Nos. 20-16157 and 20-16158

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SIERRA CLUB, et al.,
Plaintiffs-Appellants,
v.
DAVID BERNHARDT, in his official capacity as Secretary of the Interior, et al.,
Defendants-Appellees

STATE OF CALIFORNIA, et al.,
Plaintiff-Appellant,
v.
BUREAU OF LAND MANAGEMENT, et al.,
Defendants-Appellees

Appeal from the United States District Court for the Northern District of California, Oakland
Nos. 4:18-cv-00521 and 4:18-cv-00524
(Hon. Haywood S. Gilliam, Jr.)

OPENING BRIEF OF PLAINTIFFS-APPELLANTS SIERRA CLUB, ET AL.

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ORAL ARGUMENT REQUESTED

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs-Appellants Sierra Club, Dine CARE, Fort Berthold POWER, Center for Biological Diversity, Earthworks, Western Resource Advocates, The Wilderness Society, and Southern Utah Wilderness Alliance have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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STATEMENT OF JURISDICTION

The district court had federal question jurisdiction, 28 U.S.C. § 1331, because this case challenges a Bureau of Land Management (BLM) decision to repeal a regulation (the Repeal) under federal law.

This Court has jurisdiction under 28 U.S.C. § 1291. Plaintiffs-Appellants Sierra Club, Dine CARE, Fort Berthold POWER, Center for Biological Diversity, Earthworks, Western Resource Advocates, The Wilderness Society, and Southern Utah Wilderness Alliance (collectively, the Citizen Groups) seek review of a final district court order and judgment granting summary judgment for defendants on all claims. See Appellants' Joint Excerpts of Record (ER) at ER000016 (Order); ER000015 (Judgment). Judgment was issued on April 14, 2020. The Citizen Groups timely filed their notice of appeal on June 12, 2020. ER000007; see Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF ISSUES

1. The Citizen Groups submitted undisputed evidence demonstrating that the Repeal eliminated regulatory protections that would have benefitted their members in a variety of ways, and which could have been reinstated by a ruling from the district court. Did the court err in holding that Citizen Groups lacked standing to assert an Administrative Procedure Act (APA) claim challenging the Repeal?

2. BLM's explanations for repealing the 2015 Rule are contradicted by its own analysis in the administrative record. The agency also abandoned its prior conclusion that the 2015 Rule was legally necessary to satisfy its land management responsibilities, without acknowledging that reversal. Should the Repeal be set aside as arbitrary and capricious?

3. BLM prepared an environmental assessment (EA) for the Repeal under the National Environmental Policy Act (NEPA), which recognized that the 2015 Rule would take effect if the agency did not act to repeal it. Did the district court err in excusing flaws in the EA based on the rationale that NEPA compliance was unnecessary because the Repeal did not alter the status quo?

Relevant statutes and regulations are attached in the Addendum at the end of this brief.

STATEMENT OF THE CASE

I. BLM's 2015 HYDRAULIC FRACTURING RULE

This case challenges BLM's repeal of a 2015 regulation, 80 Fed. Reg. 16,128 (Mar. 26, 2015) (the 2015 Rule), that would have protected drinking water, public and tribal lands, and wildlife from contamination and other harms caused by oil and gas development. Five years in the making, BLM adopted the 2015 Rule to "significantly reduce the risks" of oil and gas development, "particularly risks to surface waters and usable groundwater." Id. at 16,203.

Shortly after taking office in 2017, the new presidential administration announced that it would eliminate the 2015 Rule. The decision to repeal the 2015 Rule, 82 Fed. Reg. 61,924 (Dec. 29, 2017) (the Repeal), leaves more than 700 million acres (about 1.1 million square miles) of BLM-managed lands subject to outdated standards that fail to protect water, wildlife, and other resources from contamination and other harms.

Prior to 2015, BLM had not revised its oil and gas regulations in 30 years. 80 Fed. Reg. at 16,131. Since the mid-1980s, however, oil and gas development changed substantially due to the growth of hydraulic fracturing. Hydraulic fracturing is a technique that injects water and chemicals under high pressures through an oil and gas well into geologic formations to fracture the rock and release oil and gas. Id. at 16,130–31. While such techniques have existed for decades, their scale and intensity increased dramatically in recent years. Id. at 16,128. Today, companies combine hydraulic fracturing with advanced horizontal drilling technologies to construct wellbores that are nearly three miles long and where fracturing uses millions of gallons of water per well. ER002010.

