

Table of Contents

| | |
|--|----|
| IV. REVIEW OF AGENCY DECISIONS | 1 |
| A. Introduction..... | 1 |
| 1. Arbitrary and Capricious | 1 |
| 2. Constitutional Review | 3 |
| 3. Regulatory Interpretations | 4 |
| 4. Sanctions..... | 5 |
| 5. Statutory Interpretations | 6 |
| 6. Substantial Evidence | 9 |
| B. Specific Agency Review..... | 11 |
| 1. Agricultural Marketing Service (“AMS”)..... | 11 |
| 2. Bonneville Power Administration (“BPA”)..... | 12 |
| 3. Department of Energy | 13 |
| 4. Department of the Interior | 13 |
| 5. Environmental Protection Agency (“EPA”) | 14 |
| 6. Federal Aviation Administration (“FAA”) | 15 |
| 7. Federal Communications Commission (“FCC”)..... | 15 |
| 8. Food and Drug Administration (“FDA”) | 16 |
| 9. Federal Energy Regulatory Commission (“FERC”)..... | 16 |
| 10. Federal Labor Relations Authority (“FLRA”) | 18 |
| 11. Federal Railroad Administration (“FRA”)..... | 18 |
| 12. Federal Mine Safety and Health Review Commission | 18 |
| 13. Federal Trade Commission (“FTC”)..... | 19 |
| 14. Federal Transit Administration | 20 |
| 15. Immigration and Naturalization Service (“INS”)..... | 20 |
| 16. Food Safety and Inspection Service (“FSIS”)..... | 20 |

| | |
|---|----|
| 17. Interior Board of Land Appeals (“IBLA”)..... | 21 |
| 18. Labor Benefits Review Board | 21 |
| 19. National Labor Relations Board..... | 21 |
| 20. National Transportation Safety Board (“NTSB”) | 22 |
| 21. Occupational Safety and Health Review Commission (“OSHRC”)..... | 22 |
| 22. Railroad Retirement Board (“RRB”) | 23 |
| 23. Railway Adjustment Board | 24 |
| 24. Securities Exchange Commission | 24 |
| 25. Social Security Administration | 25 |

IV. Review of Agency Decisions

A. Introduction

1. Arbitrary and Capricious

The Administrative Procedure Act (“APA”) “sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts” and “requires agencies to engage in ‘reasoned decisionmaking[.]’” *Dep’t of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1905 (2020) (citations omitted); *see also Transportation Div. of the Int’l Ass’n of Sheet Metal, Air, Rail, & Transportation Workers v. Fed. R.R. Admin.*, 988 F.3d 1170, 1178 (9th Cir. 2021).

The APA “directs that agency actions be ‘set aside’ if they are ‘arbitrary’ or ‘capricious.’ ” “Under this narrow standard of review, . . . a court is not to substitute its judgment for that of the agency, but instead to assess only whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” The [Supreme] Court explained that “[i]t is a foundational principle of administrative law” that judicial review of agency action is limited to the grounds that the agency invoked when it took the action.”

Transportation Div., 988 F.3d at 1178 (quoting *Regents of the Univ. of California*, 140 S. Ct. at 1905–07).¹

Pursuant to the APA, agency decisions may be set aside only if “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); *Transportation Div.*, 988 F.3d at 1178; *Nat’l Mining Ass’n v. Zinke*, 877 F.3d 845, 866 (9th Cir. 2017); *Wildwest Inst. v. Kurth*, 855 F.3d 995,

¹ *See also U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 6–7 (2001); *All. for the Wild Rockies v. United States Forest Serv.*, 907 F.3d 1105, 1112 (9th Cir. 2018) (as amended); *Turtle Island Restoration Network v. United States Dep’t of Commerce*, 878 F.3d 725, 732 (9th Cir. 2017); *Barnes v. U.S. Dep’t of Transp.*, 655 F.3d 1124, 1132 (9th Cir. 2011); *Amalgamated Sugar Co. LLC v. Vilsack*, 563 F.3d 822, 829 (9th Cir. 2009); *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1032 (9th Cir. 2008); *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 858 (9th Cir. 2005).

1002 (9th Cir. 2017); *Gardner v. U.S. Bureau of Land Mgmt.*, 638 F.3d 1217, 1224 (9th Cir. 2011); *Latino Issues Forum v. EPA*, 558 F.3d 936, 941 (9th Cir. 2009); *Public Util. Dist. No. 1*, 371 F.3d at 706. The arbitrary and capricious standard is appropriate for resolutions of factual disputes implicating substantial agency expertise. See *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 376 (1989); *Safari Aviation Inc. v. Garvey*, 300 F.3d 1144, 1150 (9th Cir. 2002); *Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1194 (9th Cir. 2000).

The APA’s arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained. *Fed. Commc’ns Comm’n v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). The agency must articulate a rational connection between the facts found and the conclusions made. See *Transportation Div.*, 988 F.3d at 1182 (“In reviewing petitioners’ claim that the FRA failed to comply with the APA, [the court] look[s] to “whether the [agency] examined the relevant data and articulated a satisfactory explanation for [its] decision, including a rational connection between the facts found and the choice made.”); *Wildwest Inst.*, 855 F.3d at 1002; *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 833 F.3d 1136, 1150 (9th Cir. 2016) (concluding that BLM “considered the relevant factors and articulated a rational connection between the facts found and the choices made.”); *Latino Issues Forum*, 558 F.3d at 941; *Friends of Yosemite Valley*, 520 F.3d at 1032; *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 858 n.36 (9th Cir. 2003).

The reviewing court must determine whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. See *Dep’t of Homeland Sec.*, 140 S. Ct. at 1905; *Marsh*, 490 U.S. at 378; *Japanese Vill., LLC v. Fed. Transit Admin.*, 843 F.3d 445, 453 (9th Cir. 2016); *Ocean Advocates*, 402 F.3d at 859; *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1097 (9th Cir. 2003); *Envtl. Def. Ctr.*, 344 F.3d at 858 n.36.

The inquiry, though narrow, must be searching and careful. See *Marsh*, 490 U.S. at 378; *Japanese Vill., LLC v. Fed. Transit Admin.*, 843 F.3d 445, 453 (9th Cir. 2016); *Ocean Advocates*, 402 F.3d at 858–59; *Brower v. Evans*, 257 F.3d 1058, 1065 (9th Cir. 2001); *Ninilchik Traditional Council*, 227 F.3d at 1194.

An agency action is arbitrary and capricious “only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation 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.”

Defs. of Wildlife v. Zinke, 856 F.3d 1248, 1257 (9th Cir. 2017) (quoting *Conservation Cong. v. U.S. Forest Serv.*, 720 F.3d 1048, 1054 (9th Cir. 2013)) (Fish and Wildlife Service and Bureau of Land Management). *See also Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007); *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. Zinke*, 889 F.3d 584, 602 (9th Cir. 2018) (Bureau of Indian Affairs); *Friends of Santa Clara River v. United States Army Corps of Engineers*, 887 F.3d 906, 921 (9th Cir. 2018) (United States Army Corps of Engineers); *Native Ecosystems Council v. Marten*, 883 F.3d 783, 789 (9th Cir. 2018) (United States Forest Service); *Envtl. Def. Ctr.*, 344 F.3d at 858 n.36; *Brower*, 257 F.3d at 1065.

An agency’s decision can be upheld only on the basis of the reasoning in that decision. *See Transportation Div.*, 988 F.3d at 1178 (“The [Supreme] Court explained that ‘[i]t is a foundational principle of administrative law’ that judicial review of agency action is limited to the grounds that the agency invoked when it took the action.” (quoting *Regents of the Univ. of California*, 140 S. Ct. at 1905–07)); *California Energy Comm’n v. Dep’t of Energy*, 585 F.3d 1143, 1150 (9th Cir. 2009); *Snoqualmie Indian Tribe v. F.E.R.C.*, 545 F.3d 1207, 1212 (9th Cir. 2008); *Anaheim Mem’l Hosp. v. Shalala*, 130 F.3d 845, 849 (9th Cir. 1997).

“The APA’s standard of review is highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision.” *California Pac. Bank v. Fed. Deposit Ins. Corp.*, 885 F.3d 560, 570 (9th Cir. 2018) (internal quotation marks and citation omitted). “Judicial review under that standard is deferential, and a court may not substitute its own policy judgment for that of the agency. A court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision.” *Prometheus Radio Project*, 141 S. Ct. at 1158.

2. Constitutional Review

The constitutionality of an agency’s regulation or statute is reviewed de novo. *See United States v. Kelly*, 874 F.3d 1037, 1046 (9th Cir. 2017); *Gonzalez v. Metropolitan Transp. Auth.*, 174 F.3d 1016, 1018 (9th Cir. 1999). For example, the court reviews de novo whether an agency’s regulations are unconstitutionally vague. *See Regency Air, LLC v. Dickson*, 3 F.4th 1157, 1162 (9th Cir. 2021); *Cal. Pac. Bank v. Fed. Deposit Ins. Corp.*, 885 F.3d 560, 569 (9th Cir. 2018). A court

may refuse to defer to an agency’s interpretation of a statute that raises serious constitutional concerns. *See Diouf v. Napolitano*, 634 F.3d 1081, 1090 (9th Cir. 2011) (explaining court will not defer to agency interpretation if it raises “grave constitutional doubts”); *Ma v. Ashcroft*, 257 F.3d 1095, 1105 n.15 (9th Cir. 2001) (noting *Chevron* deference is not owed where a substantial constitutional question is raised by an agency’s interpretation of a statute it is authorized to construe); *Williams v. Babbitt*, 115 F.3d 657, 661–62 (9th Cir. 1997).

