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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, by and through XAVIER BECERRA, ATTORNEY GENERAL,

Plaintiff,

v.

DAVID BERNHARDT, Secretary of the Interior; JOSEPH R. BALASH, Assistant Secretary for Land and Minerals Management, United States Department of the Interior; UNITED STATES BUREAU OF LAND MANAGEMENT; UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants.

Case No. 4:18-cv-00521-HSG

Case No. 4:18-cv-00524-HSG (related)

STATE PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES

Date: December 5, 2019
Time: 2:00 P.M.
Judge: Hon. Haywood S. Gilliam, Jr.

Courtroom 2, 4th Floor
1301 Clay Street, Oakland, CA 94612

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

TO ALL PARTIES AND COUNSEL OF RECORD:

PLEASE TAKE NOTICE that, on December 5, 2019, at 2:00 P.M., or as soon thereafter as it may be heard, Plaintiff State of California, by and through Xavier Becerra, Attorney General, by and through the undersigned counsel, will, and hereby do, move for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and Civil Local Rule 7. This motion will be made before the Honorable Haywood S. Gilliam, Jr., United States District Judge, Oakland Courthouse, 1301 Clay Street, Oakland, CA 94612.

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiff hereby moves for summary judgment on the ground that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. In support of this motion, Plaintiff submits the accompanying Memorandum of Points and Authorities and a Proposed Order.

Dated: June 3, 2019

Respectfully Submitted,

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/s/ Shannon Clark
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MEMORANDUM OF POINTS AND AUTHORITIES

The State of California challenges a final action by the United States Department of the Interior's Bureau of Land Management ("BLM") to repeal a commonsense rule promulgated in response to widespread increases in hydraulic fracturing operations across the U.S. and documented concerns about these operations' impact on human health and the environment. Following a nearly five-year long rulemaking process in which BLM solicited over 1.5 million comments, the Hydraulic Fracturing on Federal and Indian Lands rule ("Fracking Rule" or "Rule") was issued in March of 2015. 80 Fed. Reg. 16,128 (Mar. 26, 2015) (AR 24014).[1] The Fracking Rule supplemented an antiquated regulatory scheme which had remained unchanged for over 25 years and was no longer adequate to manage the increasing use and complexity of hydraulic fracturing operations coupled with horizontal drilling technology. *Id.* Among other requirements, the Rule ensured the integrity of well construction to prevent contamination of drinking water supplies, set storage requirements for hydraulic fracturing fluids to prevent the leakage of dangerous chemicals and hazardous air emissions, and provided for public disclosure of chemicals injected during fracturing operations. *Id.*

These achievements were short-lived, however. Following a short nine-month rulemaking process in which BLM contradicted its own prior findings regarding the importance of the Rule, the agency abruptly issued a repeal of the Fracking Rule ("Final Repeal" or "Repeal"). *See* 82 Fed. Reg. 61,924 ("Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Rescission of a 2015 Rule") (Dec. 29, 2017) (AR 195). In its haste and determination to rescind the rule, BLM ignored foundational requirements of good rulemaking in the Administrative Procedure Act ("APA") and violated the important public disclosure and "hard look" requirements of the National Environmental Policy Act ("NEPA").

To begin, BLM failed to provide a "reasoned analysis" for the Repeal. The few justifications that BLM provides for its decision to repeal the Fracking Rule are all based on unsupported assertions that directly contradict the agency's prior findings in the record. BLM does not acknowledge or explain these inconsistencies. Similarly fatal to BLM's action is its

[1] The administrative record in this matter is cited as "AR [page number], excluding leading zeros.

failure to consider alternatives that would address any alleged deficiencies with the Rule, rather than a wholesale repeal of its requirements.

Additionally, BLM's Repeal only considered the agency's perceived faults with the Rule, but not its substantial benefits. The record shows that BLM ignored benefits of the Fracking Rule that the agency had previously found to be important and necessary protections for the environment and public health. In the Regulatory Impact Analysis conducted for the Repeal, BLM fails to explain how the benefits of the Fracking Rule are outweighed by the cost savings of the Repeal, which the agency admitted were minimal.

Further, many of the purported problems with the Fracking Rule that BLM now argues form the basis for the Repeal, were addressed and dismissed by the agency during the promulgation of the Rule. Despite this abrupt change in position, BLM offers no new explanations, data, or other information to justify its decision to ignore its prior findings. This lack of a reasoned explanation, along with BLM's other failures to provide good reasons for the Repeal, render the agency action arbitrary and capricious and in violation of the APA.

BLM's evaluation of potential significant impacts associated with the Repeal also violates NEPA. Notwithstanding evidence that there are substantial questions as to whether the Repeal would cause significant impacts to the environment, and despite the agency's prior findings that failing to implement the rule would result in environmental risks, BLM finds that the Repeal would cause no significant impacts. This unsubstantiated finding reflects BLM's cursory analysis and failure to take a "hard look" at the potential impacts of the Repeal, violating both NEPA and the APA.

As a result of these failings, the Repeal is unlawful and should be vacated by this Court.

STATUTORY BACKGROUND

I. FEDERAL LAND MANAGEMENT STATUTES

BLM is tasked with the regulation and administration of oil and gas operations, including hydraulic fracturing activities, on federal and Indian lands pursuant to several federal land management statutes. The Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1701 *et seq*., directs BLM to "manage the public lands under principles of multiple use and

sustained yield." *Id.* § 1732. FLPMA further requires that BLM undertake its management of public lands "in a manner that will protect the quality of … ecological, environmental, air and atmospheric, [and] water resources … values," *Id.* § 1701(a)(8), and that BLM "take any action necessary to prevent unnecessary or undue degradation of the lands." *Id.* § 1732(b).

The Mineral Leasing Act of 1920 ("MLA"), 30 U.S.C. § 181 *et seq*., similarly directs BLM to "prescribe necessary and proper rules and regulations" to ensure that operations on federal leases are conducted with "reasonable diligence, skill and care," to protect "the interests of the United States," and to safeguard "the public welfare" in federal mineral leases. *Id*. §§ 187, 189. Pursuant to the Indian Mineral Leasing Act of 1983, 25 U.S.C. §§ 396-396g, and the Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-08, oil and gas operations and mineral leases on tribal lands are governed by the rules and regulations promulgated by BLM and subject to BLM's approval. 25 U.S.C. §§ 396d, 2102.

II. NATIONAL ENVIRONMENTAL POLICY ACT

The National Environmental Policy Act, 42 U.S.C. § 4321 *et seq*., is the "basic national charter for the protection of the environment." 40 C.F.R. § 1500.1. The fundamental purposes of the statute are to ensure that "environmental information is available to public officials and citizens before decisions are made and before actions are taken," and that "public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." *Id*. § 1500.1(b)-(c). NEPA requires federal agencies to take a "hard look" at the environmental consequences of a proposed activity before taking action. *See* 42 U.S.C. § 4332; *Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988).