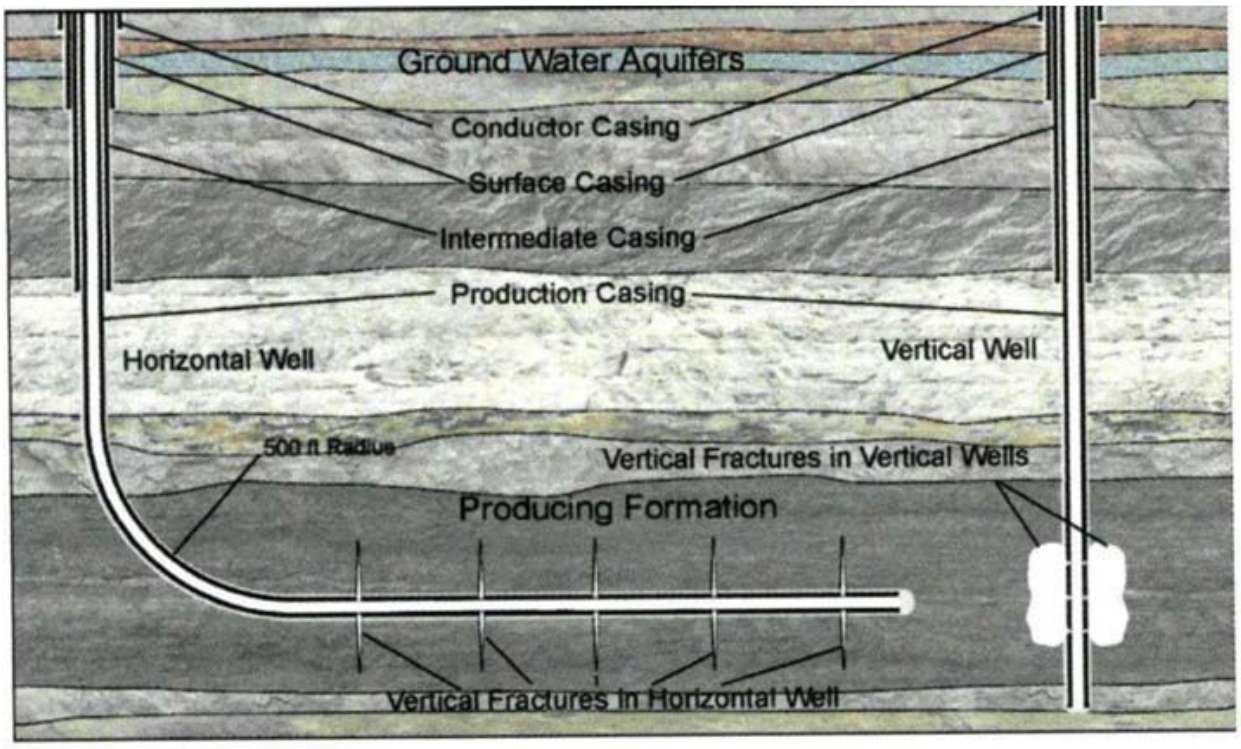

Figure 3—Example of a Horizontal and Vertical Well

ER001170. In addition to facilitating far larger operations, hydraulic fracturing has become much more common. BLM estimates that 90% of new wells today are hydraulically fractured. 80 Fed. Reg. at 16,131.

BLM recognized that its regulations were out of date and inadequate to address the new environmental risks posed by modern hydraulic fracturing. The agency explained that its "current regulations … lack substantive provisions to assure that wellbores will be able to withstand the high pressures" associated with hydraulic fracturing, to "assure proper management of recovered fluids," and to prevent other accidents. ER001210–11 (Environmental Assessment for 2015 Rule (2015 EA) at 4–5). Numerous experts supported this conclusion. For example, the

U.S. Environmental Protection Agency (EPA) commented that modern hydraulic fracturing "raise[s] serious concerns regarding exposure of hydraulic fracturing fluids to drinking water resources." ER002010. BLM also recognized that to comply with its statutory obligations for managing public lands, and as trustee for Indian lands, "it is necessary to have adequate requirements in place without further delay." 80 Fed. Reg. at 16,180; see also pp. 43–47, infra.