Whether an agency’s procedures comport with due process requirements presents a question of law reviewed de novo. *See Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365, 377 (9th Cir. 2003) (en banc) (noting no deference is owed to agency); *Gilbert v. Nat’l Transp. Safety Bd.*, 80 F.3d 364, 367 (9th Cir. 1996) (FAA); cf. *Adkins v. Trans-Alaska Pipeline Liability Fund*, 101 F.3d 86, 89 (9th Cir. 1996) (noting that absent constitutional constraints or extremely compelling circumstances, courts should usually defer to agency’s fashioning of hearing procedures). The court also reviews de novo whether an agency’s complaint violates due process. *See Regency Air, LLC*, 3 F.4th at 1161–62. *See also California Pac. Bank v. Fed. Deposit Ins. Corp.*, 885 F.3d 560, 572–73, 581 (9th Cir. 2018) (holding no due process violation where FDIC did not exhibit unconstitutional bias in its investigation against the bank).

3. Regulatory Interpretations

“[A]n agency’s interpretation of its own regulation is entitled to deference when, among other things, the regulation is ‘genuinely ambiguous.’” *Goffney v. Becerra*, 995 F.3d 737, 741–42 (9th Cir. 2021) (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019)), *cert. denied*, 142 S. Ct. 589 (2021). As explained by the Supreme Court, deference has often been given “to agencies’ reasonable readings of genuinely ambiguous regulations.” *Kisor*, 139 S. Ct. at 2408. That practice is called “*Auer* deference, or sometimes *Seminole Rock* deference, after two cases in which [the Court] employed it. *Id.* (citing *Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)). “*Auer* deference retains an important role in construing agency regulations[,]” but is limited in scope. *Kisor*, 139 S. Ct. at 2408 (explaining that whether to apply *Auer* deference depends on a range of considerations, which the Supreme Court went on to compile and further develop in the opinion).

When faced with an agency’s interpretation of its own regulation, [the court] must first determine whether the regulation is “genuinely ambiguous.” [*Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019)]. To determine if a regulation’s text is genuinely ambiguous, [the court]

must “resort[] to all the standard tools of interpretation,” including analysis of the regulation’s “text, structure, history, and purpose.” *Id.* at 2414–15. If the regulation’s text is unambiguous, [the court] give[s] no deference to the agency’s interpretation: “[t]he regulation then just means what it means.” [*Id.* at 2415]. But if the regulation is ambiguous, [the court] will defer to the agency’s interpretation so long as that interpretation is “reasonable,” is based on the agency’s “substantive expertise,” “reflect[s] [the agency’s] fair and considered judgment,” and represents “the agency’s authoritative or official position.” *Id.* at 2415–17 (internal quotation marks omitted).

Attias v. Crandall, 968 F.3d 931, 937 (9th Cir. 2020). *See also Landis v. Washington State Major League Baseball Stadium Pub. Facilities Dist.*, 11 F.4th 1101, 1105 (9th Cir. 2021) (discussing *Kisor*); *Nat’l Parks Conservation Ass’n v. FERC*, 6 F.4th 1044, 1050–51 (9th Cir. 2021) (“Under *Kisor*, deference to an agency’s interpretation of its own regulation is warranted as long the regulation is genuinely ambiguous, the agency’s interpretation is reasonable, the interpretation is the agency’s authoritative or official position, the interpretation in some way implicates the agency’s substantive expertise, and the agency’s reading of its rule reflects the agency’s fair and considered judgment.”); *Sec’y of Labor, U.S. Dep’t of Labor v. Seward Ship’s Drydock, Inc.*, 937 F.3d 1301, 1307 (9th Cir. 2019) (discussing *Kisor*).

Interpretive regulations are entitled to less deference than legislative regulations. *See Cmty. Hosp. of Monterey Peninsula v. Thompson*, 323 F.3d 782, 791 (9th Cir. 2003); *Lynch v. Dawson*, 820 F.2d 1014, 1020 (9th Cir. 1987) (noting “various degrees of deference” owed to interpretative rules). Whether an agency regulation is interpretative or legislative is a question of law reviewed de novo. *See Erringer v. Thompson*, 371 F.3d 625, 629 (9th Cir. 2004); *Hemp Indus. Ass’n v. Drug Enforcement Admin.*, 333 F.3d 1082, 1086 (9th Cir. 2003); *Chief Probation Officers v. Shalala*, 118 F.3d 1327, 1330 (9th Cir. 1997).

4. Sanctions

“When ... Congress has authorized the agency to determine and impose sanctions, the agency’s sanction determinations are ‘peculiarly a matter for administrative competence.’ ... Thus, a reviewing court cannot overturn the determination unless ‘unwarranted in law or without justification in fact.’” *Regency Air, LLC v. Dickson*, 3 F.4th 1157, 1161 (9th Cir. 2021) (quoting *Butz v. Glover Livestock Comm’n Co.*, 411 U.S. 182, 185 (1973) and *Balice v. U.S. Dep’t of Agric.*, 203 F.3d 684, 689 (9th Cir. 2000)) (reviewing the Administrator’s

sanction determination under the APA’s deferential arbitrary or capricious standard).

Imposition of sanctions by an agency are reviewed for an abuse of discretion. *See Regency Air, LLC*, 3 F.4th at 1165 (holding FAA acted within its discretion and established policy in seeking and imposing sanctions); *World Trade Fin. Corp. v. U.S. S.E.C.*, 739 F.3d 1243, 1247 (9th Cir. 2014); *Saberi v. Commodity Futures Trading Comm’n*, 488 F.3d 1207, 1215 (9th Cir. 2007); *Ponce v. SEC*, 345 F.3d 722, 728–29 (9th Cir. 2003); *Vernazza v. SEC*, 327 F.3d 851, 858 (9th Cir. 2003) (noting limited scope of review), *amended by* 335 F.3d 1096 (9th Cir. 2003). A penalty imposed should not be overturned unless it is unwarranted in law or unjustified in fact. *See World Trade Fin. Corp.*, 739 F.3d at 1247; *Saberi*, 488 F.3d at 1215.

5. Statutory Interpretations

An agency’s interpretation or application of a statute is a question of law reviewed de novo. *See Thomas v. CalPortland Co.*, 993 F.3d 1204, 1208 (9th Cir. 2021); *United States v. Kelly*, 874 F.3d 1037, 1046 (9th Cir. 2017); *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1212 (9th Cir. 2008); *Schneider v. Chertoff*, 450 F.3d 944, 952 (9th Cir. 2006); *Vernazza v. SEC*, 327 F.3d 851, 858 (9th Cir.), *amended by* 335 F.3d 1096 (9th Cir. 2003). An agency’s interpretation of its statutory mandate is also reviewed de novo. *See Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1073 (9th Cir. 2003); *American Rivers v. FERC*, 201 F.3d 1186, 1194 (9th Cir. 2000). An “agency’s interpretation of a statute outside its administration and expertise ...” is reviewed de novo. *Nat’l Labor Relations Bd. v. Int’l Ass’n of Bridge, Structural, Ornamental, & Reinforcing Iron Workers, Local 229, AFL-CIO*, 941 F.3d 902, 904 (9th Cir. 2019).

In reviewing an agency’s interpretation of a statute, the court applies the standard articulated by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). “Under *Chevron* step one, [the court] ask[s] whether Congress has directly spoken to the precise question at issue. ... At that point, “[i]f the intent of Congress is clear, that is the end of the matter; ... [the court] must give effect to the unambiguously expressed intent of

Congress.” *Safer Chemicals, Healthy Families v. U.S. Env’tl. Prot. Agency*, 943 F.3d 397, 422 (9th Cir. 2019) (internal quotation marks and citations omitted).²

[I]f the statute is silent or ambiguous with respect to the specific issue, [the court] must ask at *Chevron* step two whether the regulations promulgated by the agency are based on a permissible construction of the statute. ... If they are, [the court] must defer to the agency. ... [The court] need not defer to agency regulations, however, if they construe a statute in a way that is contrary to congressional intent or that frustrates congressional policy.”

Safer Chemicals, Healthy Families, 943 F.3d at 422 (internal quotation marks and citations omitted).³ *See also Chevron*, 467 U.S. at 843 (Review is limited to whether the agency’s conclusion is based on a permissible construction of the statute.); *Yazzie v. U.S. Env’tl. Prot. Agency*, 851 F.3d 960, 968 (9th Cir. 2017) (“Under the second step, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” (internal quotation marks and citation omitted)); *Snoqualmie Indian Tribe*, 545 F.3d at 1213; *Espejo v. INS*, 311 F.3d 976, 978 (9th Cir. 2002); *McLean v. Crabtree*, 173 F.3d 1176, 1181 (9th Cir. 1999).

