

I'm writing in response to your earlier question on the APA. I asked one of my staff attorneys, Anne Marie Yatsula, to investigate the matter. Here is her response:

The short answer:

Cities in Kansas aren't subject to the Kansas APA, so I don't think that any recommendation we could make would be particularly helpful. Agencies in Kansas typically use their own procedures rather than the Kansas APA. Virginia's APA is much more rigid than Kansas's; my brief read of the Kansas APA led me to conclude that there are so many exemptions and exceptions that it's likely not used often, and our processes for hearings feel a lot more like litigation than Virginia's.

The long answer:

My knowledge of administrative procedure is primarily based on the federal APA, but generally, the preservation of error doctrine (though I don't know that it's really called that in administrative law, but the idea exists) relates more to an agency adjudication requiring a hearing, whereas a rulemaking usually does not take that form (at the federal level, it's more likely that a reg is created via notice and comment because the formal rulemaking process is onerous, expensive, and there are a number of exceptions to the rulemaking requirement that get used frequently). I'm not sure how often formal hearings are coming up in Virginia, because their APA creates a process for a public forum-type meeting for feedback on proposed regs, an alternative/addition to an evidentiary hearing. Their evidentiary hearing is the equivalent of a formal rulemaking hearing at the federal level, where preservation of error would be relevant, since a different, adjudication-like process exists for formal rulemaking. They also have what they call a "fast track" rulemaking, a cousin to federal notice and comment; that leads me to believe that there are rarely formal evidentiary hearings.

As to the harshness issue, I'm not sure what to think beyond just a look at the statutes; I would imagine case law would address some of those points as a matter of statutory interpretation. I recall some finality and exhaustion requirements under the federal APA to move up the ladder of the administrative process to get to judicial review, so that could also be relevant.

Needless to say, we don't have a significant amount of expertise on this matter, but I hope some of this information proves useful. Regardless, best of luck on your ALAC study, and I hope you have a great start to 2026!

Patty:

You asked me to research how the Oregon Administrative Procedures Act (APA) addresses preservation of errors.

The Oregon APA is found in ORS Chapter 183 and addresses two primary areas of administrative law: 1) state agency rule making; and 2) the administrative contested case process. There are also related model administrative rules found in OAR 137, divisions: 1-model rules for rulemaking; 2- model rules for agency declaratory rulings; 3 -model rules for contested case hearings; and 4 - orders other than contested case.

The APA and model rules DO NOT address the preservation of error on appeal or otherwise. The majority of appeals under the APA are directly to the Court of Appeals and the preservation of error standard is instead addressed in the Oregon Rules of Appellate Procedure (ORAP).

ORAP 5.45 addresses the preservation of error. I've attached a copy of the rule.

Let me know if this is enough information - or if you need to me research anything additional.

Jayme

places in the transcript, narrative statement, audio record, record, or excerpt where such facts appear.

(10) In a dissolution proceeding or a proceeding involving modification of a dissolution judgment, the summary of facts shall begin with the date of the marriage, the ages of the parties, the ages of any minor children of the parties, the custody status of any minor children, the amount and terms of any spousal or child support ordered, and the party required to pay support.

(11) Any significant motion filed in the appeal and the disposition of the motion. A party need not file an amended brief to set forth any significant motion filed after that party's brief has been filed.

(12) Any other matters necessary to inform the court concerning the questions and contentions raised on the appeal, insofar as such matters are a part of the record, with reference to the parts of the record where such matters appear.

(13) In the Court of Appeals, the appellant's brief may also include, without argument, under the heading "ORAP 10.30," a statement explaining whether the issues presented in the case meet any of the factors listed in ORAP 10.30(2).

* See ORS 19.415(3)(b) regarding discretion of the Court of Appeals to try the cause *de novo* or make one or more factual findings anew on appeal in some equitable proceedings; *see also* ORAP 5.45(5) concerning the identification of standards of review for each assignment of error on appeal.

Rule 5.45

ASSIGNMENTS OF ERROR AND ARGUMENT

(1) Assignments of error are required in all opening briefs of appellants and cross-appellants. No matter claimed as error will be considered on appeal unless the claim of error was preserved in the lower court and is assigned as error in the opening brief in accordance with this rule, provided that the appellate court may, in its discretion, consider a plain error.¹

(2) Each assignment of error must be separately stated under a numbered heading. The arrangement and form of assignments of error, together with reference to pages of the record, should conform to the illustrations in Appendix 5.45.

(3) Each assignment of error must identify precisely the legal, procedural, factual, or other ruling that is being challenged.