In developing the 2015 Rule, BLM undertook an extensive effort lasting nearly five years and involving numerous public forums and consultation sessions with Indian tribes. 80 Fed. Reg. at 16,131–32. BLM also accepted two rounds of public comment during which it received input from more than 1.5 million members of the public. Id. at 16,131. On March 26, 2015, BLM issued the 2015 Rule, which included four main elements, id. at 16,128–30:

- It updated BLM's well construction and testing standards, improving requirements for the casing (pipe) surrounding the wells and ensuring the casing is adequately cemented, among other changes. See p. 4, supra (depicting well casing); ER001383 (Regulatory Impact Analysis for the 2015 Rule (2015 RIA)) at 37–38. This change was supported by extensive

record evidence of groundwater contamination and other accidents resulting from inadequately constructed wells.[1]

- It required the use of tanks instead of pits for storing fracturing wastes. BLM explained that "the storage of flowback, or recovered fluid in pits, poses a risk of impacts to air, water, and wildlife." 80 Fed. Reg. at 16,162. Fracturing wastes are often toxic and can contaminate groundwater by leaking from pits. Pits also kill wildlife that drink from, or fall into, them.[2]

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[1] Several studies estimated well cementing failure rates ranging from 1% to 7%, see, e.g., ER001609–10; ER000787 (Regulatory Impact Analysis for the 2017 Repeal (RIA) at 46); ER001551; see also ER001890 (21% of major environmental violations on federal wells resulted from casing and cementing deficiencies). Hydraulic fracturing company Halliburton Energy Services identifies "casing failure and cementing failure" as key risks, ER001562–63. The record also documents numerous examples of groundwater contamination linked to faulty well construction. See, e.g., ER001651–58; ER001511–12; see also ER001936–39; ER002101–16; ER001919; ER001172–200.

[2] See, e.g., ER001130 (EPA study describing 120 examples of water contamination from pits in six states); ER002078 (New Mexico official stating "[o]perators have not been maintaining proper control of their waste and some of those . . . wastes have gotten into surface and ground water"); ER002133 (Colorado resident fell ill after drinking water contaminated by chemicals leaching from a pit); ER001555, 1562 (Halliburton identifying management of "flowback of reservoir fluids" as a "priority environmental risk"); ER002104 (examples of pit-related contamination); ER001029 (same); ER002115 (same); ER002117 (same); ER002128–32 (same); ER001903 (violations from improper pit construction); ER001908 (same); ER001591–92 (pit-related groundwater contamination on Eastern Shoshone reservation). Pits also can harm livestock and wildlife that attempt to drink from them. See ER000965–66 (livestock dying after drinking out of waste pits); ER001683–84 (bird mortality); ER001794–95 (same). Air pollution is also an issue. ER001700 (describing air pollution from pits); ER001714–15 (same);

BLM found that requiring above-ground tanks better protects wildlife and largely eliminates the risk of leaks damaging groundwater. 2015 EA at 43.

Figure 12. Reserve pit in Carbon County, Wyoming, site of a large waterfowl mortality incident (77 bird carcasses recovered). (USFWS Photo by P. Ramirez)

ER000968 (citing studies about air pollution impacts of pits); ER001503 (noting risks pits pose to air, water, and wildlife).