To meet these objectives, federal agencies must prepare a detailed EIS for any "major federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Prior to completing an EIS, an agency may first prepare an environmental assessment to determine whether the effects of an action may be significant. 40 C.F.R. § 1508.9. If an agency decides not to prepare an EIS, it must supply a "convincing statement of reasons" to explain why a project's impacts are not significant. *Nat'l Parks & Conservation Ass'n v. Babbitt*,

241 F.3d 722, 730 (9th Cir. 2001). However, an EIS must be prepared if "substantial questions are raised as to whether a project ... may cause significant degradation of some human environmental factor." *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998). "To trigger this requirement a plaintiff need not show that significant effects will in fact occur." *Id.*

To determine whether a proposed project may significantly affect the environment, NEPA requires that both the context and the intensity of an action be considered. 40 C.F.R. § 1508.27. In evaluating the context, "[s]ignificance varies with the setting of the proposed action" and includes an examination of "the affected region, the affected interests, and the locality." *Id.* § 1508.27(a). Intensity "refers to the severity of impact," and NEPA's implementing regulations list ten factors to be considered in evaluating intensity, including "[u]nique characteristics of the geographic area such as proximity to ... ecologically critical areas," "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial," "[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks," and "[t]he degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration." *Id.* § 1508.27(b). The presence of just "one of these factors may be sufficient to require the preparation of an EIS in appropriate circumstances." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 865 (9th Cir. 2005).

FACTUAL AND PROCEDURAL BACKGROUND

I. MANAGEMENT OF HYDRAULIC FRACTURING OPERATIONS PRIOR TO THE FRACKING RULE

The Department of Interior, and through its delegation, BLM, are responsible for administering oil and gas operations on federal and Indian lands. 30 U.S.C. §§ 181, 187; 43 U.S.C. §§ 1701, 1731; 25 U.S.C. §§ 396, 2102. Collectively, BLM oversees hundreds of millions of acres of mineral estate on federal and tribal lands. 80 Fed. Reg. at 16,129 (AR 24015). At the time of the final Fracking Rule's promulgation, there were approximately 47,000 active oil and gas leases on public lands. *Id.*

Hydraulic fracturing is the process of injecting water and other materials at very high pressures into a well in order to create or enlarge fractures in reservoir rock, thereby creating access to oil or gas within the rock. 80 Fed. Reg. at 16,131 (AR 24017). Chemical additives are frequently added to the injection fluid, the exact makeup of which varies depending on the operator of the well, and the material forming the rock reservoir. *Id.* Many of these additives are known to be hazardous to human health, and impacts from exposure can include cancer, immune system effects, changes in body weight or blood chemistry, cardiotoxicity, neurotoxicity, liver and kidney toxicity, and reproductive and developmental toxicity. AR 21165-21166. Prior to the promulgation of the Fracking Rule, BLM's only existing regulations specific to hydraulic fracking operations, located at 43 C.F.R. § 3162.3-2, had last been revised in 1988. *Id.* These provisions were limited in scope, and required that operators performing "non-routine" fracturing operations seek approval from the BLM. 43 C.F.R. § 3162.3-2. The remaining existing requirements for oil and gas operations, found at 43 C.F.R. § 3162.3-1 and Onshore Oil and Gas Orders 1, 2, and 7, were not specific to hydraulic fracturing operations and had largely remained unchanged for at least 25 years. 80 Fed. Reg. at 16,129 (AR 24015).

Since the promulgation of these authorities, hydraulic fracturing activities increased dramatically throughout the country. 80 Fed. Reg. at 16,131 (AR 24017). BLM estimates that about 90 percent of new wells in 2013 on federal and Indian lands utilized hydraulic fracturing techniques. *Id.* This increase, coinciding with technological advances in horizontal drilling, has expanded oil and gas explorations to shale deposits across the country that had not previously produced large amounts of oil or gas. *Id.*

Public concern over risks associated with hydraulic fracturing, including groundwater contamination and increased seismic activity, grew in response to the rise in fracturing activities. *Id.* Beginning in November 2010, BLM began to address these concerns by holding forums to solicit comments from the public and industry on issues regarding hydraulic fracturing. *Id.* Additionally, the Secretary of Energy convened a Shale Gas Production Subcommittee to evaluate hydraulic fracturing concerns. *Id.* On November 18, 2011, after meeting with representatives from industry, regulatory bodies and environmental groups, the subcommittee

issued its final report which made recommendations for implementing hydraulic fracturing best practices. AR 32185. In particular, the report recommended adopting policies that accelerate the disclosure of fracturing fluid composition, implementing stricter standards for well development and construction, and conducting pressure testing of cemented casing in fracturing wells. *Id.*

II. THE FRACKING RULE

In response to four public forums and the subcommittee's report, on May 11, 2012, the BLM published its proposed rule titled, "Oil and Gas; Well Stimulation, Including Hydraulic Fracturing, on Federal and Indian Lands." *See* 77 Fed. Reg. 27,691 (AR 28257) ("Proposed Rule"). Following an extended comment period on the Proposed Rule, BLM issued a supplemental notice of proposed rulemaking for the Fracking Rule on May 24, 2013 to solicit additional input. *See* 78 Fed. Reg. 31,636 (AR 26338) ("Supplemental Proposed Rule"). During the comment periods for both the Proposed Rule and the Supplemental Proposed Rule, BLM received over 1.5 million comments. 80 Fed. Reg. at 16,131 (AR 24017). Finally, more than four years after BLM held the initial public forum and following multiple comment periods, the BLM published the final Fracking Rule on March 26, 2015. *Id.* at 16,128 (AR 24013).

According to BLM, the Fracking Rule "serves as a much-needed complement to existing regulations designed to ensure the environmentally responsible development of oil and gas resources on Federal and Indian lands, which were finalized nearly thirty years ago, in light of the increasing use and complexity of hydraulic fracturing coupled with advanced horizontal drilling technology." 80 Fed. Reg. at 16,128 (AR 24014). The Fracking Rule "is more protective than the previous proposed rules and current regulations," "strengthens oversight and provides the public with more information than is currently available, while recognizing state and tribal authorities and not imposing undue delays, costs, and procedures on operators." *Id.* In enacting the Fracking Rule, BLM aimed to "ensure that wells are properly constructed to protect water supplies, to make certain that the fluids that flow back to the surface as a result of hydraulic fracturing operations are managed in an environmentally responsible way, and to provide public disclosure of the chemicals used in hydraulic fracturing fluids." *Id.* In particular, the Rule sought to reduce and identify potential "frack hits," or the unplanned surge of pressurized fluid during a

hydraulic fracturing operation into another well, which often results in surface spills. *Id.* at 16,148 (AR 24034).

The requirements established by the Fracking Rule reflect these goals. The Fracking Rule required that operators of hydraulic fracturing operations submit detailed information to BLM about their proposed operation, implement a casing and cementing program that met performance standards to protect usable groundwater, and monitor, test, and remediate, if necessary, well cementing to ensure that it meets performance standards. 80 Fed. Reg. at 16,129 (AR 24015). Additionally, the Rule required that operators monitor pressure during hydraulic fracturing operations, set standards for the storing of injection liquids in secure above-ground storage tanks, and mandated the disclosure of chemicals used in injection fluids to BLM and the public, with limited exceptions. *Id.* at 16,130 (AR 24015). The Rule further eliminated the distinction between "routine" and "non-routine" fracturing operations from the existing BLM regulations, and instead required prior approval for nearly all hydraulic fracturing operations, regardless of whether they were "routine." *Id.* at 16,146 (AR 24032).

