Environmental Claims Journal

ISSN: 1040-6026 (Print) 1547-657X (Online) Journal homepage: http://www.tandfonline.com/loi/becj20

Genuine Auto Parts v EPA: How to Challenge Agency Findings of Fact

Aaron Gershonowitz

To cite this article: Aaron Gershonowitz (2018): *Genuine Auto Parts v EPA*: How to Challenge Agency Findings of Fact, Environmental Claims Journal, DOI: 10.1080/10406026.2018.1511101

To link to this article: https://doi.org/10.1080/10406026.2018.1511101

Published online: 19 Sep 2018.

ENVIRONMENTAL CLAIMS JOURNAL
https://doi.org/10.1080/10406026.2018.1511101

Routledge
Taylor & Francis Group

Genuine Auto Parts v EPA: How to Challenge Agency Findings of Fact

Aaron Gershonowitz

ABSTRACT

This article discusses how to challenge decisions of fact made by administrative agencies, based on a recent federal appellate decision in which a decision by the Environmental Protection Agency was overturned. In Genuine Auto Parts v EPA, the court concluded that the agency's failure to address an important element of the matter made its decision "arbitrary and capricious" and "not supported by substantial evidence." The article discusses the relationship between "arbitrary and capricious" and "not supported by substantial evidence" as independent grounds for overturning an agency decision and concludes that both require a challenge to the decision-making process, not a challenge to the substance of the agency decision and the both require a rational process so that an agency failure to articulate a reason for its decision can be grounds for reversal.

Introduction

Professor William Fox, in his text on Administrative Law, says it is a "cardinal rule of agency practice" that "a lawyer must win a case at the agency level or likely will not win it at all."[1] The reason a court is not likely to reverse an agency decision is that agencies have special expertise and should be allowed to exercise their judgment in their area of expertise. The Supreme Court has often stated that it is inappropriate for a court to substitute its judgment for that of an agency.[2]

A recent federal court of appeals case provides a rare example of a court overturning an Environmental Protection Agency (EPA) decision on an issue of fact – a decision to place a site on the National Priorities List (NPL). In *Genuine Auto Parts v EPA*,[3] the court vacated an EPA decision to place a site on the NPL based on its conclusion that EPA's decision was "arbitrary and capricious" and not supported by "substantial evidence." The decision is

CONTACT Aaron Gershonowitz AGershonowitz@ForchelliLaw.com

[1]Fox, Understanding Administrative Law, Sixth Edition, LexisNexis 2012, at page 5.

[2]See, for example, Universal Camera Corp. v NLRB 340 U.S. 456, 488 (stating that a reviewing court must respect the expertise of the agency and not displace the agency's choice between conflicting views); Vermont Yankee Nuclear Power Corp. v Natural Resources Defense Council, 435 US 519, 556 (1978) (admonishing courts not to substitute their judgment for the judgment of the agency).; Citizens to Preserve Overton Park v Volpe, 401 U.S. 402, 416 (1971 (stating that a reviewing court is not entitled to substitute its judgment for that of the agency.)

[3]2018 WL 2270186 (D. C. Cir. 2018).

noteworthy because the "arbitrary and capricious" standard is a very difficult standard and rarely results in overturning an agency decision. This article will use the *Genuine Auto Parts* case to examine how one proves that an agency decision is "arbitrary and capricious." The *Genuine Auto Parts* decision is also noteworthy because the court found that the agency decision was not supported by substantial evidence. Our analysis of how to prove an agency decision is "arbitrary and capricious" will therefore include a discussion of how the "arbitrary and capricious" standard relates to the "substantial evidence" standard.

The *Genuine Auto Parts* case arose out of the EPA listing of the West Vermont Drinking Water Contamination Site, a site of groundwater contamination in Indianapolis, Indiana.[4] To determine which sites should be listed on the NPL, EPA uses a hazard ranking system. The regulations regarding EPA's hazard ranking system are codified at 40 C.F.R. Part 300. Based on this hazard ranking analysis, EPA determined that the site should be listed on the NPL. The groundwater contamination at the site was primarily from two source facilities, Genuine Auto Parts and Aimco. EPA determined that the aquifers contaminated by the two sites were interconnected and should therefore be treated as one hydrogeologic unit. Had EPA treated the aquifers as separate hydrogeologic units, the hazard ranking score would not have resulted in listing the site on the NPL.[5]

Genuine Auto Parts challenged the listing and particularly challenged EPA's finding that the aquifers were interconnected. It pointed out that the studies relied on by EPA to support its conclusion that the aquifers were interconnected contained diagrams that showed the opposite, that is, the diagrams showed the aquifers to be separate. Petitioners had pointed this out to the EPA in their comments on the proposed rule listing the site and EPA did not address this issue in its response to comments.[6] The court vacated the rule, reasoning that because EPA had failed to consider an important aspect of the problem, the listing of the site was arbitrary and capricious. The court also concluded that EPA's decision to list the site was not supported by substantial evidence.