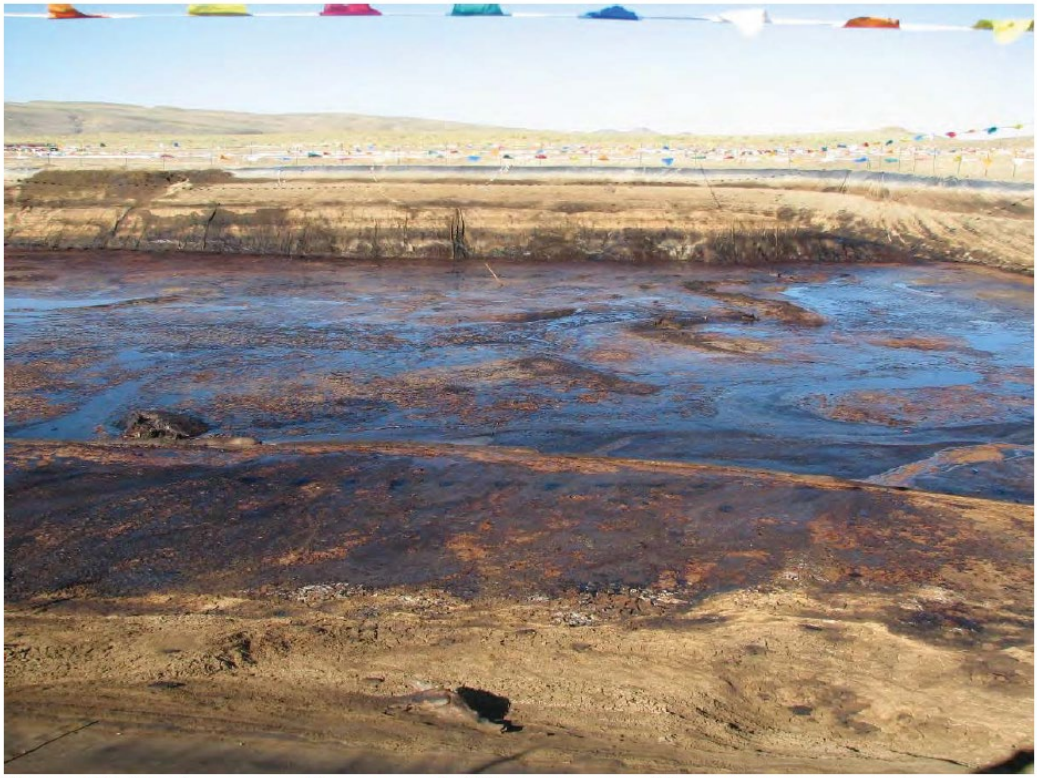

Figure 13. Duck carcass (lower center) in a reserve pit. (USFWS Photo by P. Ramirez)

ER000263.

- It provided for additional oversight by BLM. For the first time, the 2015 Rule required BLM to review and approve all fracturing operations to ensure that no pathways existed for gas or fluids to contaminate aquifers or cause other accidents. See 80 Fed. Reg. at 16,147, 16,153.
- It required public disclosure of the chemicals used for fracturing, many of which can be hazardous, so that BLM can effectively address contamination incidents that do occur. 77 Fed. Reg. 27,691, 27,700–02 (May 11, 2012) (proposed rule). Disclosure also allows first responders and medical professionals to safely address accidents at oil and gas sites. See ER001522.

The compliance costs for these additional protections were very modest: they amounted to only 0.1% to 0.2% of the cost of drilling each well, which BLM determined was too small to discourage energy development. 80 Fed. Reg. at 16,195, 16,208.

Unfortunately, the 2015 Rule's benefits were never realized. Two oil and gas industry trade associations, and several states, challenged the 2015 Rule in in the District of Wyoming, and court orders in that litigation prevented the 2015 Rule from taking effect. See Wyoming v. Zinke, 871 F.3d 1133, 1138–39 (10th Cir. 2017) (Zinke).

II. BLM REPEALS THE 2015 RULE

While a Tenth Circuit appeal of the district court's ruling was pending, a new presidential administration took office in January 2017. Id. at 1140. Intervenor-Appellees Western Energy Alliance (WEA) and American Petroleum Institute (API) immediately began lobbying the new Interior Department officials to eliminate the 2015 Rule. See ER001062, ER001077–78 (API); ER000992–93 (WEA). Then, shortly before oral argument in March 2017, the Tenth Circuit sua sponte directed BLM to confirm whether its positions defending the 2015 Rule (argued in its 2016 appellate briefs) "remain the same, or have now changed." ER001060–61.

The new administration seized the opportunity presented by the Tenth Circuit. Six days after the court's inquiry, BLM reversed position and announced that it planned to rescind the 2015 Rule. ER001052–53. Later that month, President Trump and Secretary of the Interior Ryan Zinke formally directed BLM to rescind the 2015 Rule. 82 Fed. Reg. 16,093, 16,096 (Mar. 28, 2017); ER000994. Following these instructions, BLM moved swiftly to finalize the Repeal. In contrast to the nearly five-year process of developing the 2015 Rule, BLM sped through notice-and-comment rulemaking on the Repeal in just over five months. See 82 Fed. Reg. 34,464 (July 25, 2017) (proposed Repeal); 82 Fed. Reg. 61,924 (Dec. 29, 2017) (final Repeal).