The reviewing court fully defers “to an agency’s interpretation of a statute under *Chevron*, ... , where Congress has delegated authority to the agency generally to make rules carrying the force of law,” and the agency interpretation

² If the statute’s meaning is plain, that is the end of the matter, and the court does not need to defer to the agency’s interpretation. *Chevron, U.S.A., Inc*, 467 U.S. at 842–44 (no deference is owed to an agency when “Congress has directly spoken to the precise question at issue”); *CalPortland Co.*, 993 F.3d at 1208; *Safer Chemicals, Healthy Families*, 943 F.3d at 422; *Cnty. Hosp. of Monterey Peninsula v. Thompson*, 323 F.3d 782, 789 (9th Cir. 2003); *see also Larson v. Saul*, 967 F.3d 914, 917 (9th Cir. 2020), *cert. denied sub nom. Larson v. Kijakazi*, No. 20-854, 2022 WL 199379 (U.S. Jan. 24, 2022).

³ Courts are also not obligated to defer to an agency’s interpretations that are contrary to the plain and sensible meaning of the statute. *See Mota v. Mukasey*, 543 F.3d 1165, 1167 (9th Cir. 2008); *Kankamalage v. INS*, 335 F.3d 858, 862 (9th Cir. 2003).

claiming deference was promulgated in the exercise of that authority.” *Larson v. Saul*, 967 F.3d 914, 917 (9th Cir. 2020), *cert. denied sub nom. Larson v. Kijakazi*, No. 20-854, 2022 WL 199379 (U.S. Jan. 24, 2022).⁴ “[W]hen an agency is authorized by Congress to issue regulations and promulgates a regulation interpreting a statute it enforces, the interpretation receives deference if the statute is ambiguous and if the agency’s interpretation is reasonable. This principle is implemented by the two-step analysis set forth in *Chevron*.” *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 220 (2016); *see also Pac. Choice Seafood Co. v. Ross*, 976 F.3d 932, 940 (9th Cir. 2020), *cert. denied sub nom. Pac. Choice Seafood Co. v. Raimondo*, 141 S. Ct. 2518 (2021).

“When full-blown *Chevron* deference is not due—either because Congress has not delegated rulemaking authority to the agency or the rule in question does not carry the force of law—courts still owe some deference to reasonable agency construction of statutes under *Skidmore v. Swift & Co.*, [323 U.S. 134 (1944)].” *Larson*, 967 F.3d at 924 (internal quotation marks omitted). “Agencies often make interpretive choices in applying statutes; those choices are due deference when they are ‘well-reasoned views’ that reflect ‘a body of experience and informed judgment to which courts and litigants may properly resort for guidance.’” *Larson*, 967 F.3d at 924–25 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (quoting *Skidmore*, 323 at 139–40)).

⁴ A federal agency’s interpretation of a statutory provision it is charged with administering may be entitled to deference. *See Bear Lake Watch*, 324 F.3d at 1073 (noting “deference [is owed] to an agency’s reasonable interpretation of a statutory provision where Congress has left the question to the agency’s discretion”); *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1175 (9th Cir. 2002) (noting deference unless agency’s interpretation is contrary to clear congressional intent or frustrates the policy Congress sought to implement); *Royal Foods Co. v. RJR Holdings Inc.*, 252 F.3d 1102, 1106 (9th Cir. 2000) (noting under the two-part *Chevron* analysis, deference is due the agency’s interpretation of a statute unless the plain language is unambiguous “with regard to the precise matter at issue). *See also Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1162 (9th Cir.) (describing two-step *Chevron* review, and noting when Congress leaves a statutory gap for the agency to fill, any administrative regulations must be upheld unless they are arbitrary, capricious, or manifestly contrary to the statute), *amended by* 197 F.3d 1035 (9th Cir. 1999).

No deference is given to an agency’s interpretation of a statute that it does not administer or is outside of its expertise. See *Medina-Lara v. Holder*, 771 F.3d 1106, 1117 (9th Cir. 2014); *Trung Thanh Hoang v. Holder*, 641 F.3d 1157, 1163–64 (9th Cir. 2011); *Mandujano-Real v. Mukasey*, 526 F.3d 585, 589 (9th Cir. 2008). Moreover, “[r]adically inconsistent interpretations of a statute by an agency, relied upon in good faith by the public, do not command the usual measure of deference to agency action.” *Pfaff v. United States Dep’t of Housing & Urban Dev.*, 88 F.3d 739, 748 (9th Cir. 1996). Thus, “[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.” *Young v. Reno*, 114 F.3d 879, 883 (9th Cir. 1997) (quoting *INS v. Cardozo-Fonseca*, 480 U.S. 421, 446 n.30 (1987)); cf. *Queen of Angels/Hollywood Presbyterian Med. Ctr. v. Shalala*, 65 F.3d 1472, 1480 (9th Cir. 1995) (noting an agency “is not disqualified from changing its mind”). Similarly, no deference is owed when an agency has not formulated an official interpretation, but is merely advancing a litigation position. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019) (noting a court should decline to defer to a merely convenient litigating position); *United States v. Able Time, Inc.*, 545 F.3d 824, 836 (9th Cir. 2008); *United States v. Trident Seafoods Corp.*, 60 F.3d 556, 559 (9th Cir. 1995).⁵ “[J]udicial deference is also not necessarily warranted where courts have experience in the area and are fully competent to decide the issue.” *Monex Int’l, Ltd. v. Commodity Futures Trading Comm’n*, 83 F.3d 1130, 1133 (9th Cir. 1996).

A state agency’s interpretation of a federal statute is not entitled to deference. See *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495 (9th Cir. 1997) (review is de novo); cf. *JG v. Douglas County Sch. Dist.*, 552 F.3d 786, 798 n.8 (9th Cir. 2008) (explaining that although a state agency’s interpretation of federal law is not entitled to deference, “the Secretary’s approval of that agency’s interpretation is due some deference because it shows a federal agency’s interpretation of the federal statute that it is charged to administer.”).

6. Substantial Evidence

On judicial review, an agency’s factual findings are reviewed under the substantial evidence standard. See, e.g., *Biestek v. Berryhill*, 139 S. Ct. 1148, 1153

⁵ See also *Resource Invs., Inc. v. U.S. Army Corps of Eng’rs*, 151 F.3d 1162, 1165 (9th Cir. 1998) (deference does not extend to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice).

(2019) (Social Security Administration); *Kappos v. Hyatt*, 566 U.S. 431, 132 S. Ct. 1690, 1694 (2012) (Patent and Trademark Office); *East Bay Auto. Council v. NLRB*, 483 F.3d 628, 633 (9th Cir. 2007) (NLRB); *Alaska Dep’t of Health & Soc. Servs. v. Ctrs. for Medicare and Medicaid Servs.*, 424 F.3d 931, 937 (9th Cir. 2005) (Centers for Medicare and Medicaid Services).

The phrase “substantial evidence” is a “term of art” used throughout administrative law to describe how courts are to review agency factfinding. . . . Under the substantial-evidence standard, a court looks to an existing administrative record and asks whether it contains “sufficien[t] evidence” to support the agency’s factual determinations. . . . And whatever the meaning of “substantial” in other contexts, the threshold for such evidentiary sufficiency is not high. Substantial evidence, th[e Supreme] Court has said, is “more than a mere scintilla.” . . . It means—and means only—“such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”).

Biestek v. Berryhill, 139 S. Ct. 1148, 1154 (2019) (internal citations omitted). *See also Ford v. Saul*, 950 F.3d 1141, 1154 (9th Cir. 2020); *California Pac. Bank v. Fed. Deposit Ins. Corp.*, 885 F.3d 560, 570 (9th Cir. 2018); *NLRB v. Int’l Bhd. of Elec. Workers, Local 48*, 345 F.3d 1049, 1054 (9th Cir. 2003); *De la Fuente II v. FDIC*, 332 F.3d 1208, 1220 (9th Cir. 2003). The standard is “extremely deferential” and a reviewing court must uphold the agency’s findings “unless the evidence presented would *compel* a reasonable factfinder to reach a contrary result.” *See Monjaraz-Munoz v. INS*, 327 F.3d 892, 895 (9th Cir.), *amended by* 339 F.3d 1012 (9th Cir. 2003) (internal quotation marks and citation omitted); *see also Cal. Pacific Bank*, 885 F.3d at 570 (explaining review is highly deferential, presuming the agency action to be valid, and affirming if a reasonable basis exists for the decision). If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the agency. *See Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1212 (9th Cir. 2008); *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1076 (9th Cir. 2003); *McCartey v. Massanari*, 298 F.3d 1072, 1075 (9th Cir. 2002).

The substantial evidence standard requires the appellate court to review the administrative record as a whole, weighing both the evidence that supports the agency’s determination as well as the evidence that detracts from it. *See Cal. Pacific Bank*, 885 F.3d at 570; *Rounds v. Comm’r Soc. Sec. Admin.*, 807 F.3d 996, 1002 (9th Cir. 2015); *De la Fuente*, 332 F.3d at 1220 (reviewing the record as a whole); *Mayes v. Massanari*, 276 F.3d 453, 458–59 (9th Cir. 2001).

A district court’s decision to exclude extra-record evidence when reviewing an agency’s decision is reviewed for an abuse of discretion. *See Tri-Valley CAREs v. U.S. Dep’t of Energy*, 671 F.3d 1113, 1124 (9th Cir. 2012); *Northwest Env’tl. Advocates v. Nat’l Marine Fisheries Serv.*, 460 F.3d 1125, 1133 (9th Cir. 2006); *Partridge v. Reich*, 141 F.3d 920, 923 (9th Cir. 1998); *Southwest Ctr. for Biological Diversity v. United States Forest Serv.*, 100 F.3d 1443, 1447 (9th Cir. 1996); *see also Bear Lake Watch*, 324 F.3d at 1077 n.8 (declining to review extra-record evidence).

