⁹⁰ *Id.*

¹⁹¹ See *supra* note 143 and accompanying text.

¹⁹² See Director's Memorandum, 2001 National Park Service Management Policies, available at <http://www.nps.gov/policy/mp/director.htm> (indicating their adoption on Dec. 27, 2000). Although the Park Service Management Policies are not published in the Code of Federal Regulations, the Park Service uses a notice-and-comment process to develop the policies, announcing the availability of drafts through the Federal Register, and the agency specifies in the Management Policies that "[t]his section 1. 4 of Management Policies represents the agency's interpretation of these key statutory provisions." 2001 Management Policies, *supra*, note 28, at ¶ 1.4. The 2006 Management Policies have added a statement that the Management Policies do not create any enforceable obligations, but retained the statement that Park Service staff are accountable for their adherence to the policies. 2006 Management Policies, *supra* note 32, Introduction at 2. Based on earlier versions of the policies, several courts have stated or held that the policies have the "force of law" because the agency intends to be bound by them. See *S. Utah Wilderness Alliance v. Nat'l Park Serv.*, 387 F.

In August 2005, the Park Service issued a set of proposed revisions to the Management Policies drafted by Paul Hoffman, Interior deputy assistant secretary for fish and wildlife and parks.¹⁹³ The Park Service withdrew the proposal after critics charged that these revisions would have reduced preservation of the parks to only avoiding permanent and irreversible damage to park resources, eliminated limits to motorized traffic, encouraged continued grazing and mining in certain areas, and lowered air quality standards.¹⁹⁴ In October 2005, the agency announced a new set of revisions to the Management Policies,¹⁹⁵ intended to “improve their clarity and keep pace with the changes in laws, regulations, socio-economic factors and technology.”¹⁹⁶ In June 2006, the Park Service prepared a third draft revision of the Management Policies.¹⁹⁷ Finally, on August 31, 2006, the Park Service issued its final 2006 Management Policies.¹⁹⁸

The 2006 Management Policies revise many parts of the 2001 Management Policies. However, the final 2006 Management Policies eliminate proposed revisions in the October 2005 draft that would have substantially reinterpreted the bedrock statutory term “unimpaired.”¹⁹⁹ This significantly diminishes the difference between the interpretation of this critical term in the 2001 Management Policies and the 2006 Management Policies.²⁰⁰ As a result, a

Supp. 2d 1178, 1188-89 (D. Utah 2005) (holding that the Management Policies have the force and effect of law because the policies by their own terms are mandatory for the agency and because, procedurally, the Management Policies are closer to a legislative rule than a policy manual); *Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 106 n.8 (D.D.C. 2003) (holding that Park Service’s intent to be bound to the Management Policies was clear); *see also* *Davis v. Latschar*, 202 F.3d 359, 366 n.4 (D.C. Cir. 2000) (Park Service Management Policies are binding because agency intends them to be binding). *But see* *The Wilderness Soc’y v. Norton*, 434 F.3d 584, 595-97 (D.C. Cir. 2006) (holding that Park Service Management Policies are not binding on agency because they are not published in Code of Federal Regulations and do not sufficiently purport to bind agency, distinguishing determination in *Davis* as dicta, based on Park Service not having contested issue in that case). Although the case law is unsettled, there is a strong argument that the Park Service Management Policies are equivalent to regulations for purposes of change of course analysis. A party challenging the Park Service Management Policies under the *State Farm* standard in a court outside the D.C. Circuit would have to convince that court that the policies are binding, or that the principle of consistency of agency interpretation otherwise applies.

¹⁹³ Dan Berman, *Director Vows NPS is not Changing ‘Core Mission’*, GREENWIRE, Sept. 7, 2005, available at <http://www.eenews.net/Greenwire/2005/09/07/archive/15/?terms=park>.

¹⁹⁴ Berman, *supra* note 29.

¹⁹⁵ *See* Comparison Edition of the Draft Management Policies, Oct. 2005 (on file with author).

¹⁹⁶ Notice of Availability of Draft National Park Service Management Policies, 70 Fed. Reg. 60,852, 60,852 (Oct. 19, 2005).