(4) (a) Each assignment of error must demonstrate that the question or issue presented by the assignment of error timely and properly was raised and preserved in the lower court. The court may decline to consider any assignment of error that requires the

court to search the record to find the error or to determine if the error properly was raised and preserved. Under the subheading "Preservation of Error":

(i) Each assignment of error, as appropriate, must specify the stage in the proceedings when the question or issue presented by the assignment of error was raised in the lower court, the method or manner of raising it, and the way in which it was resolved or passed on by the lower court.

(ii) Each assignment of error must set out pertinent quotations of the record where the question or issue was raised and the challenged ruling was made, together with reference to the pages of the transcript or other parts of the record quoted or to the excerpt of record if the material quoted is set out in the excerpt of record. When the parts of the record relied on under this clause are lengthy, they must be included in the excerpt of record instead of the body of the brief.

(iii) If an assignment of error challenges an evidentiary ruling, the assignment of error must quote or summarize the evidence that appellant believes was erroneously admitted or excluded. If an assignment of error challenges the exclusion of evidence, appellant also must identify in the record where the trial court excluded the evidence and where the offer of proof was made; if an assignment of error challenges the admission of evidence, appellant also must identify where in the record the evidence was admitted.

(b) Where a party has requested that the court review a claimed error as plain error, the party must identify the precise error, specify the state of the proceedings when the error was made, and set forth pertinent quotations of the record where the challenged error was made.

(5) Under the subheading "Standard of Review," each assignment of error must identify the applicable standard or standards of review, supported by citation to the statute, case law, or other legal authority for each standard of review.²

(6) Each assignment of error must be followed by the argument. If several assignments of error present essentially the same legal question, the argument in support of them may be combined so far as practicable.

(7) The court may decline to exercise its discretion to consider plain error absent a request explaining the reasons that the court should consider the error.³

¹ For an error to be plain error, it must be an error of law, obvious and not reasonably in dispute, and apparent on the record without requiring the court to choose among competing inferences; in determining whether to exercise its discretion to consider an error that qualifies as a plain error, the court takes into account a non-exclusive list of factors, including the interests of the parties, the nature of the case, the gravity of the error, and the ends of justice in the particular case. *See State v. Vanorum*, 354 Or 614, 629-30, 317 P3d 889 (2013).

² Standards of review include but are not limited to *de novo* review and substantial evidence for factual issues, errors of law and abuse of discretion for legal issues, and special statutory standards of review such as those found in the Administrative Procedures Act, ORS 183.400(4), and ORS 183.482(7) and (8). *See also* ORS 19.415(1), which provides that, generally, "upon an appeal in an action or proceeding, without regard to whether the action or proceeding was triable to the court or a jury," the court's review "shall be as provided in section 3, Article VII (Amended) of the Oregon Constitution"; ORS 19.415(3)(b) regarding discretion of the Court of Appeals to try the cause *de novo* or make one or more factual findings anew on appeal in some equitable proceedings; *see also* ORAP 5.40(8) concerning appellant's request for the court to exercise *de novo* review and providing a list of nonexclusive items Court of Appeals may consider in deciding whether to exercise its discretion.

³ *See State v. Ardizzone*, 270 Or App 666, 673, 349 P3d 597, *rev den*, 358 Or 145 (2015) (declining to review for plain error absent a request from the appellant).

Rule 5.50

THE EXCERPT OF RECORD

(1) Except in the case of a self-represented party, the appellant must include in the opening brief an excerpt of record.¹ The parties to an appeal are encouraged to confer regarding the content of the excerpt of record, including whether to file a joint excerpt of record to be included in the opening brief.

(2) The excerpt of record must contain:²

(a) The judgment or order on appeal or judicial review.

(b) Any written or oral rulings by the lower tribunal or agency addressing the issues presented by the assignments of error.

(c) Any pleading or excerpt of pleadings, particular part of the transcript, exhibit, evidentiary submission and other filing necessary for reviewing and understanding the assignments of error in advance of oral argument, if the parties anticipate that the case will be orally argued.³

(d) If preservation of error is or is likely to be disputed in the case, parts of memoranda and the transcript pertinent to the issue of preservation presented by the case.

(e) A copy of the eCourt Case Information register of actions, if the case arose in an Oregon circuit court.