Note that when an agency and a hearings officer disagree, the court reviews the decision of the agency, not the hearings officer. *See Maka v. INS*, 904 F.2d 1351, 1355 (9th Cir. 1990), *amended by* 932 F.2d 1352 (9th Cir. 1991); *NLRB v. Int’l Bhd. of Elec. Workers, Local 77*, 895 F.2d 1570, 1573 (9th Cir. 1990). The standard of review is not modified when such a disagreement occurs. *See Maka*, 904 F.2d at 1355; *Int’l Bhd.*, 895 F.2d at 1573. When the agency rejects the hearings officer’s credibility findings, however, it must state its reasons and those reasons must be based on substantial evidence. *See Maka*, 904 F.2d at 1355; *Howard v. Heckler*, 782 F.2d 1484, 1487 (9th Cir. 1986).

This court defers to credibility determinations made by an agency. *See Delta Sandblasting Co., Inc. v. Nat’l Labor Relations Bd.*, 969 F.3d 957, 963 (9th Cir. 2020); *Manes v. Sessions*, 875 F.3d 1261, 1263 (9th Cir. 2017); *Underwriters Lab., Inc. v. NLRB*, 147 F.3d 1048, 1051 (9th Cir. 1998). Such credibility determinations must be upheld unless they are “inherently or patently unreasonable.” *United Nurses Associations of California v. Nat’l Labor Relations Bd.*, 871 F.3d 767, 777 (9th Cir. 2017) (quoting *Retlaw Broad. Co. v. NLRB*, 53 F.3d 1002, 1005 (9th Cir. 1995)); *see also Healthcare Employees Union, Local 399 v. NLRB*, 463 F.3d 909, 914 n.8 (9th Cir. 2006). Although deference is given, an agency must give specific, cogent reasons for an adverse credibility determination. *See Iman v. Barr*, 972 F.3d 1058, 1064 (9th Cir. 2020); *Manes*, 875 F.3d at 1263; *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998).

B. Specific Agency Review

1. Agricultural Marketing Service (“AMS”)

“The relevant grant of authority in the AMA only authorizes the AMS ‘[t]o develop and improve standards of quality, condition, quantity, grade, and packaging, and recommend and demonstrate such standards in order to encourage uniformity and consistency in commercial practices.’” *Compassion Over Killing v. U.S. Food & Drug Admin.*, 849 F.3d 849, 854–55 (9th Cir. 2017) (quoting

7 U.S.C. § 1622(c)). The court “reviews challenges to final agency action decided on summary judgment de novo and pursuant to Section 706 of the Administrative Procedure Act (“APA”). ... The APA requires the Court to ‘hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” *Compassion Over Killing*, 849 F.3d at 854 (quoting 5 U.S.C. § 706(2)). “When an agency refuses to exercise its discretion to promulgate proposed regulations, the Court’s review “is ‘extremely limited’ and ‘highly deferential.’” *Compassion Over Killing*, 849 F.3d at 854 (concluding “that the AMS ... did not act arbitrarily or capriciously in denying Plaintiffs’ rulemaking petition because the agency correctly concluded that it lacks the authority to promulgate mandatory labeling requirements for shell eggs).

2. Bonneville Power Administration (“BPA”)

“The Bonneville Power Administration (“BPA”) is an agency within the Department of Energy that markets the energy output of federal power projects in the Pacific Northwest.” *Indus. Customers of Nw. Utilities v. Bonneville Power Admin.*, 767 F.3d 912, 915 (9th Cir. 2014). BPA’s decisions are reviewed pursuant to the Pacific Northwest Electric Power Planning and Conservation Act of 1980. *See Public Power Council, Inc. v Bonneville Power Admin.*, 442 F.3d 1204, 1209–10 (9th Cir. 2006); *Puget Sound Energy, Inc. v. United States*, 310 F.3d 613, 617 (9th Cir. 2002). Review is under the Administrative Procedures Act. *See Public Power Council*, 442 F.3d at 1209–10; *Vulcan Power Co. v. Bonneville Power Admin.*, 89 F.3d 549, 550 (9th Cir. 1996) (per curiam). Thus, the agency’s final action may be set aside only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See Pacific Northwest Generating Co-op. v. Dep’t of Energy*, 596 F.3d 1065, 1072 (9th Cir. 2010); *Public Power Council*, 442 F.3d at 1209; *Confederated Tribes of the Umatilla Indian Reservation v. Bonneville Power Admin.*, 342 F.3d 924, 928 (9th Cir. 2003); *M-S-R Public Power Agency*, 297 F.3d 833, 841 (9th Cir. 2002) (noting “review of final BPA actions is extremely limited”); *Vulcan Power*, 89 F.3d at 550. Review under this standard is to be searching and careful, but remains narrow, and a court is not to substitute its judgment for that of the agency. *See Public Power Council*, 442 F.3d at 1209; *Aluminum Co. of Amer. v. Administrator, Bonneville Power Admin.*, 175 F.3d 1156, 1160 (9th Cir. 1999); *Northwest Res. Info. Ctr., Inc. v. Northwest Power Planning Council*, 35 F.3d 1371, 1383 (9th Cir. 1994) (internal quotation omitted).

The court will accord “substantial deference” to the BPA’s interpretation of the statute and to its application and interpretation of its regulations. *See Public*

Power Council, 442 F.3d at 1210; *Confederated Tribes*, 342 F.3d at 928. Thus, to uphold the BPA’s interpretation of the Act, the court “need only conclude that it is a reasonable interpretation of the relevant provisions.” See *Northwest Env’tl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1530 (9th Cir. 1997) (internal quotation marks and citation omitted).⁶

Whether a district court has subject matter jurisdiction under the Northwest Power Planning Act to hear challenges to a final agency action by the BPA is a question of law reviewed de novo. See *Transmission Agency of California v. Sierra Pacific Power Co.*, 295 F.3d 918, 925 (9th Cir. 2002).

3. Department of Energy

A decision by the Secretary of Energy will be set aside only if it is arbitrary, capricious, or otherwise not in accordance with law. See *Nevada v. U.S. Dep’t of Energy*, 133 F.3d 1201, 1204 (9th Cir. 1998). Statutory interpretations are reviewed de novo. See *id.*; *Nevada v. Watkins*, 914 F.2d 1545, 1552 (9th Cir. 1990). Nevertheless, the agency’s construction of a statute it is implementing should not be set aside unless that construction conflicts with clear congressional intent or is unreasonable. See *County of Esmeralda v. U.S. Dep’t of Energy*, 925 F.2d 1216, 1219 (9th Cir. 1991).

4. Department of the Interior

“The APA requires reviewing courts to ‘hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,’ ‘in excess of statutory jurisdiction,’ or ‘without observance of procedure required by law.’” *Kalispel Tribe of Indians v. U.S. Dep’t of the Interior*, 999 F.3d 683, 688 (9th Cir. 2021) (quoting 5 U.S.C. § 706(2)(A), (C)–(D)). “Reversal is proper only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to

⁶ See also *Confederated Tribes of the Umatilla Indian Reservation v. Bonneville Power Admin.*, 342 F.3d 924, 928–29 (9th Cir. 2003) (stating standard); *Kaiser Aluminum & Chem. Corp. v. Bonneville Power Admin.*, 261 F.3d 843, 848–49 (9th Cir. 2001) (noting court may reject a construction inconsistent with statutory mandates or that frustrate the statutory policies that Congress sought to implement).

a difference in view or the product of agency expertise.” *Id.* (internal quotation marks omitted). “Where the allegation is that the agency’s decision was arbitrary and capricious, the court reviews the record carefully to ensure that the agency conducted a reasonable evaluation of the relevant factors and reasonably interpreted the governing statute.” *Id.* at 692 (holding district court correctly ruled that Kalispel did not meet its burden of showing that the Secretarial Determination was arbitrary and capricious).

5. Environmental Protection Agency (“EPA”)

Final administrative actions of the EPA are reviewed under the standards established by the Administrative Procedures Act (“APA”). *See Bahr v. Regan*, 6 F.4th 1059, 1069 (9th Cir. 2021) (reviewing EPA action under the Clean Air Act pursuant to the judicial review provisions of the APA); *Helping Hand Tools v. U.S. Env’t. Prot. Agency*, 848 F.3d 1185, 1193–94 (9th Cir. 2016) (as amended); *Ober v. Whitman*, 243 F.3d 1190, 1193 (9th Cir. 2001); *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1162 (9th Cir.), *amended by* 197 F.3d 1035 (9th Cir. 1999). Whether an EPA decision is final is a question of subject matter jurisdiction reviewed de novo. *See City of San Diego v. Whitman*, 242 F.3d 1097, 1101 (9th Cir. 2001).