¹⁹⁷ National Park Service Management Policies Draft June 2006, *supra* note 31.

¹⁹⁸ 2006 Management Policies, *supra* note 32.

¹⁹⁹ *Compare id.* at ¶¶ 1.4.3-1.4.5 with Comparison Edition of the Draft Management Policies, *supra* note 195, at ¶¶ 1.4.3-1.4.5.

²⁰⁰ For example, in the October 2005 draft, the Park Service changed the 2001 phrase “[t]he impairment that is prohibited . . . is any impact” to “[t]he impairment that is prohibited . . . is any significant impact” Comparison Edition of the Draft Management Policies, *supra* note

litigant will find less fertile ground for a challenge to the 2006 Management Policies based on *State Farm* than would have been available if the agency had retained the language in the October 2005 draft.

Nevertheless, the 2006 Management Policies represent a departure from the priority accorded to conservation in the 2001 Management Policies. A litigant could challenge whether the agency has adequately explained this change of policy. In reviewing the Park Service's change of course,²⁰¹ a court would focus on differences between the old and new versions of Chapter 1 of the Management Policies, entitled "The Foundation." The Park Service is proposing changes to that Chapter in the 2006 Management Policies that alter its interpretation of the critical statutory term "unimpaired" and the agency's obligations under the Organic Act.²⁰² Under *State Farm*, the agency must supply a reasoned explanation for these changes.²⁰³

In its 2001 Management Policies, the Park Service stated that "[a]s the physical remnants of our past, and great scenic and natural places that continue to evolve—repositories of outstanding recreation opportunities—class rooms of our heritage—and the legacy we leave to future generations—[the parks] warrant the highest standard of protection."²⁰⁴ Paragraph 1.4.5 of the 2001 Management Policies defined "impairment" as "an impact that, in the professional judgment of the responsible [Park Service] manager, would harm

195, at ¶ 1.4.5 (emphasis added). The term "significant" is not present in the 2006 Management Policies. 2006 Management Policies, *supra* note 32, at ¶ 1.4.5. Similarly, the October 2005 draft identified the Park Service's obligation to avoid or minimize "unacceptable impacts," where the 2001 Management Policies required the agency to avoid or minimize "adverse impacts." Comparison Edition of the Draft Management Policies, *supra* note 195, at ¶ 1.4.3 (emphasis added). Combined with a proposed Paragraph 1.4.3.2, which described impacts that would "unreasonably interfere" with resources or uses, the introduction of the concept of "unacceptable impacts" would have allowed more activities with detrimental effects within parks than the previous, more categorical "adverse impacts" standard. The 2006 Management Policies eliminates the term "unacceptable" in this section. 2006 Management Policies, *supra* note 32, at ¶ 1.4.3. Although the definition of "unacceptable impacts" remains in the 2006 Management Policies, in a new Paragraph 1.4.7.1, the purpose of the new phrase is no longer obviously to raise the threshold at which an impact constitutes impairment.

²⁰¹ Such judicial review could occur if a court finds that the 2006 Management Policies are binding on the agency. *See supra* note 192.

²⁰² Compare 2001 Management Policies, *supra* note 28, at ¶¶ 1.4.3, 1.4.5 with 2006 Management Policies, *supra* note 32, at ¶¶ 1.4.3, 1.4.5, 1.4.7.1. A litigant challenging this change as a binding obligation on the agency could point to the fact that the Park Service's regulations in 36 C.F.R. Chapter I do not define the statutory term "unimpaired" or the related term "impairment," whereas the Management Policies provide extensive definitions of this core concept from the Organic Act. 36 C.F.R. § 1.4 (2006) (including neither term in the "Definitions" section); *see S. Utah Wilderness Alliance v. Nat'l Park Serv.*, 387 F. Supp. 2d 1178, 1188-89 (D. Utah 2005) (holding that Management Policies are binding on Park Service because they are more like legislative rules than a policy manual); *see also supra* note 192 (discussing whether policies are binding on Park Service).

²⁰³ *See supra* Section I.A.1.