(f) In criminal cases in which the defendant appealed after entering a conditional plea of guilty or no contest under ORS 135.335(3), the defendant must include in the excerpt of record the writing in which the defendant reserved for review on

Preservation of Error in Administrative Appeals – Comparative Research Update

December 11, 2025

DISCLAIMER: The below is a summary of certain legal research to look into the issue of preservation of error in administrative appeals as compared to other states. This is intended to be a working document that will be updated, and nothing in this document should be considered the provision of legal advice.

2010 Model State Administrative Procedure Act

There have been four “model” APA’s developed by the National Conference of Commissioners on Uniform State Laws, with versions from the years 1946, 1961, 1981, and 2010. The model APA acts have been largely adopted, in whole or in part, by most states; however, no state has adopted the 2010 revision.

Of note, the 2010 Model State APA includes specific language requiring exhaustion of administrative remedies. *See* Section 506. That provision explicitly addresses that, when dealing with challenges to a rule or regulation, the petitioner need not have participated in the rulemaking proceeding. *See* Section 506(c) (“A petitioner for judicial review of a rule need not have participated in the rulemaking proceeding on which the rule is based or have filed a petition to adopt a rule under Section 318.”). This provision is largely unchanged from the 1981 version.

But none of the materials reviewed from the Uniform Laws Commission indicated a detailed discussion or consideration of “preservation of error.” The 2010 Model State APA generally contemplates that the particular states’ appellate or civil rules, as appropriate, would apply to judicial review of agency action. *See* Section 502 (a) (except as otherwise provided, “judicial review of final agency action may be taken only as provided by rules of [appellate] [civil] procedure [of this state]”).

State Specific Rules

West Virginia

W. Va. Code § 29A-4-2 permits a declaratory judgment action to challenge any agency rule. It specifically provides that “The declaratory judgment may be rendered whether or not the plaintiff of plaintiffs has or have first requested the agency to pass upon the validity of the rule in question.” Thus, there is no “preservation” requirement for challenges to administrative rules.

West Virginia does appear to have a similar “preservation” rule in the context of contested cases, however, analogizing the circuit court as sitting in an appellate capacity. Thus, where a litigant has not raised the issue with the agency, it cannot raise the issue in judicial review. *See Noble v. W.Va. DMV*, 223 W.Va. 818, 821-22 (2009) (error to consider “non-jurisdictional question, outside the record made before the Commissioner, that was made for the first time on appeal”).

North Carolina

North Carolina's State APA has unique facets. For rules, there is a review commission that oversees all regulatory actions. In addition, agencies are given authority to make "declaratory rulings," which can itself be used as a vehicle to challenge a rule. *See* N.C. G.S. § 150B-4. But the N.C. APA's review provisions otherwise appear to be limited to appeal of case adjudications.

In terms of preservation of error, there appear to be few cases that handle the issue from the standpoint of preserving error at the agency level.

California

California's Administrative Procedure Act governs adoption of state regulations. The review provisions of the statute make clear that "Any interested person" may challenge, by an action for declaratory relief, and such right to adjudication shall not be affected by a failure to "petition or to seek reconsideration" from the agency. *See* Cal. Gov. Code § 11350.

Cases suggest that, in contested administrative proceedings, the preservation of error rule works similarly. Cited exceptions exist, e.g. "when an injustice would result," but appear rarely applied. *See Sustainability, Parks, Recycling & Wildlife Def. Fund v. Dep't of Resources Recycling and Recovery*, 34 Cal. App. 5th 676, 697 (3d Dist. Cal. Ct. of Appeal). While there does not appear to be a separate administrative-law rule for preservation, it also appears that California courts have some further discretion in ruling upon matters not preserved at the trial court (or, presumably, the administrative agency). *See, e.g. Raphael v. Bloomfield*, 113 Cal. App. 4th 617, 622 (2d Dist. Cal. Ct. App. 2003) (allowing discretion for new legal theories to be considered where they are purely legal and involve undisputed facts); *Kaushansky v. Stonecroft Attorneys, APC*, 109 Cal. App. 5th 788, 798 (2d Dist. Cal. Ct. App. 2025) (challenge to sufficiency of evidence is not waived by failure to argue it at the trial level, as an "obvious exception" to the preservation rule).

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AI Overview



Yes, the preservation of error doctrine applies to the federal rulemaking process, meaning parties challenging agency rules in court must raise their objections during the agency's comment period or rulemaking stage to preserve those issues for judicial review; otherwise, courts may deem them waived or review them only under a strict "plain error" standard, ensuring the agency has a chance to correct itself before litigation, notes.