The court may reverse the EPA’s decision only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See Food & Water Watch v. U.S. Env’t Prot. Agency*, 20 F.4th 506, 513–14, 518 (9th Cir. 2021) (setting forth standard of review and holding that the EPA’s issuance of the National Pollutant Discharge Elimination System under the Clean Water Act was arbitrary, capricious, and a violation of law); *Bahr*, 6 F.4th at 1069; *Helping Hand Tools*, 848 F.3d at 1193–94; *Great Basin Mine Watch v. EPA*, 401 F.3d 1094, 1098 (9th Cir. 2005); *Ober*, 243 F.3d at 1193; *Exxon Mobil Corp. v. EPA*, 217 F.3d 1246, 1248 (9th Cir. 2000). Deference is owed to the EPA’s interpretation of its own regulations if those regulations are not unreasonable. *See Western States Petroleum Ass’n v. EPA*, 87 F.3d 280, 283 (9th Cir. 1996); *see also Pronsolino v. Nastri*, 291 F.3d 1123, 1131–32 (9th Cir. 2002) (explaining levels of deference owed to the EPA).

The “EPA must ‘articulate[] a rational connection between the facts found and the choice made.’ *Sierra Club v. EPA*, 346 F.3d 955, 961 (9th Cir. 2003) (alteration in original) (quoting *Ariz. Cattle Growers’ Ass’n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1236 (9th Cir. 2001)).” *Helping Hand Tools*, 848 F.3d at 1194. *See also Bahr v. U.S. Env’t. Prot. Agency*, 836 F.3d 1218, 1229 (9th Cir. 2016).

“[The court does] not simply review whether it was arbitrary or capricious” for the Board to reject a petitioner’s claims that EPA clearly erred. *Citizens for Clean Air v. EPA*, 959 F.2d 839, 845–46 (9th Cir. 1992). “Rather, [the court] conduct[s] a deferential review of the entire agency action,” including whether [EPA’s decision] is based on a clearly erroneous finding of fact or conclusion of law. *Id.* at 846.

Helping Hand Tools, 848 F.3d at 1194.

6. Federal Aviation Administration (“FAA”)

“Judicial review of [the FAA’s] decisions under [NEPA] is governed by the Administrative Procedure Act, which specifies that an agency action may only be overturned when it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Ctr. for Cmty. Action & Env’t Just. v. Fed. Aviation Admin.*, 18 F.4th 592, 598 (9th Cir. 2021) (holding that Petitioners failed to establish the FAA acted arbitrarily or capriciously).

The court reviews the FAA Administrator’s sanction determination under the Administrative Procedure Act’s deferential arbitrary or capricious standard. *See Regency Air, LLC v. Dickson*, 3 F.4th 1157, 1161 (9th Cir. 2021) (citing 5 U.S.C. § 706(2)(A)). A “reviewing court cannot overturn the determination unless unwarranted in law or without justification in fact.” *Id.* (internal quotation marks and citation omitted).

“The FAA’s findings of fact are ... conclusive if supported by substantial evidence.” *Regency Air, LLC*, 3 F.4th at 1161 (citing 49 U.S.C. § 46110(c)). *See also Ctr. for Cmty. Action & Env’t Just.*, 18 F.4th at 598 (9th Cir. 2021) (“An agency’s factual determinations must be supported by substantial evidence.”).

7. Federal Communications Commission (“FCC”)

FCC decisions may be set aside if arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See Fed. Commc’ns Comm’n v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158, 1160 (2021) (holding that FCC’s analysis was reasonable and reasonably explained for purposes of the APA’s deferential arbitrary-and-capricious standard); *Wide Voice, LLC v. Fed. Commc’ns Comm’n*, 7 F.4th 796, 801 (9th Cir. 2021); *California v. FCC*, 75 F.3d 1350, 1358 (9th Cir. 1996); *California v. FCC*, 39 F.3d 919, 925 (9th Cir. 1994); *see also FCC v. Fox Television Studios*, 556 U.S. 502, 513 (2009).

“The APA’s arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained.” *Prometheus Radio Project*, 141 S. Ct. at 1158. Under that standard, the court must determine whether the FCC’s decision was a reasonable exercise of its discretion, based on consideration of relevant factors, and supported by the record. *See Wide Voice, LLC*, 7 F.4th at 801 (the court must determine whether the FCC’s decision “was a reasonable exercise of its discretion); *California*, 75 F.3d at 1358. “The scope of judicial review under this standard is narrow and an agency’s interpretation of its own policies and prior orders is entitled to deference.” *California*, 39 F.3d at 925; *see also Fox Television Studios*, 556 U.S. at 513; *Howard v. America Online Inc.*, 208 F.3d 741, 752–53 (9th Cir. 2000) (upholding FCC’s “reasonable” interpretation of the Communications Act).

Whether a district court has subject matter jurisdiction to enforce orders of the FCC is a question of law reviewed de novo. *See United States v. Peninsula Communications, Inc.*, 287 F.3d 832, 836 (9th Cir. 2002) (reviewing district court’s refusal to dismiss for lack of jurisdiction). The district court’s decision whether to stay enforcement proceedings is reviewed for an abuse of discretion. *See id.* at 838.

8. Food and Drug Administration (“FDA”)

The court reviews challenges to a final agency action decided on summary judgment de novo and pursuant to Section 706 of the Administrative Procedure Act (“APA”). *Compassion Over Killing v. U.S. Food & Drug Admin.*, 849 F.3d 849, 854 (9th Cir. 2017) (reviewing actions of the FSIS, AMS, FTC, and FDA). “The APA requires the Court to ‘hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” *Id.* (quoting 5 U.S.C. § 706(2)). “When an agency refuses to exercise its discretion to promulgate proposed regulations, the Court’s review “is ‘extremely limited’ and ‘highly deferential.’” *Compassion Over Killing*, 849 F.3d at 854, 856–57 (holding the FDA acted reasonably in denying Plaintiffs’ rulemaking petitions).

9. Federal Energy Regulatory Commission (“FERC”)

FERC’s findings of fact are conclusive if supported by substantial evidence. *See Nat’l Parks Conservation Ass’n v. FERC*, 6 F.4th 1044, 1049 (9th Cir. 2021); *California Pub. Utilities Comm’n v. Fed. Energy Regulatory Comm’n*, 854 F.3d 1136, 1146 (9th Cir. 2017) (“FERC must be able to demonstrate that it has made a reasoned decision based upon substantial evidence in the record.” (internal

quotation marks and citation omitted)); *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1212 (9th Cir. 2008); *Public Utilities Comm'n of California v. FERC*, 462 F.3d 1027, 1045 (9th Cir. 2006); *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1073 (9th Cir. 2003); *American Rivers v. FERC*, 201 F.3d 1186, 1194 (9th Cir. 2000). The court “will not disturb such findings even if ‘the evidence is susceptible of more than one rational interpretation.’” *MPS Merch. Servs., Inc. v. Fed. Energy Regulatory Comm'n*, 836 F.3d 1155, 1163 (9th Cir. 2016).

Review of the agency’s decision is limited to the arbitrary, capricious, abuse of discretion standard. *See Nat’l Parks Conservation Ass’n*, 6 F.4th at 1049; *Idaho Power Co. v. F.E.R.C.*, 801 F.3d 1055, 1058 (9th Cir. 2015); *California Dep’t of Water Res. v. FERC*, 489 F.3d 1029, 1035 (9th Cir. 2007); *Public Utilities Comm’n*, 462 F.3d at 1045; *California Dep’t of Water Res. v. FERC*, 341 F.3d 906, 910 (9th Cir. 2003); *see also California Pub. Utilities Comm’n*, 854 F.3d at 1146. “Under the arbitrary and capricious standard, ‘[a] court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives.’” *Nat’l Parks Conservation Ass’n*, 6 F.4th at 1049 (quoting *FERC v. Elec. Power Supply Ass’n*, 577 U.S. 260, 292 (2016)). “The Court ... must ensure that FERC articulate[s] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *California Pub. Utilities Comm’n*, 854 F.3d at 1146 (internal quotation marks and citation omitted). *See also Nat’l Parks Conservation Ass’n*, 6 F.4th at 1049 (“While we are not to substitute our judgment for that of the agency, the Commission nevertheless must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” (internal quotation marks and citation omitted)).

Deference is owed to FERC’s interpretation of its own regulations unless plainly erroneous. *See California Dep’t of Water Res.*, 489 F.3d at 1035; *Skokomish Indian Tribe v. FERC*, 121 F.3d 1303, 1306 (9th Cir. 1997); *Rainsong Co. v. FERC*, 106 F.3d 269, 272 (9th Cir. 1997). Deference is also owed to FERC’s interpretation of the law it is charged with administering. *See Montana Consumer Counsel v. FERC*, 659 F.3d 910, 915 (9th Cir. 2011); *California Dep’t of Water Res.*, 489 F.3d at 1035; *California Trout, Inc. v. FERC*, 313 F.3d 1131, 1134 (9th Cir. 2002) (noting *Chevron* deference); *American Rivers*, 201 F.3d at 1194 (same). Note, however, that FERC’s interpretation of its statutory mandate is reviewed de novo. *See City of Fremont v. FERC*, 336 F.3d 910, 914 (9th Cir. 2003); *Bear Lake Watch*, 324 F.3d at 1073; *California Trout*, 313 F.3d at 1133; *American Rivers*, 201 F.3d at 1194.

“FERC’s discretion is at its zenith when ... fashioning ... remedies and sanctions.” *MPS Merch. Servs., Inc. v. FERC*, 836 F.3d 1155, 1163 (9th Cir. 2016) (internal quotation marks and citation omitted).