The Fracking Rule's requirements supplemented existing federal, tribal and state regulations so as to "establish a consistent standard across Federal and Indian lands and fulfill BLM's stewardship and trust responsibilities." *See* 80 Fed. Reg. at 16,129, 16,178 (AR 24015, 24064). At the time the Fracking Rule was issued, many state regulations fell short of the requirements imposed by the Fracking Rule. For example, at least six of the nine states where the majority of fracking on federal land occurs did not require the use of tanks instead of pits for containing injection waste fluids, as the Fracking Rule does. *See* 80 Fed. Reg. at 16,162-63 (AR 24047-24048); AR 24325-24329. Additionally, most of the nine states' regulations on monitoring and verifying the integrity of cement casing fell short of the Fracking Rule's requirements. AR 24291. The Fracking Rule contemplated concurrent state regulation of wells on federal lands and in no way prevented states from enacting stricter requirements. 80 Fed. Reg. at 16,178 (AR 24064). States or tribes could also apply for a variance from the requirements of the Fracking Rule. *Id.* at 16,175 (AR 24061). Further, BLM estimated that compliance with the Fracking Rule was expected to cost about $11,400 per well, or approximately 0.13 to 0.21 percent

of the cost of drilling a well (an estimate that BLM has since lowered in its Final Repeal), but noted that such costs may be overstated to the extent that the Fracking Rule's provisions are already required by state regulations or are consistent with the voluntary, existing practices of operators. *Id.* at 16,130 (AR 24016). BLM found that the Fracking Rule would not "adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities." AR 24372.

III. TENTH CIRCUIT LITIGATION OVER THE FRACKING RULE

Shortly after the Fracking Rule was finalized, two industry groups, the States of Wyoming, Colorado, North Dakota, and Utah, and the Ute Indian Tribe (collectively, "Petitioners") filed or intervened in lawsuits challenging the Rule in Federal District Court in Wyoming. *See Indep. Petroleum Ass'n. of America, et al. v. Jewell*, *et al.*, Case No. 2:15-CV-041-SWS (D. Wyo. petition filed Mar. 20, 2015) (AR 78935); *State of Wyoming, et al. v. U.S. Dep't of the Interior, et al.*, Case No. 2:15-CV-043-SWS (D. Wyo. petition filed Mar. 26, 2015) (AR 83502). Citizen Groups subsequently moved to intervene in support of BLM on June 2, 2015. AR 79634. Petitioners argued that BLM lacked the statutory authority to regulate fracking on federal and Indian lands, and the District Court agreed in a merits decision issued on June 21, 2016, and set aside the Fracking Rule. *State of Wyoming v. U.S. Dep't of the Interior*, No. 2:15-CV-043-SWS, 2:15-CV-041-SWS, 2016 WL 3509415 (D. Wyo. June 21, 2016); AR 22234. BLM and the Citizen Group Respondents appealed to the Tenth Circuit Court of Appeals. *See* AR 83212, 86287.

While these appeals were pending, and following President Donald Trump's inauguration in January 2017, the Tenth Circuit requested that BLM provide a statement to the court confirming whether their positions on the issues presented on appeal remained the same in light of the change in administration. AR 110031-110032. On March 15, 2017, BLM responded to the court, stating that BLM had begun reviewing the Fracking Rule "for consistency with the policies and priorities of the new Administration," and that this "initial review revealed that the [Fracking Rule] does not reflect those policies and priorities." AR 110034. BLM stated that it had "begun

the process to prepare a notice of proposed rulemaking … to rescind the [Fracking Rule]." AR 110034-110035.

On September 21, 2017, based on BLM's decision to rescind the Rule, the Tenth Circuit Court of Appeals dismissed the appeals of the District Court's decision as prudentially unripe and vacated the District Court's June 21, 2016 judgment invalidating the Fracking Rule. *Wyoming v. Zinke*, 871 F.3d 1133 (10th Cir. 2017) (AR 110635-110638; AR 110603-110630).[2]

IV. EXECUTIVE ORDER 13783 AND SECRETARIAL ORDER 3349

On March 28, 2017, President Trump issued Executive Order 13783, titled, "Promoting Energy Independence and Economic Growth." 82 Fed. Reg. at 16,093 (AR 19392). The order establishes that "it is the policy of the United States that … agencies immediately review existing regulations that potentially burden the development or use of domestically produced energy resources." *Id.* Section 7, "Review of Regulations Related to United States Oil and Gas Development," orders the Secretary of the Interior to review the Fracturing Rule for consistency with this policy and "if appropriate, shall, as soon as practicable, suspend, revise, or rescind the guidance, or publish for notice and comment proposed rules suspending, revising, or rescinding [the Fracking Rule]." *Id.* at 16,096 (AR 19395).

The very next day, Secretary of the Interior Ryan Zinke issued Secretarial Order 3349, titled, "American Energy Independence," in order to implement Executive Order 13783. AR 19419. The order states that "as previously announced by the Department, BLM shall proceed expeditiously with proposing to rescind the [Fracking Rule]." AR 19422.

V. THE FRACKING RULE REPEAL

Less than four months later, on July 25, 2017, BLM proposed to repeal Fracking Rule in its entirety ("Proposed Repeal"). 82 Fed. Reg. 34,464 (AR 16483). The eight-page Proposed Repeal stated that it reviewed the Fracking Rule at the direction of Executive Order 13783 and Secretarial Order 3349 and as a result, the agency now "believes that compliance costs associated with the [Fracking Rule] are not justified." *Id.* at 34,466-67 (AR 16485-16486). BLM also

[2] Throughout this litigation, BLM never contended that it lacked the statutory authority to regulate hydraulic fracturing. *See* AR 110119 (BLM explaining that it "had authority to promulgate the Hydraulic Fracturing Rule," and "Congress has never revoked that authority").

referenced concerns from oil and gas companies and trade associations that the Fracking Rule "would cause substantial harm to the industry." *Id.* at 34,466 (AR 16485). The Proposed Repeal concluded that despite originally finding that the Fracking Rule "would not pose a significant burden to industry," it now "recognizes that [the Rule] would pose a financial burden to industry if implemented." *Id.* BLM presented no new information regarding costs or the burdens to industry in making these findings. *Id.*

On December 29, 2017, less than ten months after the agency first announced it would rescind the Fracking Rule, BLM published the Final Repeal, which went into effect the same day. 82 Fed. Reg. 61,924 (AR 195). The Repeal eliminated the provisions added by the Fracking Rule in their entirety and returned the language of BLM regulations to nearly what it was prior to the Fracking Rule's implementation. *Id.* In addition to removing these new requirements, the Repeal went even further, eliminating the pre-existing requirement that operators request approval prior to "non-routine fracturing operations." *Id.* at 61,926 (AR 205); *see also* 43 C.F.R. § 3162.3-2. Of the more than 100,000 public comments received on the Proposed Repeal, less than 1 percent supported the Repeal. AR 3562.

BLM gave several reasons for the Repeal. Initially, BLM stated that at the direction of Executive Order 13783 and Secretarial Order 3348, it was taking action to "rescind those rules that are inconsistent" with the Orders' policy to avoid "regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation." 82 Fed. Reg. at 61,925 (AR 200). Pursuant to these Orders, the agency reviewed the Fracking Rule and concluded that "the compliance costs associated with the 2015 rule are not justified." *Id.* BLM argued that existing BLM regulations, combined with state and tribal rules on hydraulic fracturing, are adequate to ensure environmentally responsible exploration of oil and gas resources. *Id.* at 61,925-26 (AR 202-203). While BLM admitted that the Fracking Rule did "provide additional assurance that operators are conducting hydraulic fracturing operations in an environmentally sound and safe manner," and that the Repeal could "reduce these assurances," it dismissed these benefits. *Id.* BLM argued that since the Fracking Rule was promulgated, "an additional 12 states have introduced laws or regulations addressing hydraulic fracturing." *Id.*

BLM stated that chemical disclosure of fracturing fluids is more common, and that many operators were making such disclosures voluntarily. *Id.* at 61,925-26 (AR 203). Due to these changes, combined with existing regulations, BLM found the Repeal "relieved operators of duplicative, unnecessary, costly and unproductive regulatory burdens." *Id.* at 61,925 (AR 200).