Key Principles

- **Notice to the Agency**: The core idea is to give the agency a fair opportunity to understand and address the alleged error, just like a trial judge.
- **Specificity**: Objections must be specific enough to alert the agency to the substance of the issue, not just vague complaints.
- **Timing**: Issues must be raised during the rulemaking (comment period) or administrative process, not for the first time in court.
- **Waiver**: Failure to object often results in waiver, meaning the court won't consider the issue on appeal.
- **Plain Error Exception**: Federal courts can review unobjected-to errors if they are "plain" or fundamental, but this is a high bar.

How it Works in Rulemaking

- **During Comments**: When an agency proposes a rule, interested parties submit comments, raising concerns about factual, legal, or procedural flaws (e.g., lack of evidence, arbitrary decisions).
- **Creating the Record**: These comments form part of the administrative record, putting the agency on notice and creating the basis for later judicial review.
- **Judicial Review**: When a court reviews an agency rule (often under the Administrative Procedure Act's arbitrary and capricious standard), it looks at the grounds raised in the agency record, not new ones.

In essence, if you want a federal agency's rule challenged in court, you must "preserve" that challenge by making it known to the agency during its deliberative process. 

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Rule 51 - Instructions to the Jury; Objections; Preserving a Claim of ...

Explanation. Rule 51 is designed to ensure the jury receives accurate and appropriate guidance from the court regarding the law as...

 www.federalrulesofcivilprocedure.org 



Unpreserved Errors Are All the Same, Right? Not Exactly

Mar 2, 2018 — Vol. 92, No. 3 March 2018 Pg 35 Tracy S. Carlin Appellate Practice. In both state and federal court, to preserve an err...

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Legal Information Institute (LII)

https://www.law.cornell.edu/rules/frcmp/rule_51

Rule 51. Preserving Claimed Error - Law.Cornell.Edu

A party may **preserve** a claim of **error** by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, ...



Bowen Law Repository

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Preservation Rules in the Federal ^{PDF} Courts of Appeals

by IS Speir · 2015 · Cited by 16 — By statute and **rule**, appellate courts are required to ignore “harmless **error**,” that is, **error** that **does** “not affect the substantial rights of ...



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does the preservation of error doctrine apply in federal rulemaking process?



Yes, the principle of **"issue exhaustion"**—which is the administrative law equivalent of the "preservation of error" doctrine in trial litigation—generally **applies in the federal rulemaking process**. This principle requires parties challenging an agency rule in court to have raised their objections with the agency during the public comment period. 

Key Concepts

- **Purpose:** The core idea is that the administrative agency must be given a fair opportunity to consider and respond to objections, use its expertise, and correct potential errors before a court intervenes. This creates a robust administrative record for judicial review and promotes efficient governance by preventing issues from being raised for the first time on appeal.
- **Application:** While the traditional "preservation of error" doctrine is rooted in trial and appellate court rules (like the Federal Rules of Civil or Criminal Procedure), the issue exhaustion doctrine in administrative law developed through both specific statutory requirements (e.g., Clean Air Act, Securities Exchange Act) and common-law application by federal courts.
- **Waiver/Forfeiture:** If an issue is not properly raised during the rulemaking process (typically the notice-and-comment period), the argument is generally considered waived or forfeited, and a federal appellate court will likely decline to consider it. 

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- The final rule was not a "logical outgrowth" of the rule originally proposed, meaning the public did not have adequate notice or opportunity to comment on the final version's contents.

Ultimately, the goal is "simple fairness" and ensuring orderly administrative and judicial procedures.

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↪ Give an example of a rulemaking where issue exhaustion was an issue

↪ Tell me more about futility exceptions to issue exhaustion

↪ What are the effects of failing to raise an issue during rulemaking?



9 sites



Does Issue Exhaustion Have a Place i" by Jeffrey Lubbers

Fail to Comment at Your Own Risk: Does Issue Exhaustion Have a Place in Judicial Review of Rules? * Authors. Jeffrey Lubbers, Amer...



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Rule 51. Preserving Claimed Error - Law.Cornell.Edu

Rule 51. Preserving Claimed Error. (a) Exceptions Unnecessary. Exceptions to rulings or orders of the court are unnecessary. (b) P...