10. Federal Labor Relations Authority (“FLRA”)

Review of decisions issued by the FLRA is governed by 5 U.S.C. § 706, which directs that agency action can be set aside only if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *See Nat’l Treasury Employees Union v. FLRA*, 418 F.3d 1068, 1071 n.5 (9th Cir. 2005); *see also Dep’t of Treasury-IRS v. FLRA*, 521 F.3d 1148, 1152 (9th Cir. 2008); *Dep’t of Veterans Affairs Med. Ctr. v. FLRA*, 16 F.3d 1526, 1529 (9th Cir. 1994). Deference is owed to the FLRA’s interpretation of the statute that it administers. *See Nat’l Treasury*, 418 F.3d at 1071 n.5; *U.S. Dep’t of Interior v. FLRA*, 279 F.3d 762, 765 (9th Cir. 2002); *Eisinger v. FLRA*, 218 F.3d 1097, 1100 (9th Cir. 2000) (noting “considerable discretion”). No deference is owed, however, to the FLRA’s interpretation of statutes that it does not administer. *See Nat’l Treasury*, 418 F.3d at 1071 n.5; *Dep’t of Interior*, 279 F.3d at 765.

11. Federal Railroad Administration (“FRA”)

The Administrative Procedure Act (“APA”) directs that agency actions be set aside if they are arbitrary or capricious. *Transportation Div. of the Int’l Ass’n of Sheet Metal, Air, Rail, & Transportation Workers v. Fed. R.R. Admin.*, 988 F.3d 1170, 1178 (9th Cir. 2021). “Under this narrow standard of review, ... a court is not to substitute its judgment for that of the agency, but instead to assess only whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Id.* In *Transportation Div. of the Int’l Ass’n of Sheet Metal, Air, Rail, & Transportation Workers*, the court held that the FRA’s issuance of an order purporting to adopt a nationwide maximum one-person crew rule and to preempt any state laws concerning that subject matter violated the APA’s notice-and-comment requirements and that the order was arbitrary and capricious, and therefore must be vacated. 988 F.3d at 1178–79.

12. Federal Mine Safety and Health Review Commission

The Mine Safety and Health Administration’s decisions are reviewed under the arbitrary and capricious standard. *See Stillwater Mining Co. v. Federal Mine Safety & Health Review Comm’n*, 142 F.3d 1179, 1182 (9th Cir. 1998). Findings of fact are reviewed for substantial evidence. *See id.* at 1183. This court will defer to the agency’s interpretation of its regulations. *See D.H. Blattner & Sons, Inc. v.*

Secretary of Labor, Mine Safety and Health Comm., 152 F.3d 1102, 1105 (9th Cir. 1998) (noting interpretations must be “reasonable” and “conform” to the purpose and wording of the regulations). The Federal Mine Safety and Health Review Commission’s interpretation of a statute is subject to de novo review. *See Thomas v. CalPortland Co.*, 993 F.3d 1204, 1208 (9th Cir. 2021).

13. Federal Trade Commission (“FTC”)

The court reviews challenges to a final agency action decided on summary judgment de novo and pursuant to Section 706 of the Administrative Procedure Act (“APA”). *Compassion Over Killing v. U.S. Food & Drug Admin.*, 849 F.3d 849, 854 (9th Cir. 2017) (reviewing actions of the FSIS, AMS, FTC, and FDA). “The APA requires the Court to ‘hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” *Id.* (quoting 5 U.S.C. § 706(2)). “When an agency refuses to exercise its discretion to promulgate proposed regulations, the Court’s review “is ‘extremely limited’ and ‘highly deferential.’” *Compassion Over Killing*, 849 F.3d at 856 (concluding that the FTC did not act arbitrarily or capriciously in denying Plaintiffs’ rulemaking petition).

The Commission’s findings of fact are reviewed under the substantial evidence standard. *See California Dental Ass’n v. FTC*, 128 F.3d 720, 725 (9th Cir. 1997), *vacated on other grounds*, 526 U.S. 756 (1999); *Olin Corp. v. FTC*, 986 F.2d 1295, 1297 (9th Cir. 1993). Under that standard, the Commission’s findings of fact will be upheld if they are supported by “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *California Dental Ass’n*, 128 F.3d at 725; *Olin*, 986 F.2d at 1297; *see also Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431, 1435 (9th Cir. 1986); *accord Litton Indus., Inc. v. FTC*, 676 F.2d 364, 368 (9th Cir. 1982).

Legal issues are for the courts to resolve, although even in considering such issues the court is to give deference to the Commission’s informed judgments. *See California Dental Ass’n*, 128 F.3d at 725; *Olin*, 986 F.2d at 1297; *see also United States v. Louisiana-Pac. Corp.*, 754 F.2d 1445, 1447 (9th Cir. 1985) (great deference should be given to the FTC’s interpretation of the Federal Trade Commission Act). Whether a district court has given the FTC’s findings of fact and conclusions of law appropriate weight is reviewed de novo. *See Pool Water Products v. Olin Corp.*, 258 F.3d 1024, 1030 (9th Cir. 2001).

14. Federal Transit Administration

“Under the Administrative Procedure Act, a ‘reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” *Japanese Vill., LLC v. Fed. Transit Admin.*, 843 F.3d 445, 453 (9th Cir. 2016) (quoting 5 U.S.C. § 706(2)(A)). In making the factual inquiry regarding whether a decision by the Federal Transit Administration was arbitrary or capricious, the reviewing court must consider whether the decision was based on a consideration of relevant factors and whether there has been a clear error of judgment. *Id.*

15. Immigration and Naturalization Service (“INS”)

Note the INS was abolished by the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, and the majority of its immigration enforcement functions were transferred to the Bureau of Immigration and Customs Enforcement, a part of the Department of Homeland Security. *See Hernandez v. Ashcroft*, 345 F.3d 824, 828 n.2 (9th Cir. 2003). The Bureau of Immigration and Customs Enforcement is now known as U.S. Immigration and Customs Enforcement, or ICE.

See III. Civil Proceedings, C. Trial Decisions in Civil Cases, 27. Substantive Areas of Law, v. Immigration.

16. Food Safety and Inspection Service (“FSIS”)

The court reviews challenges to a final agency action decided on summary judgment de novo and pursuant to Section 706 of the Administrative Procedure Act (“APA”). *Compassion Over Killing v. U.S. Food & Drug Admin.*, 849 F.3d 849, 854 (9th Cir. 2017) (reviewing actions of the FSIS, AMS, FTC, and FDA). “The APA requires the Court to ‘hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” *Id.* (quoting 5 U.S.C. § 706(2)). “When an agency refuses to exercise its discretion to promulgate proposed regulations, the Court’s review ‘is ‘extremely limited’ and ‘highly deferential.’” *Compassion Over Killing*, 849 F.3d at 854 (holding the FSIS did not act arbitrarily or capriciously in denying Plaintiffs’ rulemaking petition).

17. Interior Board of Land Appeals (“IBLA”)

Decisions of the IBLA are reversed only if arbitrary, capricious, not supported by substantial evidence, or contrary to law. *See Corrigan v. Haaland*, 12 F.4th 901, 906 (9th Cir. 2021); *Akootchook v. United States*, 271 F.3d 1160, 1164 (9th Cir. 2001); *Hjelvik v. Babbitt*, 198 F.3d 1072, 1074–75 (9th Cir. 1999) (noting limited standard of review); *Hoefler v. Babbitt*, 139 F.3d 726, 727 (9th Cir. 1998) (noting review is under the APA). To make that determination, “[t]his court carefully search[es] the entire record to determine whether it contains such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and whether it demonstrates that the decision was based on a consideration of relevant factors.” *Akootchook*, 271 F.3d at 1164 (quoting *Hjelvik*, 198 F.3d at 1074). “An agency decision construing a statute is not in violation of the APA where the agency accurately applies an unambiguous statute, or permissibly construes an ambiguous statute, and its conclusion is “well supported by substantial evidence in the record.” *Corrigan*, 12 F.4th at 906 (internal quotation marks and citation omitted).

18. Labor Benefits Review Board

The court reviews decisions of the Labor Benefits Review Board (“BRB”) for errors of law and for adherence to the substantial evidence standard. *See Iopa v. Saltchuk-Young Bros., Ltd.*, 916 F.3d 1298, 1300 (9th Cir. 2019) (per curiam); *Christie v. Georgia-Pacific Co.*, 898 F.3d 952, 956 (9th Cir. 2018). The court conducts de novo review on questions of law, including questions of statutory interpretation. *See Iopa*, 916 F.3d at 1300; *Christie*, 898 F.3d at 956 (reviewing the Board’s interpretation of the Act de novo because such interpretations are questions of law); *Pedroza v. BRB*, 624 F.3d 926, 930 (9th Cir. 2010).

“Because the [BRB] is not a policymaking entity, [the court] accord[s] no special deference to its interpretation of the Longshore Act.” *Iopa*, 916 F.3d at 1300 (internal quotation marks and citation omitted); *see also Christie*, 898 F.3d at 956.

See III. Civil Proceedings, C. Trial Decisions in Civil Cases, 27. Substantive Areas Labor Law, x. Labor Law.

19. National Labor Relations Board

See III. Civil Proceedings, C. Trial Decisions in Civil Cases, 27. Substantive Areas of Law, x. Labor Law, iv. National Labor Relations Board.