The arbitrary and capricious standard

To support its conclusion that an agency decision is arbitrary and capricious if the agency failed to consider an important aspect of the problem, the court cited the Supreme Court's decision in *Motor Vehicle Manufacturer's*

[4] *Id.* at *3.
[5] *Id.* at *1.
[6] *Id.* The court noted that EPA may be able to support its finding, but the failure to articulate a reason rendered the decision arbitrary and capricious.

Association v State Farm Mutual Automobile Insurance Co.,[7] 463 US 29 (1983). The *Motor Vehicles* decision arose out of a challenge to the National Highway Traffic Safety Administration's (NHTSA) decision to rescind Standard 208, which required auto manufacturers to use automatic seat belts or air bags. This standard had a very convoluted history and involved more than 60 rulemaking notices.[8] It began as a rule requiring seatbelts in cars. Soon after imposing the seatbelt requirement, it became apparent that seatbelt usage was very low and NHTSA began examining a rule that would require passive restraint systems.[9] Two primary types of passive restraint systems were discussed: air bags and automatic seatbelts. The rule was modified to allow manufacturers to choose what type of passive restraint system to install. Then, after a number of delays in implementation of the rule, NHTSA found that most manufacturers planned to install automatic seatbelts and to install them in a manner that could be disconnected by the user. Based on this, NHTSA found that the passive restraint rule was not likely to save a significant number of lives and rescinded the rule.[10] State Farm and other auto insurers challenged the rescission of the rule.

The Court started its analysis by noting that pursuant to the Administrative Procedure Act an agency's action may be set aside if it is found to be "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."[11] The Department of Transportation agreed that "arbitrary and capricious" was the appropriate standard but argued that as long as the agency action is rational, based on consideration of relevant factors, the agency action should be upheld.[12] The agency argued that it met that standard because it had evidence that the passive restraint rule was not likely to save a significant number of lives, a factor rationally related to its decision to rescind the rule.

The Court disagreed, reasoning that a decision that fails to consider an important aspect of the problem is arbitrary and capricious.[13] The Court recognized that it cannot require an agency to examine all possible alternatives. Here, however, NHTSA initially required passive restraints and allowed manufacturers to choose between two types of passive restraints: airbags and automatic seat belts. NHTSA then found that manufacturers were mostly choosing automatic seat belts and that most users would

[7] 463 US 28 (1983).
[8] *Id.* at 34.
[9] *Id.* at 35. Standard 208 was originally issued in 1967 and it was revised in 1972 to require passive restraints.
[10] *Id.* at 38. It is interesting to note that Standard 208 was found to be not arbitrary and capricious and consistent with the department's mandate in Pacific Legal Foundation v Department of Transportation, 593 F2d 1338 (DC Cir. 1979).
[11] 463 US at 41.
[12] *Id.* at 42. Thus, the argument was not whether to apply the arbitrary and capricious standard, but how to apply it.
[13] *Id.*at 46.

disable the automatic seat belts. Based on that, NHTSA decided to rescind the rule without any discussion of air bags. The Court stated that based on NHTSA's congressional mandate to improve traffic safety and NHTSA's finding in the earlier version of this rulemaking that air bags were effective as a safety device, the rescission of the passive restraint rule without any consideration of revising the rule to require air bags, was arbitrary and capricious.[14]

The *Motor Vehicles* Court requires the reviewing court to review the decision-making process, the substance of the decision. The agency does not examine the evidence and decide whether the agency decision was correct. Instead, a court is to review whether the decision was the result of a rational process. The Court examined the process and determined that because the agency failed to discuss a key element of the issue, it failed to follow a rational process.