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What is Preservation of Error? - Boyd & Jenerette



<https://www.congress.gov/crs-product/R44699#:~:text=if%20the%20agency%20has%20relied,the%20product%20of%20agency%20expertise.&text=Given%20the%20broad%20scope%20of,decisionmaking%20when%20reaching%20its%20determination.&text=Courts%20%22must%20judge%20the%20propriety,reasons%20presented%20by%20the%20agency.>

Arbitrary-and-Capricious Review

In addition to ensuring that agencies act within the scope of their statutory authority, courts will also review agency action to ensure the agency has acted reasonably.²²⁷ The APA instructs courts to "hold unlawful and set aside agency actions, findings, and conclusions found to be arbitrary, capricious, [or] an abuse of discretion."²²⁸ This "catch-all" provision of the APA applies to factual determinations made during "informal" proceedings,²²⁹ such as notice-and-comment rulemaking,²³⁰ and most other policy determinations an agency makes.²³¹

The seminal Supreme Court decision elaborating the arbitrary-and-capricious standard, *Motor Vehicle Manufacturers Ass'n v. State Farm Auto Mutual Insurance Co.*, explains that the scope of this review is "narrow," as "a court is not to substitute its judgment for that of the agency."²³² That said, courts will invalidate agency determinations that fail to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"²³³ When reviewing that determination, courts must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."²³⁴ In general, the Court noted, an agency decision is arbitrary

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.²³⁵

Given the broad scope of federal agency actions that are subject to judicial review, whether an agency decision is arbitrary and capricious is largely a situation-specific question.

The arbitrary-and-capricious standard requires an agency to demonstrate that it engaged in reasoned decisionmaking when reaching its determination.²³⁶ Courts "must judge the propriety of [an agency's] action solely by the grounds invoked by the agency," and they may not create their own justifications to support an agency's decision beyond the reasons presented by the agency.²³⁷ Further, courts require agencies to provide the "essential facts upon which the administrative decision was based"²³⁸ and explain what justifies their

determinations with actual evidence beyond a "conclusory statement."²³⁹ An agency's failure to provide an adequate explanation for its decision will typically result in remand or invalidation of its decision.²⁴⁰

Similarly, a court may find an agency to have acted arbitrarily and capriciously when the agency fails to provide an adequate response to significant comments raised during notice-and-comment rulemaking.²⁴¹ For example, in its 2024 *Ohio v.*

Environmental Protection Agency (EPA) decision, which stayed implementation of an EPA Clean Air Act rule pending appeal, the Supreme Court held that the EPA would likely lose on the merits because it likely acted arbitrarily and capriciously when it failed to adequately respond to a particular public comment when it implemented its final rule.²⁴²

Beyond those circumstances in which courts find that an agency failed to provide an adequate explanation for its decision, courts may also find the decision itself to be arbitrary and capricious.²⁴³ For example, courts will invalidate agency actions that are the product of "illogical"²⁴⁴ or inconsistent reasoning.²⁴⁵ In addition, courts will find an agency action to be arbitrary and capricious if the agency simply failed to consider an important factor relevant to its action,²⁴⁶ such as the policy effects of its decision²⁴⁷ or vital aspects of the problem in the issue before it.²⁴⁸ Likewise, courts may invalidate or remand a determination to the agency if the agency decision failed to consider regulatory alternatives that would similarly serve the agency's goals²⁴⁹ or provide "less restrictive, yet easily administered" options.²⁵⁰ It bears mention that courts are sometimes particularly deferential to agencies' expertise when making predictive judgments based on scientific or technical determinations.²⁵¹

Because of the wide range of statutory authorities and agency missions, what counts as a relevant factor that must be considered by an agency when reaching a decision can be context specific. An illustrative case is *Judulang v. Holder*, where the Supreme Court found the Board of Immigration Appeals' (BIA's) policy for deciding whether resident aliens may apply for relief from removal to be arbitrary and capricious.²⁵² The Court noted that the relevant factors for the BIA to consider were the "purposes of the immigration laws or the appropriate operation of the immigration system."²⁵³ Because the BIA failed to root its determination in consideration of such factors and instead based its policy on an "irrelevant comparison between statutory provisions" unconnected to the merits of a removal decision or the administration of immigration laws, the Court held that the agency's determination was arbitrary and capricious.²⁵⁴

Agencies, of course, often change prior policies in response to changing circumstances or administrative preferences. In *FCC v. Fox Television Stations, Inc.*, the Supreme Court held that review under the arbitrary-and-capricious standard is not heightened or more stringent

simply because an agency's action alters its prior policy.²⁵⁵ An agency must set forth a "reasoned explanation" for changing course,²⁵⁶ but if the agency's action is permissible under its authorizing statute and reasonably supported, then the agency need not show that new policies are better than old ones.²⁵⁷ In other words, an agency may be authorized to pursue a range of policy outcomes under its governing statutes, and courts may not scrutinize an agency's shift in policy more strictly than other agency decisions.²⁵⁸