²⁰⁴ 2001 Management Policies, *supra* note 28, at ¶¶ 1.1, 1.2.

the integrity of park resources and values.”²⁰⁵ Whether an impact meets the impairment standard “depends on the particular resources and values that would be affected; the severity, duration, and timing of the impact; the direct and indirect effects of the impact; and the cumulative effects of the impact in question and other impacts.”²⁰⁶

The 2006 Management Policies leave Section 1.4.5 largely intact, except for one important change: the proposed policies stress that “[a]n impact to any park resource or value may, *but does not necessarily*, constitute an impairment.”²⁰⁷ To illustrate the category of effects that may be “impacts” but not “impairments,” the 2006 Management Policies introduce the concept of “unacceptable impacts.”²⁰⁸ This term did not appear in the 2001 Management Policies. New Paragraph 1.4.7.1 defines unacceptable impacts using terms that appear to expand a park manager’s discretion.²⁰⁹ The new definitions would allow some uses that affect park resources that would have been prohibited under the previous definition of impairment in Paragraph 1.4.5.²¹⁰ These definitions provide that unacceptable impacts are those that would be “inconsistent with the park’s purposes or values,” or “*unreasonably* interfere with... an appropriate use, or the atmosphere of peace and tranquility, or the natural soundscape maintained in the wilderness...”²¹¹ Under new Paragraph 1.4.7.1, a park manager could declare a proposed park use—for example, a new motorized use—not “unreasonable” interference with the peace and tranquility of the park. The manager could then authorize the use on that basis. Previously, the use might have been forbidden had the manager literally followed the standard in Paragraph 1.4.5 prohibiting *any* “impact that... would harm the integrity of park resources and values.”²¹²

The 2006 Management Policies also omit significant interpretive language from Paragraph 1.4.3 of the 2001 Management Policies, which described the Park Service’s obligation to preserve the parks unimpaired for future generations. The 2001 Management Policies recognized that Congress

provided that when there is a conflict between conserving resources and values and providing for enjoyment of them, conservation is to be predominant. This is how courts have consistently interpreted the Organic Act, in decisions that variously describe it as making ‘resource protection the primary goal’ or ‘resource protection the overarching concern,’ or as

²⁰⁵ *Id.* at ¶ 1.4.5.

²⁰⁶ *Id.*

²⁰⁷ 2006 Management Policies, *supra* note 32, at ¶ 1.4.5 (emphasis added).

²⁰⁸ *Id.* at ¶ 1.4.7.1.

²⁰⁹ *Id.*

²¹⁰ 2001 Management Policies, *supra* note 28, at ¶ 1.4.5.

²¹¹ 2006 Management Policies, *supra* note 32, at ¶ 1.4.7.1 (emphasis added).

²¹² *Id.* at ¶ 1.4.5.

establishing a ‘primary mission of resource conservation,’ a ‘conservation mandate,’ ‘an overriding preservation mandate,’ ‘an overarching goal of resource protection,’ or ‘but a single purpose, namely, conservation.’²¹³

The 2006 Management Policies maintain the statement that “conservation is to be predominant.”²¹⁴ However, the new policies include only a bland statement that “[t]his is how courts have consistently interpreted the Organic Act,” eliminating the specific references to judicial interpretations of the Act.²¹⁵ This omission weakens the agency’s regulatory interpretation of the primacy of conservation in its management policies.²¹⁶

Read together, these changes weaken the Park Service’s non-impairment and conservation obligations. The agency has flagged in Paragraph 1.4.5 that not all harmful effects on the parks will constitute impairments.²¹⁷ It has created a new definition of “unacceptable impacts” which, perversely, may allow a park manager more leeway to find that a proposed park use has an “acceptable” effect on the park, thereby dodging the non-impairment standard.²¹⁸ It has also eliminated important interpretive language that highlighted the courts’ understanding that the Organic Act requires the agency to make conservation of the parks its principle management objective.²¹⁹ The result is a weaker non-impairment standard and, potentially, harmful effects from authorized uses of parks that would have been prohibited under the 2001 Management Policies.