20. National Transportation Safety Board (“NTSB”)

Review of an order of the NTSB is “narrowly circumscribed.” *See Olsen v. NTSB*, 14 F.3d 471, 474 (9th Cir. 1994). Review is conducted in accordance with the Administrative Procedure Act; this court must affirm unless the NTSB’s order is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See Connors v. Nat’l Transportation Safety Bd.*, 844 F.3d 1143, 1145 (9th Cir. 2017); *Gilbert v. NTSB*, 80 F.3d 364, 368 (9th Cir. 1996); *Borregard v. NTSB*, 46 F.3d 944, 945 (9th Cir. 1995). The NTSB’s decision must be based on the relevant factors and may not constitute a clear error of judgment. *See Gilbert*, 80 F.3d at 368. The Board’s factual findings are conclusive if supported by substantial evidence. *See Borregard*, 46 F.3d at 945; *Olsen*, 14 F.3d at 474. Pure legal questions are reviewed de novo. *See Connors*, 844 F.3d at 1145; *Wagner v. NTSB*, 86 F.3d 928, 930 (9th Cir. 1996); *Borregard*, 46 F.3d at 945. The agency’s interpretations of its own organic statute and regulations, however, are accorded deference, unless the administrative construction is clearly contrary to the plain and sensible meaning of the statute or regulation. *See Connors*, 844 F.3d at 1145; *Borregard*, 46 F.3d at 945; *Reno v. NTSB*, 45 F.3d 1375, 1378 (9th Cir. 1995). The Board’s award of attorneys’ fees under the Equal Access to Justice Act is reviewed for an abuse of discretion. *See Mendenhall v. NTSB*, 213 F.3d 464, 470 (9th Cir. 2000) (as amended on denial of rehearing), *overruled on other grounds by Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012).

21. Occupational Safety and Health Review Commission (“OSHRC”)

The appellate court must “uphold a decision of the OSHRC unless it is arbitrary and capricious, not in accordance with the law, or in excess of the authority granted by the OSHA ... [T]he Commission’s factual findings [are reviewed] under the substantial evidence standard; and [the court] accept[s] reasonable factual inferences drawn by the Commission.” *Loomis Cabinet Co. v. OSHRC*, 20 F.3d 938, 941 (9th Cir. 1994) (citations omitted); *see also Bergelectric Corp. v. Sec’y of Labor*, 925 F.3d 1167, 1170 (9th Cir. 2019) (per curiam) (“A decision of the Commission must be upheld unless it is ‘arbitrary and capricious, not in accordance with the law, or in excess of the authority granted by OSHA.’” (citation omitted)). The court “must uphold the factfinder’s determinations if the record contains such relevant evidence as reasonable minds might accept as adequate to support a conclusion, even if it is possible to draw different conclusions from the evidence.” *Loomis Cabinet Co.*, 20 F.3d at 941; *see also Bergelectric Corp.*, 925 F.3d at 1170; *R. Williams Const. Co. v. OSHRC*, 464 F.3d 1060, 1063 (9th Cir. 2006). Thus, the Commission’s findings must be affirmed “if supported by substantial evidence on the record considered as a whole.” *See Chao*

v. Symms Fruit Ranch, Inc., 242 F.3d 894, 897 (9th Cir. 2001) (internal quotation omitted); *see also Bergelectric Corp.*, 925 F.3d at 1170 (“The Commission’s factual findings are treated as ‘conclusive’ if supported by substantial evidence from the record as a whole.”).

“While the proper interpretation of a statute is a question of law reviewed de novo, the court must give deference to [OSHC’s] interpretation of statutes that it administers.” *Herman v. Tidewater Pac., Inc.*, 160 F.3d 1239, 1241 (9th Cir. 1998) (citations omitted). However, “[t]he possibility of deference can arise only if a regulation is genuinely ambiguous[,] ... even after a court has resorted to all the standard tools of interpretation.” *Sec’y of Lab., U.S. Dep’t of Lab. v. Seward Ship’s Drydock, Inc.*, 937 F.3d 1301, 1307 (9th Cir. 2019) (internal quotation marks and citation omitted). “To determine whether a regulation’s meaning is truly ambiguous, courts must carefully consider the text, structure, history, and purpose of a regulation.” *Id.* When the meaning of regulatory language is ambiguous, the Secretary’s interpretation controls “so long as it is reasonable, that is, so long as the interpretation sensibly conforms to the purpose and wording of the regulations.” *Crown Pacific v. OSHRC*, 197 F.3d 1036, 1038 (9th Cir. 1999) (internal quotation omitted); *see also Chao*, 242 F.3d at 897 (noting deference is owed only if the Secretary’s interpretation is reasonable). In the case of OSHA regulations ... “a reviewing court may not prefer the reasonable interpretations of the Commission to the reasonable interpretations of the Secretary.” *Seward Ship’s Drydock, Inc.*, 937 F.3d at 1307. Thus, where interpretations of the Secretary of Labor and the Commission are in conflict, the court must defer to the Secretary’s reasonable interpretation. *See Chao*, 242 F.3d at 897; *Herman*, 160 F.3d at 1241.

22. Railroad Retirement Board (“RRB”)

The RRB’s findings of fact are conclusive “if supported by evidence and in the absence of fraud.” 45 U.S.C. § 355(f). This circuit has construed this standard to be a “substantial evidence” test. *See Calderon v. Railroad Retirement Bd.*, 780 F.2d 812, 813 (9th Cir. 1986); *Estes v. Railroad Retirement Bd.*, 776 F.2d 1436, 1437 (9th Cir. 1985). The Board’s application of a regulation will be upheld if it is a permissible construction of the Railroad Retirement Act. *See Capovilla v. Railroad Retirement Bd.*, 924 F.2d 885, 887 (9th Cir. 1991).

“The Board’s decision to grant or deny reopening, while guided by substantive criteria, is ultimately discretionary and therefore subject to reversal only for abuse of discretion. ... Most decisions will be upheld under this deferential standard.” *Salinas v. United States R.R. Ret. Bd.*, 141 S. Ct. 691, 701 (2021).

23. Railway Adjustment Board

The scope of review of Railway Adjustment Board awards under the Railway Labor Act (RLA) is “among the narrowest known to the law.” *Fennessy v. Southwest Airlines*, 91 F.3d 1359, 1362 (9th Cir. 1996); *English v. Burlington N. R.R.*, 18 F.3d 741, 743 (9th Cir. 1994). The RLA allows the court to review Adjustment Board decisions on three specific grounds only: (1) failure of the Board to comply with the Act; (2) failure of the Board to conform, or confine itself to matters within its jurisdiction; and (3) fraud or corruption. *See Fennessy*, 91 F.3d at 1362; *English*, 18 F.3d at 743–44. Whether a district court has subject matter jurisdiction under the RLA is a question of law reviewed de novo. *See Ass’n of Flight Attendants v. Horizon Air Indus., Inc.*, 280 F.3d 901, 904 (9th Cir. 2002).

24. Securities Exchange Commission

The Securities Exchange Commission’s (“SEC”) factual findings are reviewed for substantial evidence. *See Ponce v. SEC*, 345 F.3d 722, 728 (9th Cir. 2003); *Krull v. SEC*, 248 F.3d 907, 911 (9th Cir. 2001); *Alderman v. SEC*, 104 F.3d 285, 288 (9th Cir. 1997). *See also* 15 U.S.C. § 78y(a)(4).

Deference is owed to the agency’s construction of its own regulations unless its interpretation is “unreasonable” or “plainly erroneous.” *See Ponce*, 345 F.3d at 728; *Alderman*, 104 F.3d at 288; *see also Vernazza v. SEC*, 327 F.3d 851, 858 (9th Cir. 2003), *amended by* 335 F.3d 1096 (9th Cir. 2003) (noting when deference is owed).

The district court’s interpretation of the Securities Exchange Act is reviewed de novo. *See SEC v. McCarthy*, 322 F.3d 650, 654 (9th Cir. 2003); *McNabb v. SEC*, 298 F.3d 1126, 1130 (9th Cir. 2002). The court’s determination that a transaction is a security for purposes of the Act is reviewed de novo. *See SEC v. Rubera*, 350 F.3d 1084, 1089 (9th Cir. 2003). Whether the court’s decision to enforce a SEC order violates due process is a question of law reviewed de novo. *See McCarthy*, 322 F.3d at 654.

The district court’s decision to issue an injunction to enforce an SEC order is reviewed for an abuse of discretion. *See SEC v. Wallenbrock*, 313 F.3d 532, 536 (9th Cir. 2002). Likewise, the SEC’s imposition of sanctions is reviewed for an abuse of discretion, *see Ponce*, 345 F.3d at 728–29; *Vernazza*, 327 F.3d at 858; *Krull*, 248 F.3d at 912, as is a disgorgement order, *see SEC v. First Pac. Bancorp*, 142 F.3d 1186, 1190 (9th Cir. 1998); *SEC v. Colello*, 139 F.3d 674, 675 (9th Cir.