The Court also examined the agency decision from the perspective of whether it was supported by substantial evidence, noting that the Court of Appeals found that there was "not one iota"[15] of evidence that the passive restraint rule would not justify its costs. The Court interpreted the substantial evidence standard to be very similar to the arbitrary and capricious standard. The issue is not the quantity or quality of the evidence underlying the decision; the decision was not supported by substantial evidence because there was no "rational connection between the facts found and the choice made."[16]

The *Genuine Auto Parts* Court cited *Universal Camera Corp. v National Labor Relations Board*,[17] for the proposition that a reviewing court must examine the record and may overturn an agency decision if it is not supported by substantial evidence. Pursuant to the Administrative Procedure Act, 5 USC 706, substantial evidence is the standard of review of formal, on the record, proceedings.[18] The *Universal Camera* case addressed the standard of review of a National Labor Relations Board order requiring *Universal Camera* to reinstate certain employees and cease and desist discriminating against employees who provide testimony under the Wagner Act.[19] The decision was one of the first to address the scope of review under the Administrative Procedure Act and the Court examined what "substantial evidence" means.

[14] *Id.* at 46–49, referring to the failure to discuss airbags as the "first and most obvious reason."
[15] *Id.* at 51.
[16] *Id.* at 51, quoting *Burlington Truck Lines v United States*, 371 U.S. at 168
[17] 340 US 474 (1951)
[18] 5 USC 706(2)(E) states as a ground for overturning an agency ruling "unsupported by substantial evidence in a case subject to section 556 and 557 of this title …"
[19] 340 US at 476.

The Court used phrases such as "more than a scintilla" and "must do more than create a suspicion of the existence of the fact,"[20] but the Court did not provide much clarity regarding what substantial evidence means. The Court did, however, help with the procedure the reviewing court must follow. The reviewing court must examine the record as a whole, both the evidence for and against the agency decision to determine whether it is supported by substantial evidence. The trend, the Court stated, "is toward a rational inquiry into the truth, in which the tribunal considers everything logically probative of some matter requiring to be proved."[21] The Courts' decisions in *Motor Vehicles* and *Universal Camera* suggest that regardless of whether the standard being applied is arbitrary and capricious or substantial evidence, the inquiry is into the agency's decision-making process and both require a rational process. The challenge is thus a challenge to the agency's process and not a challenge to the wisdom of the agency's decision.

Why did the genuine auto parts court apply two standards of review?

The Administrative Procedure Act, section 706, provides a number of bases for a reviewing court to set aside an agency action. Some of those apply to specific situations. For example, an agency action may be set aside by a reviewing court if the action is contrary to law. This requires the reviewing court to compare what Congress told the agency to do with what the agency did. For example, in *Massachusetts v EPA*,[22] a group of states and environmental groups sued EPA to require EPA to regulate certain greenhouse gasses. The Court overturned an EPA decision not to regulate, noting that "the statutory text forecloses EPA's reading" of the statute.[23] In other words, Congress said that EPA "shall by regulation … " and EPA's decision not to regulate, without further explanation, was inconsistent with statute.

The substantial evidence standard also seems to be limited to specified circumstances. Section 706 states with regard to the substantial evidence standard "in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute."[24] Sections 506 and 507 provide the procedures for certain formal adjudicatory hearings. This suggests that a court is to use the substantial evidence test when the facts at issue are adjudicatory facts, that is, facts that result from an adjudication and relate to the specific parties. The arbitrary and

[20] *Id.* at 477.
[21] *Id.* At 497.
[22] 549 US 497 (2007).
[23] 549 U.S. at 529.
[24] 5 USC 706(2)(E).

capricious standard, on the other hand, would be used when the facts at issue were legislative facts, that is, facts about society as a whole and not about the specific litigants. The hearing at issue in *Universal Camera* was a hearing to determine whether certain employees had been dismissed improperly. The facts supporting the decisions were, thus, adjudicative facts, fact resulting from a hearing and dealing with what happened to specific individuals.

Contrast that with *Motor Vehicles*, where the facts were legislative facts. The inquiry at the agency level did not address any individual person or company. The inquiry was into what safety devices save lives – what are the likely costs and benefits to society related to requiring automatic seat belts and what are the likely costs and benefits to society related to requiring air bags. When adjudicatory facts are at issue, the agency is to review the record as a whole and determine if there is support for the agency conclusion. Where the facts are legislative facts, on the other hand, the court is to assess the agency's decision-making process and determine whether it is rational.