²¹³ 2001 Management Policies, *supra* note 28, at ¶ 1.4.3. These observations in the 2001 Management Policies derived from a variety of cases that construed the phrase “unimpaired for the enjoyment of future generations” in the Organic Act, 16 U.S.C. § 1 (2000). *See, e.g.*, *S. Utah Wilderness Alliance v. Dabney*, 222 F.3d 819, 826 (10th Cir. 2000) (interpreting “no-impairment” mandate as placing an “overarching concern on preservation of resources”); *Bicycle Trails Council v. Babbitt*, 82 F.3d 1445, 1453 (9th Cir. 1996) (recognizing that “resource protection [is] the overarching concern” of the Organic Act); *Conservation Law Found. v. Clark*, 590 F. Supp. 1467, 1479 (D.Mass. 1984) (characterizing the Organic Act as having “overriding preservation mandate”). In addition, the legislative history of the Organic Act suggests that the “overriding purpose of the bill was to preserve ‘nature as it exists.’” *Nat’l Rifle Assoc. of Am. v. Potter*, 628 F. Supp. 903, 910 (D.D.C. 1986) (citing H. Rep. No. 700, 64th Cong., 1st Sess. 31 (1916)).

²¹⁴ 2006 Management Policies, *supra* note 32, at ¶ 1.4.3.

²¹⁵ *Id.*

²¹⁶ Despite the omission of the interpretive statements emphasizing that parks conservation is the agency’s central mission, Paragraph 1.4.3 of the 2006 Management Policies is significantly stronger than the version proposed in the October 2005 draft. That version provided that “[t]he Park Service recognizes that activities in which park visitors engage can cause impacts to park resources and values, and the Service must balance the sometimes competing obligations of conservation and enjoyment in managing the parks. The courts have recognized that the Service has broad discretion in determining how best to fulfill the Organic Act’s mandate.” Comparison Edition of the Draft Management Policies, *supra* note 195, at ¶ 1.4.3. In effect, the October 2005 draft would have exchanged any notion of conservation priority for a purely discretionary balancing standard weighting conservation and park use equally.

²¹⁷ 2006 Management Policies, *supra* note 32, at ¶ 1.4.5.

²¹⁸ *See supra* notes 208-12 and accompanying text.

²¹⁹ *See supra* notes 213-16 and accompanying text.

Most significantly, the Park Service does not explain in Chapter 1, the Overview, or the Introduction to the 2006 Management Policies why it is reinterpreting the agency's core mission.²²⁰ The agency does not acknowledge this change, or provide any explanation of its decision to reduce the central place of conservation and prevention of impairment in its management of the parks. A court could therefore find the new policies arbitrary and capricious under *State Farm* because the agency has not adequately explained its change of course.²²¹

CONCLUSION

Under *State Farm*, courts require agencies that rescind or revise regulations to provide a reasoned analysis for the change.²²² Subsequent Supreme Court cases reviewing regulatory changes of direction have upheld the agencies' explanations as adequate so long as they have supplied a reasonable explanation.²²³ However, the Court has not used these cases to set out an analytical framework for how to assess whether an agency's explanation is sufficiently "reasoned."²²⁴ Lower courts which have considered the reasoned analysis obligation have occasionally not distinguished this requirement from the more general arbitrary and capricious review standard also set out in *State Farm*.²²⁵ In doing so, these courts conflate what should be distinct analyses.²²⁶ Those that have assessed agency changes of course in isolation have generally found the agencies' explanations adequate, suggesting a low threshold for agencies in explaining their policy changes.²²⁷ However, courts have set aside agency rescissions or revisions of regulations where the agency did not acknowledge its change, provided no explanation for the change, provided an explanation that defied logic, or did not explain why the reason given justified a complete rescission of the rule.²²⁸ *State Farm*'s "reasoned analysis" standard

²²⁰ 2006 Management Policies, *supra* note 32, at Overview, Introduction, Ch. 1.