1998). The district court’s decision to freeze assets to enforce a contempt order arising from the failure to disgorge is also reviewed for an abuse of discretion. *See SEC v. Hickey*, 322 F.3d 1123, 1128 (9th Cir.), *amended by* 335 F.3d 834 (9th Cir. 2003). Where the district court’s order of disgorgement is based on the application of law to facts not in dispute, review is de novo. *Sec. & Exch. Comm’n v. World Cap. Mkt., Inc.*, 864 F.3d 996, 1003 (9th Cir. 2017) (reviewing de novo where the court’s decision to award disgorgement was based on a conclusion that involved the application of law to facts not disputed at the hearing).

See also III. Civil Proceedings, C. Trial Decisions in Civil Cases, 27. Substantive Areas of Law, z. Securities.

25. Social Security Administration

A district court’s order upholding the Commissioner’s denial of benefits is reviewed de novo. *See Larson v. Saul*, 967 F.3d 914, 922 (9th Cir. 2020), *cert. denied sub nom. Larson v. Kijakazi*, No. 20-854, 2022 WL 199379 (U.S. Jan. 24, 2022); *Ford v. Saul*, 950 F.3d 1141, 1153–54 (9th Cir. 2020) (reviewing district court’s order affirming the ALJ’s denial of social security benefits); *Barnes v. Berryhill*, 895 F.3d 702, 704 (9th Cir. 2018); *Revels v. Berryhill*, 874 F.3d 648, 653 (9th Cir. 2017); *Trevizo v. Berryhill*, 871 F.3d 664, 674 (9th Cir. 2017); *Carillo-Yeras v. Astrue*, 671 F.3d 731, 734 (9th Cir. 2011); *Vernoff v. Astrue*, 568 F.3d 1102, 1105 (9th Cir. 2009); *Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007); *Batson v. Commissioner of Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004). The appellate court’s “review of the Commissioner’s decision is ‘essentially the same as that undertaken by the district court.’” *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999) (quoting *Stone v. Heckler*, 761 F.2d 530, 532 (9th Cir. 1985)).

The decision of the Commissioner must be affirmed if it is supported by substantial evidence and the Commissioner applied the correct legal standards. *See Coleman v. Saul*, 979 F.3d 751, 755 (9th Cir. 2020); *Larson*, 967 F.3d at 922; *Barnes*, 895 F.3d at 704; *Carillo-Yeras*, 671 F.3d at 734; *Lewis*, 498 F.3d at 911; *Batson*, 359 F.3d at 1193; *Benton*, 331 F.3d at 1035; *Connett v. Barnhart*, 340 F.3d 871, 873 (9th Cir. 2003). When reviewing factual determinations by the Commissioner, acting through the administrative law judge (“ALJ”), this court affirms if substantial evidence supports the determinations. *See Saelee v. Chater*, 94 F.3d 520, 521 (9th Cir. 1996) (per curiam). *See also Biestek v. Berryhill*, 139 S. Ct. 1148, 1152 (2019) (“The agency’s factual findings ... are ‘conclusive’ in judicial review of the benefits decision so long as they are supported by ‘substantial evidence.’” (citing 42 U.S.C § 405(g)). “Under the substantial-evidence standard, a court looks to an existing administrative record and asks

whether it contains ‘sufficien[t] evidence’ to support the agency’s factual determinations.’” *Biestek*, 139 S. Ct. at 1154. “[T]he threshold for such evidentiary sufficiency is not high.” *Id.*

“If the evidence is susceptible to more than one rational interpretation, it is the ALJ’s conclusion that must be upheld.” *Ford*, 950 F.3d at 1154. *See also Shaibi v. Berryhill*, 883 F.3d 1102, 1108 (9th Cir. 2017); *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007); *Flaten v. Sec’y of Health & Hum. Servs.*, 44 F.3d 1453, 1457 (9th Cir. 1995). However, the Commissioner’s decision cannot be affirmed “simply by isolating a specific quantum of supporting evidence.” *Hammock v. Bowen*, 879 F.2d 498, 501 (9th Cir. 1989) (internal quotation marks and citation omitted); *see also Hill v. Astrue*, 698 F.3d 1153, 1159 (9th Cir. 2012); *Orn*, 495 F.3d at 630. The record as a whole must be considered. *See Ghanim v. Colvin*, 763 F.3d 1154, 1160 (9th Cir. 2014); *Howard v. Heckler*, 782 F.2d 1484, 1487 (9th Cir. 1986). This court reviews “only the reasons provided by the ALJ in the disability determination and may not affirm the ALJ on a ground upon which he did not rely.” *Orn*, 495 F.3d at 630; *see also Luther v. Berryhill*, 891 F.3d 872, 875 (9th Cir. 2018).

“A decision of the ALJ will not be reversed for errors that are harmless.” *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005) (citing *Curry v. Sullivan*, 925 F.2d 1127, 1131 (9th Cir. 1991)); *see also Ford*, 950 F.3d at 1154 (“We may affirm the ALJ’s decision even if the ALJ made an error, so long as the error was harmless, meaning it was inconsequential to the ultimate nondisability determination.”); *Buck v. Berryhill*, 869 F.3d 1040, 1048 (9th Cir. 2017) (“The Court may not reverse an ALJ’s decision on account of a harmless error.”); *Lockwood v. Comm’r of Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010); *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008) (“[T]he court will not reverse the decision of the ALJ’s decision for harmless error, which exists when it is clear from the record that the ALJ’s error was inconsequential to the ultimate nondisability determination.” (internal quotation marks and citation omitted)); *Stout v. Comm’r of Soc. Sec. Admin.*, 454 F.3d 1050, 1054 (9th Cir. 2006). An error is harmless “when it is clear from the record that the ALJ’s error was inconsequential to the ultimate nondisability determination.” *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008); *see also Ford*, 950 F.3d at 1154. “Overall, the standard of review is ‘highly deferential.’” *Rounds v. Comm’r Soc. Sec. Admin.*, 807 F.3d 996, 1002 (9th Cir. 2015) (as amended).

A reviewing court may not make independent findings based on the evidence before the ALJ to conclude that the ALJ’s error was harmless. . . . Rather, “[the court is] constrained to review the reasons

the ALJ asserts.” ... If the ALJ fails to specify his or her reasons for finding claimant testimony not credible, a reviewing court will be unable to review those reasons meaningfully without improperly “substitut[ing] [its] conclusions for the ALJ’s, or speculat[ing] as to the grounds for the ALJ’s conclusions.” ... Because [the court] cannot engage in such substitution or speculation, such error will usually not be harmless.

Brown-Hunter v. Colvin, 806 F.3d 487, 492 (9th Cir. 2015) (as amended) (citations omitted).

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and for resolving ambiguities. *See Benton ex rel. Benton v. Barnhart*, 331 F.3d 1030, 1040 (9th Cir. 2003); *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001) (as amended on rehearing). The ALJ, however, cannot discount a claim of excess pain without making specific findings justifying that decision. *See Johnson v. Shalala*, 60 F.3d 1428, 1433 (9th Cir. 1996). These findings must be supported by clear and convincing reasons and substantial evidence in the record as a whole. *See id.*

The ALJ’s determinations of law are reviewed de novo, although deference is owed to a reasonable construction of the applicable statutes. *See Edlund*, 253 F.3d at 1156; *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000). The Commissioner’s interpretation of social security statutes or regulations is entitled to deference. *See Campbell ex rel. Campbell v. Apfel*, 177 F.3d 890, 893 (9th Cir. 1999) (regulation and statute); *Jamerson v. Chater*, 112 F.3d 1064, 1066 (9th Cir. 1997) (statute); *Esselstrom v. Chater*, 67 F.3d 869, 872 (9th Cir. 1995) (regulations). However, “[b]efore deferring to agency interpretation, [the court] independently examine[s] the text and context of the statute. *Larson*, 967 F.3d at 922. If the statute is unambiguous, the court does not defer to the agency’s interpretation. *Id.* A court need not accept an agency’s interpretation of its own regulations if that interpretation is inconsistent with the wording of the regulations or statute under which the regulations were promulgated. *Esselstrom v. Chater*, 67 F.3d 869, 872 (9th Cir. 1995).

Whether new evidence justifies a remand to the Commissioner is reviewed de novo. *See Mayes v. Massanari*, 276 F.3d 453, 461–62 (9th Cir. 2001) (clarifying standard); *Harman v. Apfel*, 211 F.3d 1172, 1174 (9th Cir. 2000); *see also Garrison v. Colvin*, 759 F.3d 995, 1010 (9th Cir. 2014) (reviewing de novo a district court’s determination to remand a case to the Commissioner). Whether the claimant has shown good cause is reviewed, however, for an abuse of discretion.

See Mayes, 276 F.3d at 462. The district court's decision whether to remand for further proceedings or for immediate payment of benefits is reviewed for an abuse of discretion. *See Bunnell v. Barnhart*, 336 F.3d 1112, 1114 (9th Cir. 2003); *Harman*, 211 F.3d at 1175–78.

Fee awards made pursuant to the Social Security Act, 42 U.S.C. § 406(b)(1), are reviewed for an abuse of discretion. *See Crawford v. Astrue*, 586 F.3d 1142, 1146–47 (9th Cir. 2009) (en banc); *Clark v. Astrue*, 529 F.3d 1211, 1213 (9th Cir. 2008); *Widrig v. Apfel*, 140 F.3d 1207, 1209 (9th Cir. 1998). An abuse of discretion occurs if the district court does not apply the correct law or rests its decision on a clearly erroneous finding of fact. *See Clark*, 529 F.3d at 1214.