This distinction between the two standards is supported by dicta in the Supreme Court's decision in *Citizens to Preserve Overton Park, Inc. v Volpe*.[25] *Overton Park* is the landmark decision regarding standing for environmental groups to challenge regulatory action. In dicta, the Court discussed the relationship between the various standards of review and concluded that arbitrary and capricious is the standard to apply when none of the specific standards apply.[26]

The *Genuine Auto Parts* court could have applied both standards because of some uncertainty regarding which should be applied. A decision to list a site is a rulemaking and rulemaking is generally seen as legislative in nature. Thus, the primary analysis in *Genuine Auto Parts* is an arbitrary and capricious analysis. At the same time, while even though nominally a rulemaking (legislative act), the listing of the site was dependent on findings specific to this particular site – adjudicative facts. This meant there was room for a substantial evidence review.

The *Genuine Auto Parts* court gave another reason for applying two standards. It said that the two standards were effectively the same, suggesting that any decision that is not supported by substantial evidence is arbitrary and capricious and any decision that is arbitrary and capricious is not supported by substantial evidence. The court cited two cases for the proposition: *Butte County v Hogen*,[27] and *Center for Auto Safety v Federal Highway Administration*.[28] These

[25]401 U.S. 402 (1971).
[26]*Id.* at 414–416.
[27]613 F3d 190, 194 (D.C. Cir. 2010).
[28]956 F2d 309, 314 (D.C. Cir. 1992).

cases suggest that the standards are the same because regardless of how the standard of review is described, what is really at stake in review of agency action is whether the agency engaged in a reasoned process.

The *Center for Auto Safety* case arose out of a challenge to Federal Highway Administration (FHA) standards that set a requirement to test underwater portions of bridges every 5 years.[29] The challengers argued that the FHA standard was arbitrary and capricious because the FHA had not created a factual record to support its standard. In response to the lawsuit, the FHA tried to rely on draft studies that were not part of the administrative record and the court excluded the studies because the agency decision must be judged based on the record.[30] The court recognized that there was little to no factual information in the record to support the standard. Nevertheless, the agency had recognized that it faced a known risk, which created a need to require inspections and insufficient time to develop a factual basis for setting the frequency of the inspections.[31] Faced with a need to regulate and a lack of information, the agency relied on the recommendations of a private organization – the American Association of State Highway and Transportation Officials (AASHTO). In finding that such a decision was not arbitrary and capricious, the court reasoned that the agency had "examined the relevant data" and "articulate[d] a satisfactory explanation." The court concluded by noting that the agency did its best and arbitrary and capricious standard requires nothing more.[32]

The *Butte County* decision arose out of attempts by the Mechoopda Indian tribe to obtain federal approval to conduct gaming operations.[33] The Indian Gaming Regulatory Act,[34] allows federally recognized Indian tribes to conduct gaming operations on "Indian lands." Gaming operations are not allowed on Indian lands taken into trust by the Department of Interior after October 17, 1988 unless the department took this land into trust as part of restoration of lands for a tribe that has been restored to federal recognition. The question before the court was whether land purchased by the tribe and then taken into trust by the department is considered restored land.[35]

The land at issue was purchased by the Tribe in 2001 and referred to the office of the general counsel of the Gaming Commission, who, relying on information provided by the Tribe, concluded that the Tribe had a sufficient historical connection to the land for the land to be "restored land."

[29] *Id.* at 310.
[30] *Id.* at 314, citing both Section 706 and Overton Park.
[31] *Id.* at 315–316.
[32] *Id.* at 316, stating "The agency did the best it could with the little information it had, and the arbitrary and capricious standard requires no more than that."
[33] 613 F2d at 191.
[34] 25 USC 701.
[35] *Id.* at 192–193.

The counsel's memorandum was dated March 2003 and the Secretary of the Commission did not make a decision until 2008.[36] In the interim, in 2006, the attorney for Butte County wrote to the Secretary arguing that the Tribe had no historic connection to the lands and that the lands should not be considered "restored lands." To support its position, the County included a report prepared by a historian that purported to trace the history of the land at issue. The response received from the Commission was a short rejection letter that stated that "we are not inclined to revisit" the 2003 decision.[37] The Gaming Commission approved the Tribe's gaming ordinance in 2007 and the Secretary published his final decision in the Federal Register in 2008. The County objected, arguing that the decision by the Secretary was arbitrary and capricious.