Alongside the Repeal, BLM issued a "Regulatory Impact Analysis for the Final Rule to Rescind the 2015 Hydraulic Fracturing Rule" ("RIA"), which "relied heavily on the previous analysis from 2015." AR 421, 60759.[3] The RIA estimated that the Repeal would "reduce compliance costs by up to about $9,690 per well," which "represents about 0.1 - 0.2% of the costs of drilling a well." RIA at 53 (AR 476). On a yearly basis, the RIA estimated that compliance costs would range from about $15 - $34 million per year from 2018 to 2027." *Id.* In the RIA, BLM acknowledged that these estimates are lower than the estimated compliance costs for the Fracking Rule. *Id.* The RIA also notes that "the average reduction in compliance costs would be just a small fraction of a percent of the profit margin for small companies, which is not large enough impact to be considered significant." *Id.* at 63 (AR 486). In addition, the RIA finds that the Repeal will forgo benefits including "reductions in the risks to surface and groundwater resources," and "increased public awareness … of hydraulic fracturing operations." *Id.* at 55 (AR 478). The RIA contains an "Evaluation of Cost Savings and Forgone Benefits" ("Cost Benefit Analysis"). *Id.* at 56 (AR 479). Despite the RIA's findings that the saved compliance costs would be minimal, and its acknowledgement that the Repeal would remove the Fracking Rule's expected benefits, BLM still concludes, without further explanation, that the "cost savings would exceed the forgone benefits." *Id.* at 55-56 (AR 478-479).

Also in December 2017, BLM published an "Environmental Assessment, Rescinding the 2015 Hydraulic Fracturing on Federal and Indian Lands Rule" ("EA") and a "Finding of No Significant Impact" ("FONSI"). AR 140, 188. The EA briefly summarizes a few impacts caused

[3] As stated in the Court's Order at ECF No. 87, the Parties have stipulated that any documents that Federal Defendants purport to be deliberative documents, and that are cited in the Parties' merit briefs, will be attached to the brief. Per this stipulation, all such purportedly deliberative documents that State Plaintiff cites are attached here as Exhibit 1. The deliberative materials are ordered numerically by AR number.

by the Repeal, including impacts to ground water, surface water and greenhouse gases, all of which it finds to be insignificant. EA at 30-33 (AR 171-174). The EA offers several arguments to support this conclusion. First, the EA contends that state, tribal and BLM regulations will "reduce the risks associated with hydraulic fracturing." *Id.* at 33 (AR 174). The EA includes a "State-by-state Comparison of Hydraulic Fracturing Laws and Regulations" that provides a brief comparison highlighting state regulations that are "generally consistent" with the Fracking Rule. *Id.* at 43-46 (AR 184-187). The comparison reflects that state regulations are still less protective than the Fracking Rule in many areas, including cement casing requirements, baseline water testing, storage tank requirements, and records retention. *Id.* Second, the EA provides a summary of American Petroleum Institute ("API") guidance documents, which are not mandatory. *Id.* at 33-35 (AR 174-176). The EA also notes that BLM has no data on the amount of operators that comply with this guidance. *Id.* at 35 (AR 176). Finally, the EA concludes that "the reduction in compliance costs that are anticipated as a result of rescinding the [Fracking Rule] appear to be an appropriate tradeoff for any potential lessening of assurances [that operators will conduct hydraulic fracturing in a responsible manner]." *Id.* at 36-37 (AR 177-178).

STANDING

Plaintiffs have standing to bring this action. In order to demonstrate standing, plaintiffs must show that they have suffered "an injury in fact" that is "fairly traceable to the challenged conduct of the defendant," and is "likely to be redressed by a favorable judicial decision." *Lujan v. Defenders of Wildlife*, 506 U.S. 555, 560 (1992). In the NEPA context, "[t]he procedural injury implicit in agency failure to prepare an EIS"—namely, "the creation of a risk that serious environmental impacts will be overlooked"—"is itself a sufficient 'injury in fact' to support standing." *City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975); *see also Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 448-49 (10th Cir. 1996) ("[A]n injury of alleged increased environmental risks due to an agency's uninformed decisionmaking may be the foundation for injury in fact under Article III.") (citing *Douglas County v. Babbitt*, 48 F.3d 1495, 1499-1501 (9th Cir. 1992); *City of Davis*, 521 F.2d at 671). Here, California has a strong interest in preventing the adverse environmental and public health impacts from the use of hydraulic

fracturing on federal and Indian lands within the State. Hydraulic fracturing composes one fifth of all oil and gas production in the state. *See* AR 77476, 77559; AR 23418, 23427, 23365-23366. Thus, the Repeal will adversely impact California by increasing the risks of harmful environmental and public health impacts from conducting hydraulic fracturing on federal and Indian lands, including increased air pollution, impacts to surface and groundwater resources, and induced seismicity from the disposal of wastewater in disposal wells from hydraulic fracturing operations. *See* AR 5056-5057. As a result, California has standing to bring this suit.

STANDARD OF REVIEW

Summary judgment is appropriate when the record shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

The Administrative Procedure Act, 5 U.S.C. § 551 *et seq*., governs the procedural requirements for agency decision-making, including the agency rulemaking process. Judicial review of administrative decisions is governed by section 706 of the APA, 5 U.S.C. § 706. Agency actions are subject to judicial reversal where they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "in excess of statutory jurisdiction, authority, or limitations," or "without observance of procedure required by law." *Id*. § 706(2)(A), (C), (D).

To satisfy the "arbitrary and capricious" standard of review, an agency 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." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*") (internal quotation marks omitted). An agency action is arbitrary and capricious where the agency (i) has relied on factors which Congress has not intended it to consider; (ii) entirely failed to consider an important aspect of the problem; (iii) offered an explanation for its decision that runs counter to the evidence before the agency; or (iv) is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Id.* An agency's decision not to prepare an environmental

impact statement ("EIS") under NEPA is also reviewed under an "arbitrary and capricious" standard. *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 763 (2004).

When an agency reverses course by repealing a fully-promulgated regulation, it "is obligated to supply a reasoned analysis for the change." *State Farm*, 463 U.S. at 42. Further, the agency must show that "the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("*Fox*"). When an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy," it must "provide a more detailed justification than what would suffice for a new policy created on a blank slate." *Id.; see California v. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1123 (N.D. Cal. 2017) ("*California I*") ("New presidential administrations are entitled to change policy positions, but to meet the requirements of the APA they must give reasoned explanations for those changes and address [the] prior factual findings underpinning a prior regulatory regime.") (internal quotations and citations omitted); *see also California v. U.S. Dep't of the Interior*, No. C 17-5948 SBA, 2019 WL 2223804, at *7-9 (N.D. Cal. 2019). Further, any "unexplained inconsistency" between a rule and its repeal is "a reason for holding an interpretation to be an arbitrary and capricious change." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) ("*Nat'l Cable*"). Finally, an agency cannot repeal a validly promulgated rule without first considering alternatives in lieu of a complete repeal, such as by addressing any alleged deficiencies individually. *Yakima Valley Cablevision, Inc. v. F.C.C.*, 794 F.2d 737, 746 n.36 (D.C. Cir. 1986) ("The failure of an agency to consider obvious alternatives has led uniformly to reversal.").