²²¹ See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) (rejecting agency change of direction because agency offered no explanation for change); *Huntington Hosp. v. Thompson*, 319 F.3d 74, 79-80 (2d Cir. 2003) (rejecting new Department of Health and Human Services regulation because agency "offered no explanation for the inconsistent interpretation of the same statute reflected in two separate regulations"); *AFL-CIO v. Brock*, 835 F.2d 912, 918-19 (D.C. Cir. 1987) (finding no explanation for fundamental change in statutory interpretation); *cf. Mobil Oil Corp. v. EPA*, 871 F.2d 149, 152 (D.C. Cir. 1989) (holding that an agency's reinterpretation of statute is entitled to deference if agency "acknowledges and explains the departure from its prior views").

²²² *State Farm*, 463 U.S. at 42, 57.

²²³ See *supra* notes 78-79, 83, 90-91 and accompanying text.

²²⁴ See *supra* Section I.A.1.

²²⁵ See *supra* notes 97-107, 127-32, 183-85 and accompanying text.

²²⁶ See *supra* notes 52-59, 97-101, 129-31, 136 and accompanying text.

²²⁷ See *supra* notes 78-79, 81-83, 90-91, 106-07, 119-20, 140 and accompanying text.

²²⁸ See *supra* notes 46-49, 108-17, 122-26, 132, 185 and accompanying text.

places an apparently light burden on an agency to explain a change of course.²²⁹ Consequently, as illustrated by the recent decision setting aside the Roadless Repeal, a litigant seeking to have a revised rule set aside will want to argue both aspects of *State Farm*: that the explanation for the change of course is inadequate, and that the decisionmaking process to develop the new rule was flawed and arbitrary.²³⁰

The reasoned analysis requirement was one basis for the district court's decision to set aside the Roadless Repeal, and could also justify a court striking down the revised Park Service Management Policies, because in both instances the agencies provided inadequate explanations for the changes of course.²³¹ The Roadless Repeal failed to explain its lifting of protection for the 58.5 million acres of roadless national forest lands under the rule painstakingly developed by the previous administration.²³² Nor did it explain why the Forest Service discarded the scientific basis for the rule developed in the Roadless Rule FEIS.²³³ The agency provided various explanations, principally that the Roadless Rule insufficiently incorporated the views of state and local entities and that the rule had been held invalid.²³⁴ These explanations could not, and one of them did not, stand up to logical scrutiny, even given the low threshold an agency must meet in explaining its changes.²³⁵ The Park Service's interpretation of the Organic Act in the 2001 Management Policies unambiguously spelled out the agency's mandate to conserve the national parks "unimpaired."²³⁶ The 2006 Management Policies do not explain why the Park Service is altering its interpretation of the Organic Act and adopting less-protective policies that could increase the possibility of harm to the parks.²³⁷ Indeed, the 2006 Management Policies do not even acknowledge that the revisions represent a change of policy.²³⁸ As the district court held in *California*, the Forest Service did not supply an adequate reasoned analysis under *State Farm* for its change of course in promulgating the Roadless Repeal.²³⁹ A court reviewing the Park Service's 2006 Management Policies would likely find that agency also failed adequately

²²⁹ See *supra* notes 140, 227 and accompanying text.

²³⁰ See *supra* notes 52-59, 141, 181-85 and accompanying text.

²³¹ See *supra* notes 168-79, 185, 220-21 and accompanying text.

²³² See *supra* notes 168-74 and accompanying text.

²³³ See *supra* notes 179-85 and accompanying text.

²³⁴ See *supra* notes 163-66 and accompanying text.

²³⁵ See *supra* notes 168-79, 185, 227, 229 and accompanying text; see also *California v. United States Dep't of Agric.*, Nos. C05-03508 EDL, C05-04038 EDL, 2006 WL 3006489, at *26 (N.D. Cal. Sept. 20, 2006) (holding that Forest Service improperly reversed course because it provided no explanation for its conclusion that protections of the Roadless Rule were no longer necessary).

²³⁶ See *supra* notes 204-06, 213 and accompanying text.

²³⁷ See *supra* notes 220 and accompanying text.

²³⁸ See *supra* notes 220-21 and accompanying text.

²³⁹ *California*, 2006 WL 3006489, at *26.

to explain its change of direction.