The court concluded that the Secretary's decision was arbitrary and capricious for several reasons. First, the court stated that an interested party is entitled to a reasoned explanation of the agency action – an agency "must explain why it did what it did."[38] It is not enough to merely state a conclusion. Second, the refusal to consider evidence renders the decision arbitrary and capricious. Both reasons, the court stated, reveal the same problem – an agency decision must be the result of "reasoned decisionmaking." The statement that it would not revisit the matter indicates that the agency pre-judged the matter and therefore refused to consider evidence that was provided in a timely manner.[39]

Judge Rogers, dissenting, argued that there was significant evidence in the record to support the agency's decision and that is all that is required.[40] The dissent would be correct in its analysis if the issue was simply the quantity of evidence – there was sufficient evidence to support the agency's decision. Judge Rogers is on much less solid ground when he argues that the requirement of reasoned decision-making has also been met because "the rationale behind the Secretary's decision is self-explanatory."[41] The essence of reasoned decision-making is some explanation by the agency of why it made the decision it made and here the agency provided none.

The issue that really seems to be bothering Judger Rogers is the ease by which agencies can overcome this arbitrary and capricious challenge. In his discussion *of Tourus Records, Inc. v DEA*,[42] he notes that the court held that the agency action was arbitrary and capricious because the agency did not articulate its reasoning. On remand, the agency simply articulated its

[36] *Id.* at 193–194.
[37] *Id.* The court noted that there was no evidence that the department ever considered the evidence.
[38] *Id.* The court cited *Motor Vehicles* for the requirement that the agency must explain its reasoning, not merely provide its conclusion.
[39] *Id.* at 195, stating that the agency's response speaks as if it had already decided the issue.
[40] *Id.* at 198.
[41] *Id.* at 202.
[42] 259 F2d 731 (D.C. Cir. 2001).

reasoning and the agency decision was affirmed. Judge Rogers sees enough in the record to make it a near certainty that the same can happen here, that is, on remand, the agency could explain that it reviewed the conflicting reports and that it believes the report submitted by the county is less credible. Based on that, the agency could render the same decision and the decision will not be arbitrary and capricious.[43]

Judge Rogers is correct in noting that because arbitrary and capricious is a statement about the procedure followed by the agency and not necessarily about the substance of the decision, an agency on remand can simply render the same decision and this time explain why. In many cases that will work. There are times, however, where it may not be possible for the agency to give an adequate rationale. In *Genuine Auto Parts*, for example, the agency's decision was contradicted by the only evidence in the record. The agency, on remand, may not be able to simply say, we reviewed the record on this issue and believe this side is more credible.

We see from Judge Rogers' dissent a possible distinction between the substantial evidence standard and the arbitrary and capricious standard. There was substantial evidence in the record to support the decision, but the decision was arbitrary and capricious because the agency either did not review the evidence or did not provide a rationale. Where the two standards are more difficult to distinguish is where there is not substantial evidence in the record to support the decision. A decision not supported by evidence will generally be arbitrary and capricious. The *Center for Auto Safety* case, however, may be a case where the decision was not supported by substantial evidence and not arbitrary and capricious. There was no evidence in the record to support the agency decision regarding frequency of inspections. The agency, however, gave a reasoned explanation regarding how it reached its decision and why there was no time to develop such evidence. The decision may not have been supported by substantial evidence, but it was not arbitrary and capricious.

What makes the arbitrary and capricious standard so difficult?

In *Genuine Auto Parts and Motor Vehicles*, the agency determination was arbitrary and capricious because the agency failed to consider an important aspect of the problem. EPA decided that the two aquifers were connected, when the only documents in the record regarding whether the aquifers were connected contained drawings showing the opposite, that is, that the aquifers were not connected. Petitioners commented on that during the comment period and EPA did not respond to the comments. The decision

[43]613. F2d at 202, describing the events in Tourus and stating "The same analysis applies here."

was arbitrary and capricious because it failed to consider an important issue at the outset. The failure to respond to the comments is not what rendered the process arbitrary and capricious. That failure to respond was merely the agency's failure to repair the problem when given the opportunity. Thus, if the agency, in its response to comments, stated that it reviewed the reports and the drawings and, based on its expertise, it does not believe the authors of the report did enough sampling to demonstrate the separation between the aquifers, the court would have probably concluded that the agency action was not arbitrary and capricious. The court could not say that EPA ignored an important aspect of the problem. What makes the arbitrary and capricious standard so difficult is the ability of the agency to defeat the arbitrary and capricious challenge by merely explaining its decision (providing a reasoned process).

Perhaps more importantly, EPA's conclusion that the aquifers were connected would clearly not be arbitrary and capricious if EPA responded to the comments by stating that it retained an expert who reviewed the same data and reached a different conclusion. Thus, as long as EPA can show that it examined the issue and its conclusion is based on its EPA's weighing of conflicting evidence, its conclusion is not arbitrary and capricious. Simply put, an agency does not need to do a lot of work to reach the same conclusion on essentially the same evidence and defeat the claim that its actions were arbitrary and capricious.