ARGUMENT

I. BLM FAILED TO PROVIDE A REASONED ANALYSIS FOR THE FINAL REPEAL OF THE FRACKING RULE

BLM's rationale for repealing the Fracking Rule fails to meet the standards for taking such action set forth by the U.S. Supreme Court. *See State Farm*, 463 U.S. at 42, 48; *Nat'l Cable*, 545 U.S. at 981; *Fox*, 556 U.S. at 515. First, BLM claims that state and tribal regulations, combined with pre-existing federal requirements, are sufficient to protect the public and the environment

from the risks associated with hydraulic fracturing. Yet the record and BLM's own review of state regulations demonstrate that these requirements fall short of the protections that the Fracking Rule provided. Additionally, BLM asserts that repealing the Fracking Rule complies with Executive Order 13783 because the rule "unduly burdens energy resources development." However, this explanation is contradicted by BLM's own findings that the Fracking Rule will impose insignificant compliance costs on oil and gas operators and will have a minimal, if any, impact on energy development. Finally, despite acknowledging the environmental protections that the Fracking Rule provides the public, BLM failed to consider reasonable alternatives to repealing the entirety of the Rule's requirements.

A. BLM Failed to Explain How State and Tribal Regulations, Along With Preexisting Federal Rules, Will Ensure the Environmentally Responsible Development of Federal Oil and Gas Resources

BLM attempts to justify the Repeal by making the unsupported assertion that state and tribal regulatory programs, as well as pre-existing BLM regulations, are sufficient to protect public health and the environment from harms associated with hydraulic fracturing. It concludes that, as a result of these authorities, the Fracking Rule's requirements are "duplicative, unnecessary, costly and unproductive regulatory burdens." 82 Fed. Reg. at 61,925 (AR 200). These conclusory assertions, however, are expressly contradicted by both the record and BLM's own findings, which demonstrate that existing regulations are not as comprehensive as the Fracking Rule. *See California v. U.S. Dep't of the Interior,* 2019 WL 2223804 at *11 (finding that agency's "conclusory assertions" to justify rule repeal, unsupported by facts or analysis, violated APA). BLM's rationale is all-the-more confounding given that the agency acknowledged in the Fracking Rule that it was "not allowed to delegate its responsibilities to the states." 80 Fed. Reg. at 16,178 (AR 24064).

When promulgating the Fracking Rule, BLM acknowledged that its existing regulations and Onshore Orders were "in need of revision as extraction technology has advanced," and that the Fracking Rule "provided further assurance of wellbore integrity, … public disclosure of chemicals used in hydraulic fracturing, and … safe management of recovered fluids." 80 Fed. Reg. at 16,137 (AR 24023). BLM even acknowledged that the Repeal could reduce "such

assurances." 82 Fed. Reg. at 61,925 (AR 202). Despite these contradictory findings, BLM does not explain how the agency's existing regulations and Onshore Orders now provide sufficient protection from the risks the Fracking Rule was designed to address.

BLM's claim that state and tribal regulations will address the risks caused by hydraulic fracturing similarly falls flat. The agency argues that "since the promulgation of the [Fracking Rule] an additional 12 states have introduced laws or regulations addressing hydraulic fracturing." 82 Fed. Reg. at 61,925 (AR 203). However, the evidence in the record shows that state requirements differ significantly from the Fracking Rule, especially with regard to mechanical integrity testing, pressure monitoring during hydraulic fracturing operations, and post-fracturing disclosure requirements. *See* AR 15737-15742, 15712. Further, BLM's own review of state regulations reflects this disparity, demonstrating that the Fracking Rule remains more stringent and protective than most state rules. *See* EA at 41-46 (AR 182-187). For example, the agency's review shows that a majority of states, including most of the major states with hydraulic fracturing activities, do not meet the Fracking Rule's cement casing requirements, nor the minimum requirements for storage tanks or records retention. *Id.* at 43-44 (AR 184-185).

Moreover, even those state regulations that BLM represents as "generally consistent" with Fracking Rule provisions still fall short in important ways. *See* EA at 44 (AR 185). BLM finds, for example, that nearly all the states it reviewed require chemical disclosure of hydraulic fracturing fluids to FracFocus,[4] and concludes that because use of FracFocus is "more prevalent than in 2015, there is no continuing need for a federal chemical disclosure requirement." *See* 82 Fed. Reg. at 61,926 (AR 203); EA at 41-46 (AR 182-187). As noted by commenters, however, the Fracking Rule mandated the disclosure of much more information than just the chemicals used in injection fluids, such as information regarding the sources and locations of water used in the fluid. *See* 80 Fed. Reg. at 16,166-67 (AR 24052-24053).

[4] FracFocus is a website managed by the Ground Water Protection Council, a non-profit organization of state water quality regulatory agencies, and by the Interstate Oil and Gas Compact Commission, a multi-state government agency charged with balancing oil and gas development with environmental protection. 80 Fed. Reg. at 16,130 (AR 24016).

The U.S. Environmental Protection Agency ("EPA") similarly questioned BLM's rationale during its interagency review of the Repeal Rule and RIA. In response to BLM's statement that repealing the Fracking Rule would "relieve operators of duplicative, unnecessary, and unproductive regulatory burdens," EPA noted:

> This statement does not appear to be supported by the facts that BLM has provided (e.g., table 2.12 in the RIA). Table 2.12 shows that several states do not have a specified requirement in areas outlined in the 2015 rule.

AR 1041; *see* AR 1044 (EPA commenting that "Please clarify as this statement implies that all of these states have requirements that were in 2015 final rule which is not consistent with Table 2.12 in the RIA."); AR 1068 (EPA commenting that "State regulations vary widely; it is difficult to say that the rule is broadly duplicative."); AR 1110 (EPA commenting that "Table 2.12 shows several instances where states did not have specific regulations aligning with existing BLM rules. It is difficult to state that all 32 states have applicable regulations."); AR 1156 (EPA commenting that "This statement does not seem to be consis[te]nt with Table 2.12. Within that table there appears to be several states that do not appear to have aspects that are described within BLM's rule."); AR 1160 (same); *see also* AR 65854 (U.S. Army Corps of Engineers' commenting that "there are many provisions within this rule that strengthen consideration of how states and federal land management agencies and agencies with substantial critical infrastructure (e.g. dams, levees etc) is accomplished to ensure that fracturing is accomplished in a responsible manner").

Further, even for those states with certain fracturing regulations, those regulations do not necessarily apply to tribal lands. Indeed, BLM admits that many tribes do not have regulations for hydraulic fracturing at all. 82 Fed. Reg. at 61,939 (AR 261). BLM's analysis does not address these shortcomings in state and tribal rules, nor how the water quality and public disclosure concerns BLM discussed when it promulgated the Fracking Rule will be addressed without consistent enforcement of the Fracking Rule's provisions across federal and tribal lands.[5]

[5] As the record shows, BLM's review of state regulations that formed a primary rationale for the Repeal did not begin until after BLM had publicly announced that it would rescind the Rule. For example, BLM did not begin requesting information from states on their fracturing regulations or conducting research on state regulations until after the decision to repeal the Rule had been made. *See, e.g.*, AR 75505-75507, 75053-75054, 74781-74785 (BLM emails requesting information from states on hydraulic fracturing operations and conversations on status of review process from

Ultimately, BLM has failed to provide a reasoned explanation to support its claim that the Fracking Rule is "duplicative, unnecessary, costly and unproductive regulatory burdens" due to state, tribal, and pre-existing regulatory requirements, which is expressly contradicted by the record. This decision-making process fails to show a "rational connection between the facts found and the choice made," in violation of the APA. *State Farm*, 463 U.S. at 43; *California v. U.S. Dep't of the Interior*, 2019 WL 2223804, at *8-12.

B. Executive Order 13783 Cannot Justify Repealing the Fracking Rule

The Final Repeal is also not justified by Executive Order 13783. Executive Order 13783 requires agencies to "suspend, revise or rescind" regulations that "unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law." 82 Fed. Reg. at 16,093 (AR 19392). Citing the Executive Order, BLM states it conducted a review of its regulations and found that the "compliance costs associated with the [Fracking Rule] are not justified." 82 Fed. Reg. at 61,925 (AR 201). Yet BLM provides no evidence to support these assertions.[6]

To the contrary, BLM admits that the Repeal "will not have a significant economic effect on a substantial number of small entities." 82 Fed. Reg. at 61,947 (AR 296). BLM also acknowledges that the "average reduction in compliance costs will be a small fraction of a percent of the profit margin for small companies, which is not a large enough impact to be considered significant." *Id*. at 61,947 (AR 297). The compliance costs that BLM references as being so

March 21 – 27, 2017, following the March 15, 2017 Repeal announcement). Other emails from BLM employees directly reference that they are reviewing state regulations following the decision to repeal. *See, e.g*., AR 75053 (March 22, 2017 email stating, "We are working on rescinding the HF rule and coming up with a new proposal quickly. I was checking on state regulations. I didn't see any change in MT regs on Fracking since 2012."); AR 74611 (March 28, 2017 email "checking on the state regulations"); 74833 (March 24, 2017 email stating, "I am still updating the State comparison status as of current date.").

[6] As with its other primary rationale for the Repeal, Executive Order 13783 was not even issued until March 28, 2017 – two weeks after BLM had already announced it was repealing the Fracking Rule. *See* AR 19392. Despite Executive Order 13783's direction for BLM to review the Fracking Rule "for consistency with the policy set forth in section 1 of this order and, if appropriate, … publish for notice and comment proposed rules suspending, revising, or rescinding those rules" (AR 19395), Secretarial Order 3349, issued the following day, reaffirmed that "[a]s previously announced by the Department, BLM shall proceed expeditiously with proposing to rescind" the Fracking Rule. AR 19417.

burdensome to energy development directly contradict BLM's own prior finding that the costs of the Fracking Rule would be minimal. *See* RIA at AR 476; 80 Fed. Reg. at 16,195 (AR 24081) (The Rule "will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs … or state, local or tribal governments or communities."). *California v. Bureau of Land Mgmt.*, 286 F. Supp. 3d 1054, 1067 (N.D. Cal. 2018) ("*California II*") (finding that BLM failed to provide an adequate explanation because it failed to "point to any fact that justifies its assertion that the Waste Prevention Rule encumbers energy production. Its concern remains unfounded."); *California v. U.S. Dep't of the Interior,* 2019 WL 2223804 at *11-12 (agency's failure to provide data or analysis to support assertion that rule constituted a "burden" on the development of domestic energy sources under Executive Order 13783 was arbitrary and capricious).

In fact, the maximum yearly compliance costs BLM states that operators will save from the Repeal are *lower* than the maximum compliance costs estimated during promulgation of the Fracking Rule.[7] Despite the fact that BLM's new cost estimates are less than earlier estimates the agency found to be minor, BLM does not explain how it now finds such costs more burdensome to energy development. BLM's failure to reconcile this inconsistency prevents it from offering the reasoned explanation required by the APA. *See State Farm*, 463 U.S. at 43 (an agency must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.").

Moreover, by its own terms, Executive Order 13783 does not "impair or otherwise affect" the statutory mandates imposed upon BLM by Congress. 82 Fed. Reg. at 16,096 (AR 19395); *see In re Aiken County*, 725 F.3d 255, 260 (D.C. Cir. 2013) ("[T]he President and federal agencies may not ignore statutory mandates or prohibitions merely because of a policy disagreement with Congress."). FLPMA gives BLM the responsibility of managing oil and gas resources "in a manner that will protect the quality of … ecological, environmental, air and atmospheric, [and] water resources … values." 43 U.S.C. § 1701(a)(8). In finalizing the

[7] BLM estimates that the Repeal will reduce compliance costs up to $34 million per year. RIA at 4 (AR 427). In contrast, BLM previously found that compliance costs for implementing the Fracking Rule might reach $45 million per year. AR 24376.

Fracking Rule, BLM acknowledged specifically that the protections the rule implemented were "in accordance with BLM's stewardship responsibilities under the FLPMA." 80 Fed. Reg. at 16,130 (AR 24016). Moreover, BLM emphasized that the agency was "not allowed to delegate its responsibilities to the states." *Id.* at 16,178 (AR 24064). BLM's use of Executive Order 13783 to justify eliminating rules it promulgated pursuant to statutory responsibility does not meet the reasoned explanation required under the APA and results in arbitrary agency action.

C. BLM Did Not Consider Alternatives to Repealing the Entire Fracking Rule

"[A]n agency must examine significant policy alternatives in order to come to 'reasoned' regulatory decisions." *Action for Children's Television v. FCC*, 821 F.2d 741, 748 (D.C. Cir. 1987); *see also Pub. Citizen*, 733 F.2d at 103 (agency action was "arbitrary and capricious because the agency failed to pursue available alternatives that might have corrected the deficiencies in the program"). Multiple courts in this District have found that an agency's failure to consider alternatives before rescinding or removing the entirety of a regulation was in violation of the APA. In *California v. U.S. Dep't of the Interior*, the Office of Natural Resources Revenue rescinded the entirety of regulations updating the way that the agency calculated royalties from oil and gas leases, without considering alternatives that would more narrowly address the concerns with the regulation that the agency identified. 2019 WL 2223804 at *2, *10-11. The court found that the agency's action was a violation of the APA, stating that "an agency must consider alternatives in lieu of a complete repeal, such as by addressing deficiencies individually." *Id.* at *10. Additionally in *California v. Bureau of Land Management*, BLM completely suspended regulations designed to reduce waste from venting and flaring at oil and gas operations, arguing that the regulations were burdensome to small oil and gas operators. *California II*, 286 F. Supp. 3d at 1066-67. The court held that BLM's failure to consider a more "tailored" suspension of requirements as to small operators, and instead applying the suspension to all operators, "regardless of size," was arbitrary and capricious. *Id.* Similarly, BLM's decision to broadly rescind the Fracking Rule without first considering alternatives designed to address the specific concerns the agency identified fails to provide the "reasoned analysis" required by the APA.

Here, BLM failed to consider alternatives that would have mitigated the alleged failings of the Fracking Rule – namely the purportedly duplicative and costly measures – without removing the provisions that provided important environmental protections. For example, in its review of state regulations, BLM identified several provisions of the Fracking Rule, such as cement casing requirements, measures to prevent frack hits, and storage tank requirements that remain widely unregulated by states. EA at 43-44 (AR 184-185). Instead of a complete repeal, BLM could have considered an alternative that would have kept these less duplicative requirements and better addressed the environmental risks the Fracking Rule sought to prevent. BLM's failure to consider this reasonable alternative violates the APA. *See Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 746 n.36 (D.C. Cir. 1986) (noting that "[t]he failure of an agency to consider obvious alternatives has led uniformly to reversal"); *Pub. Citizen*, 733 F.2d at 103 ("At the very least, [the agency] was required to explain why those alternatives would *not* correct the … problems it had identified."); *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 93, 103 (D.C. Cir. 1984) ("[i]t is well established that an agency has a duty to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives.").