Similarly, in *Motor Vehicles*, the problem was not the substance of the decision to rescind the rule; the problem was rescinding the rule without discussing air bags. Had NHTSA provided a sufficient discussion of air bags in its decision, the decision would probably not have been arbitrary and capricious. Its discussion would have to be rational, but if there is nothing irrational about concluding that automatic seatbelts will not save lives, it could also have found some basis for concluding the same about air bags. Such a decision may have been wrong. It may have been against the great weight of the evidence. But wrong and against the great weight of the evidence do not make something arbitrary and capricious.

The arbitrary and capricious standard is also difficult because it means that when there is a dispute of facts, the agency will almost always be upheld. The court will not substitute its judgment of the facts for that of the agency; it will merely look to see if the process was rational.

Justice Kennedy's dissent in *Alaska Department of Environmental Conservation v EPA*[44] further illustrates how difficult the standard can be. The Alaska Department of Environmental Conservation (ADEC) challenged EPA enforcement orders that invalidated a Clean Air Act permit issued by

[44]540 US 461 (2004).

ADEC. The main issue before the Court was whether EPA had authority under the Clean Air Act to issue the order. The Court determined that EPA had the authority and its exercise of the authority was not arbitrary and capricious.[45] If, on the other hand, the Court held that EPA could not issue an enforcement order, then ADEC had issued a final order and the only way for EPA to challenge a final order was to do so in court, in which case, EPA would have had the burden of proving that the ADEC decision was arbitrary and capricious. Justice Kennedy is pointing out that because it is so difficult to prove an agency action to be arbitrary and capricious, in a battle between agencies, who has the burden of proof is key to the outcome.[46]

From the perspective of the regulated party, the standard is not only difficult to overcome, but it also presents strategic difficulties regarding participation in the regulatory process. A regulated party will usually have a number of opportunities to participate in the regulatory process, for example, during a public comment period. If the agency makes a decision that regulated party believes is arbitrary and capricious, and the regulated party raises the issue during the comment period, the agency can defeat the arbitrary and capricious claim by responding to the comment. The response does not affect whether the agency decision is correct – courts do not get to decide that. The response does mean that the agency did not fail to consider the issue and the decision is therefore, not arbitrary and capricious. Thus, a regulated party's participation in the process can work against its efforts to defeat what it believes is a wrong decision.

Conclusion

It is rare for a court to overturn an agency action because the standard of review, arbitrary and capricious, strongly favors the agency's decision. All that is required of the agency is a rational process. *Genuine Auto Parts* illustrates the fact that an agency action will be arbitrary and capricious if the agency fails to consider an important aspect of the problem. In most cases, however, even if the agency review missed an important issue, the agency action will not be arbitrary and capricious because the administrative process will usually include a public comment period. An objecting party should point out the deficiency during the comment period because that is the objecting party's opportunity to achieve a change in the agency decision without litigation. At that point, however, the agency can avoid or defeat the challenge by merely responding to the comments.

[45] *Id.* at 501.
[46] *Id.* at 510.

The Administrative Procedure Act includes a number of grounds for overturning agency action. Courts have struggled with how those standards relate to each other. Developing caselaw suggests that the arbitrary and capricious standard and the substantial evidence standard are merely different approaches to the same issue. Both require a rational process, with the substantial evidence rule examining the record and whether there is a rational connection between facts in the record and the conclusions and arbitrary and capricious doing the same with an emphasis on the decision-making process.

For the regulated party, it can be frustrating to be told that the way to challenge an agency decision that the regulated party believes is wrong, is to challenge the process, not the allegedly wrong conclusion. However, courts will not second guess the agency on the agency's assessment of the facts, but courts will assess the process by which the decision was reached.

Disclosure statement

No potential conflict of interest was reported by the author.

About the author

Aaron Gershonowitz is a partner at Forchelli Deegan Terrana, LLP in Uniondale, New York, where he concentrates on environmental law. He represents clients on a variety of environmental issues, including Superfund matters, RCRA compliance, underground storage tank issues, asbestos in buildings, and the environmental aspects of real estate and corporate transactions. He is also an adjunct faculty member at St. Francis Law School. Sigourney Norman, a third-year law student at St. Johns Law School assisted in the preparation of this article.