II. BLM FAILED TO CONSIDER THE FULL BENEFITS OF THE FRACKING RULE OR EXPLAIN HOW THE COST SAVINGS OF THE REPEAL EXCEEDS THESE BENEFITS

An agency rescinding a regulation must offer a "reasoned analysis" and "a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 42, 52. Such "reasoned analysis" cannot solely consider the regulation's flaws, with no consideration of its benefits. *California I*, 277 F. Supp. 3d at 1123 ("Defendants' failure to consider the benefits of compliance … rendered their action arbitrary and capricious and in violation of the APA."). In 2015, BLM stated that one of the important benefits of the Fracking Rule was that it created "a consistent, predictable, regulatory framework" that will "establish a consistent baseline" and "promote the development of more stringent standards by state and tribal governments." 80 Fed. Reg. at 16,128, 16,130 (AR 24014, 24016). BLM added that the Rule would "complement existing rules" by "providing further assurances" that hydraulic fracturing was conducted in an environmentally responsible and safe manner. *Id.* at 16,137 (AR 24023).

In the Repeal, BLM almost immediately dismisses any benefit to these "additional assurances,"[8] and in doing so, fails to fully consider the important benefits of a federal requirement. 82 Fed. Reg. at 61,925 (AR 202). For example, the agency does not address that without a consistent federal baseline, states may weaken or repeal their hydraulic fracturing regulations in the future. Nor does BLM acknowledge the role the Fracking Rule may have in encouraging states to develop more stringent rules for hydraulic fracturing operations on their lands. *Id.* at 16,128 (AR 24014). The agency also fails to consider that unlike BLM, states do not need to comply with the stewardship standards and trust responsibilities applicable to public lands. *Id.* at 16,133 (AR 24019). Additionally, as discussed above, the BLM does not address that the Fracking Rule remains much more protective than most state regulations. *See* EA at 43-46 (AR 184-187) (showing how most states still do not match the Fracking Rule's requirements regarding storage tanks, cement casing or water testing).

Moreover, BLM provides no explanation for its finding that the benefits of Repeal will exceed the marginal cost savings from eliminating the Rule's provisions. When promulgating the Fracking Rule, BLM found that the Rule would "not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities." AR 24372. Further, BLM found that the costs of compliance for the Fracking Rule were minimal and represented only a minor percentage of operator's costs per well. AR 24362. In addition, in issuing the Repeal, BLM acknowledges that the expected compliance cost savings from Repeal are even less than the costs originally estimated for implementation of the Fracking Rule. *See* RIA at 54 (AR 477) ("We estimate that this final rule would reduce per-well compliance costs by an average of about $9,690 …. In contrast … we estimated that the [Fracking Rule] would have increased per-well compliance costs by about $11,400."). However, despite these findings, BLM inexplicably concludes that benefits of Repeal will exceed the costs (in terms of foregone environmental and public health protections). *Id.* at 56 (AR 479). This failure to explain how the BLM reached its

[8] According the RIA, "Any incremental benefit that the [Fracking Rule] provided in addition to existing federal, state and tribal regulations and industry standards has heretofore been undemonstrated and is likely to be marginal." RIA at 5 (AR 428).

conclusion, as well as the agency's sole consideration of the Rule's purported flaws, while dismissing its benefits, contravenes the "reasoned analysis" requirement of the APA.

III. BLM'S PROFFERED EXPLANATION RUNS COUNTER TO THE RECORD BEFORE THE AGENCY

"The absence of a reasoned explanation for disregarding previous factual findings violates the APA." *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 969 (9th Cir. 2015). Moreover, when an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy," it must "provide a more detailed justification than what would suffice for a new policy created on a blank slate." *Fox*, 556 U.S. at 515; *see id*. at 537 (Kennedy, J., concurring) ("An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate."). During the promulgation of the Fracking Rule, BLM considered and addressed many of the concerns that the agency now argues warrant the Repeal. BLM provides no explanation for this sudden change in position. Absent "[n]ew facts or evidence coming to light, considerations that [the agency] left out in its previous analysis, or some other concrete basis supported in the record," the Repeal does not satisfy the APA. *California II*, 286 F. Supp. 3d at 1068.

Throughout the multiple comment periods during the promulgation of the Fracking Rule, operators of hydraulic fracturing operations and other entities that would be subject to the Rule raised various objections and concerns. *See* 80 Fed. Reg. at 16,140-216 (AR 24026-24102). Despite already addressing these issues in promulgating the Fracking Rule, BLM now uses many of these same arguments to support the Repeal. For example, BLM argues that the Fracking Rule is duplicative of state and existing BLM regulations. 82 Fed. Reg. at 61,925 (AR 200). However, BLM responded to comments on the Fracking Rule offering this same critique, stating, the agency "recognizes that many states have made efforts to update their hydraulic fracturing regulations in recent years, but those regulations continue to be inconsistent across states." 80 Fed. Reg. at 16,178 (AR 24064). BLM further noted that "state rules may not apply to Indian lands," and that the Fracking Rule will "establish a consistent standard across Federal and Indian lands and fulfill BLM's stewardship and trust responsibilities." *Id.* BLM also disagreed with

comments that said the existing BLM regulations were sufficient to meet the agency's stewardship responsibilities, responding that the Fracking Rule "addresses specific hydraulic fracturing operational aspects … that existing rules do not address." *Id.* at 16,180 (AR 24066). Ultimately, after considering and addressing these concerns, BLM found that the Fracking Rule offered important, necessary and additional protections that applied consistently across tribal lands and finalized the rule. *Id*. BLM has offered no new analysis or information that explains how existing BLM regulations, or state and tribal provisions, will provide the comprehensive protections of the Fracking Rule.

Similarly, BLM now claims that the Fracking Rule imposes "unnecessary burdensome and unjustified administrative requirements and compliance costs." 82 Fed. Reg. at 61,924 (AR 196). Many commenters on the Fracking Rule also claimed that the Rule's costs were overly burdensome and unnecessary. *See* 80 Fed. Reg. at 16,147, 16,160, 16,162-63, 16,180, 16,185-86 (AR 24033, 24046, 24048-24049, 24066, 24071-24072) (discussing that the requirements for prior approval and mechanical integrity tests were "unnecessary and costly" that the rule would negatively affect jobs, revenue and effective government). BLM responded that it "evaluated these [cost] concerns as a part of its economic analysis and found the overall impacts to be nominal in relation to current overall costs of drilling operations." *Id.* at 16,180 (AR 24066). BLM elaborated that "those additional costs would be easily outweighed by revenues that operators might expect from a geologically attractive area." *Id.* at 16,186 (AR 24072).

BLM does not dispute the cost estimates of the Fracking Rule, noting that compliance cost savings on Repeal would be lower than initially estimated. RIA at 53 (AR 476). BLM also admits that "[m]arket forces provide a much stronger impact on employment that the BLM rule as witnessed by the recent industry cycle of volatile prices and corresponding rig activity." AR 75992, 71408. Despite no new factual findings, BLM fails to explain why these concerns, previously addressed, now form the basis for its reversal of position. Because BLM has failed to provide a "reasoned explanation … for disregarding facts and circumstances that underlay or were engendered by the prior policy" it has violated the APA. *Fox*, 556 U.S. at 516.

IV. BLM FAILED TO TAKE A "HARD LOOK" AT THE ENVIRONMENTAL CONSEQUENCES OF REPEALING THE FRACKING RULE

NEPA requires federal agencies to take a "hard look" at the environmental consequences of a proposed activity before taking action. *See* 42 U.S.C. § 4332; *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 864 (9th Cir. 2005). To do so, a federal agency must prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.3. As the Ninth Circuit has found, "the bar for whether 'significant effects' may occur is a low standard." *League of Wilderness Defs. v. Connaughton*, 752 F.3d 755, 760 (9th Cir. 2014). An EIS is required if "substantial questions are raised as to whether a project may cause significant environmental impacts." *Friends of the Wild Swan v. Weber*, 767 F.3d 936, 946 (9th Cir. 2014). In reviewing an agency decision not to prepare an EIS pursuant to NEPA, the inquiry is "whether the responsible agency has reasonably concluded that the project will have no significant adverse environmental consequences." *Save the Yaak Comm.*, 840 F.2d at 717 (internal quotation marks omitted).

Here, there are substantial questions as to whether the Repeal may have significant environmental impacts. In the EA developed for the Fracking Rule, BLM noted that failing to implement the Rule would result in many impacts, including an increased risk of "frack hits," the potential contamination of groundwater and surface water resources, and less information provided to BLM and the public regarding the types of chemicals used in fracking injections. AR 23879-23886. However, in its EA for the Final Repeal, BLM fails to meaningfully discuss any of these impacts. Instead, the EA contains a brief summary of several impacts that the Final Repeal will cause, such as surface and groundwater impacts, which it quickly concludes to be insignificant. EA at 30-31 (AR 171-172). For example, BLM references a 2015 EPA report[9] on the impacts of hydraulic fracturing, which BLM acknowledges "confirms that there are risks to drinking water from hydraulic fracturing operations." *Id.* at 32 (AR 173). BLM further states that the report "indicates a need to assure well-bore integrity and care in conducting fracturing operations with little vertical separation of the fractured stratum and drinking water sources." *Id.*

[9] EPA, Hydraulic Fracturing for Oil and Gas: Impacts from the Hydraulic Fracturing Water Cycle on Drinking Water Resources in the United States (Dec. 2016) (AR 76121).

Despite these findings indicating substantial questions as to whether the Repeal would impose significant impacts, BLM quickly dismisses such findings by arguing that such risks are "rare" and that the "report does not indicate that BLM regulation is necessary in addition to state or tribal regulation." *Id.* This cursory rejection of potential impacts does not establish that the Repeal could not have significant impacts on water sources, and also impedes the "hard look" required of BLM under NEPA.

Moreover, as the comment letter from Plaintiff discusses, recent science conducted in California demonstrates the potential for significant environmental impacts from the use of hydraulic fracturing in California. AR 5056. These impacts include significant and unavoidable impacts to aesthetics, air quality, biological resources (terrestrial environment), cultural resources, geology, soils and mineral resources, greenhouse gas emissions, land use and planning, risk of upset/public and worker safety, and transportation and traffic. *Id*. For example, the California analysis finds that, in Kern County, air emissions resulting from hydraulic fracturing operations "would occur at levels that could violate an air quality standard or contribute substantially to an existing or projected air quality violation." *Id*. The California Council on Science and Technology also released a study in July 2015 which identified several potential direct and indirect impacts from hydraulic fracturing, including the release of volatile organic compounds ("VOCs") from retention ponds and tanks used to store well stimulation fluids, and induced seismicity from the disposal of wastewater in disposal wells. *Id*. As EPA noted in its comments on the induced seismicity issue, "While most induced seismicity has been linked to wastewater injection, in the last few years there has been more induced seismicity that is potentially linked to hydraulic fracturing." AR 1081; *see also* AR 1129. The large number of comments opposing the Repeal (AR 3562) also reflects the degree to which the impacts from hydraulic fracturing "are likely to be highly controversial." 40 C.F.R. § 1508.27(b)(4); *see California v. U.S. Dep't of Transp*., 260 F. Supp. 2d 969, 973-74 (N.D. Cal. 2003) (agency violated NEPA by failing to evaluate "the degree to which the effects on the quality of the human environment are likely to be controversial," especially given "the volume of comments from and the serious concerns raised by federal and state agencies specifically charged with protecting the environment support a

finding that an EIS was required"); *Nat. Res. Def. Council, Inc. v. Dep't of Energy*, 2007 WL 1302498 (N.D. Cal. May 2, 2007) (finding that controversy factor required preparation of EIS); *Ocean Mammal Inst. v. Gates*, 546 F. Supp. 2d 960, 979-80 (D. Haw. 2008) (finding that a "substantial national controversy" regarding the Navy's use of sonar "further supports the need for an EIS").

BLM attempts to "soft-pedal" these potentially significant impacts by stating that such impacts will be reduced by existing BLM regulations, as well as state and tribal rules on hydraulic fracturing. EA at 25-33 (AR 166-174); *see* AR 59617 ("I have lightly edited the EA, as attached. The most substantive suggested edit is on p.20, in which I attempt to soft-pedal the climate change issue"). As discussed above, these arguments are directly undermined by the review of state regulations outlined in the EA itself, which demonstrates that state regulations are significantly less protective than the Fracking Rule. EA at 41-46 (AR 182-187). Moreover, as in other parts of the Repeal, the EA fails to discuss how these less comprehensive and inconsistent regulations will provide the same protections as the Fracking Rule. BLM also argues that environmental risks posed by hydraulic fracturing will be adequately addressed by recommendations in API guidance documents. *Id.* at 33-35 (AR 174-176). Yet BLM does not address how these unenforceable documents will offer the same protection as mandatory provisions of the Fracking Rule, and even admits it has no statistics on the industry's compliance with these guidance documents. *Id.* at 52 (AR 193).

BLM also attempts to justify the impacts it acknowledges the Repeal would create by stating that such impacts were an "appropriate tradeoff" for purported reductions in compliance costs. EA at 36 (AR 176-177). However, the EA does not purport to include a cost-benefit analysis as authorized by 40 C.F.R. § 1502.23.[10] Moreover, cost reductions cannot prevent an agency from preparing an EIS under NEPA when the appropriate significance standards have been met. *See* 40 C.F.R. § 1508.27(a); *Klamath-Siskiyou Wildlands Ctr. v. U.S. Forest Serv.*, 373

[10] As this section provides: "If a cost-benefit analysis relevant to the choice among environmentally different alternatives is being considered for the proposed action, it shall be incorporated by reference or appended to the statement as an aid in evaluating the environmental consequences." 40 C.F.R. § 1502.23.

F. Supp. 2d 1069, 1086 (E.D. Cal. 2004) ("Neither the net long term benefits of the program, nor the risk associated with not implementing the project, relieve [an agency] of its duty to conduct an EIS when the project will have significant environmental impacts."). BLM's attempt to wave away significant impacts by simply comparing them to the Final Repeal's purported benefits is improper and undermines its FONSI determination. Moreover, BLM's reliance on purported economic impacts contradicts the agency's own prior assertion that the compliance costs imposed by the Fracking Rule are minimal. *See* 80 Fed. Reg. at 16,180, 16,186 (AR 24066, 24072). This flawed analysis cannot reasonably support BLM's conclusion that the impacts of the Repeal are insignificant.

In sum, BLM's attempts to ignore, undermine, and obfuscate the potentially significant impacts caused by the Repeal fail to provide the "hard look" required by NEPA.

CONCLUSION

For the reasons given above, the State of California respectfully requests that this Court grant its motion for summary judgment, declare that the Repeal is unlawful, and vacate the Repeal.

Dated: June 3, 2019

Respectfully Submitted,

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