The agency's haste was necessary to prevent the 2015 Rule from taking effect. In response to BLM's planned repeal of the 2015 Rule, the Tenth Circuit dismissed the pending appeals and ordered the lower court ruling vacated, Zinke, 871 F.3d at 1146, which would have allowed the 2015 Rule to take effect. To avoid that result, BLM managed to complete its Repeal on December 29, 2017, just a few days before the Tenth Circuit's mandate issued on January 12, 2018. See ER002139. To prevent the 2015 Rule from taking effect, BLM also took the extraordinary step of waiving APA provisions that normally delay the effective date of new regulations for 30 days. 82 Fed. Reg. at 61,946–47.

In addition to rescinding the 2015 Rule, the Repeal eliminated a provision of BLM's 1980s-era regulations mandating that operators give notice of "nonroutine" fracturing operations. 82 Fed. Reg. at 61,926, 61,936. Thus, the Repeal made BLM's regulations even weaker than they had been before 2015. The Repeal leaves oil and gas development on federal and tribal lands subject to outdated regulations that the agency had acknowledged were inadequate to address the risks from modern hydraulic fracturing.

III. PROCEDURAL HISTORY

On January 24, 2018, the Citizen Groups filed suit to challenge the Repeal. The Citizen Groups are conservation and Native American organizations whose members live, work, and recreate on federal and tribal lands where BLM-approved oil and gas development is occurring and who are affected by such operations. See pp. 18–21, 23–26, infra.

Plaintiff-Appellant State of California filed its own challenge to the Repeal. Both California and the Citizen Groups asserted claims alleging that the Repeal violated the APA and NEPA. The two lawsuits were designated as related cases, and the district court managed them on a consolidated basis. Pp. 16–17, infra. On March 27, 2020, the court entered summary judgment for Defendants. ER000016–45 (Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiffs' Motions for Summary Judgment (Op.) at 30). The court held that the

Citizen Groups lacked standing to bring their APA claim. The court found that California had standing for its APA claim, but rejected the claim on the merits. The district court also ruled for Defendants on the NEPA claims. This timely appeal followed.

SUMMARY OF ARGUMENT

The district court's rulings on both standing and the merits were wrong as a matter of law. First, the dismissal of the Citizen Groups' APA claim on standing grounds was error in light of its holding that it had jurisdiction to decide the same claim asserted by the State of California. Because an Article III case or controversy already existed over that claim, the Citizen Groups were not required to independently establish their own standing. In addition, the district court erred in ruling that the Citizen Groups could not show an injury establishing standing because the 2015 Rule would not have eliminated all impacts from oil and gas development. The Citizen Groups submitted undisputed evidence demonstrating that their members were harmed in a variety of ways by elimination of protections in the 2015 Rule. That was sufficient for standing.

Further, the court's standing ruling applied an incorrect legal standard: it held that the Citizen Groups had not shown their injuries from the Repeal were "current or ongoing." The court, however, failed to consider whether the Repeal

created a "substantial risk" of future harms, which is sufficient for standing and amply demonstrated by the record in this case.

Second, on the merits, the Repeal should be set aside as arbitrary and capricious under the APA for two reasons: (a) BLM's explanations for rescinding the 2015 Rule were contradicted by its own analysis; and (b) BLM failed to acknowledge that it was reversing its prior legal conclusion that the 2015 Rule was necessary to satisfy its statutory obligations as a federal land manager and trustee on Indian lands.

Third, the district court erred in ruling that BLM did not have to comply with NEPA because the Repeal did not alter the status quo. That argument was an improper post hoc rationalization by the agency, which had already prepared a NEPA analysis recognizing that the Repeal would change the status quo. That EA, moreover, violated NEPA by failing to analyze the reasonably foreseeable impacts of the Repeal.

STANDARD OF REVIEW

The district court's award of summary judgment, and its standing ruling, are reviewed de novo. Or. Nat. Res. Council Fund v. Goodman, 505 F.3d 884, 888–89 (9th Cir. 2007) (summary judgment); Fair Hous. of Marin v. Combs, 285 F.3d 899, 902 (9th Cir. 2002) (standing).

Under the APA, a reviewing court must "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." 5 U.S.C. § 706(2)(A). In applying this standard, the reviewing court must engage in "a substantial inquiry[,] ... a thorough, probing, in-depth review" of the administrative record before the agency when it made its decision. Native Ecosystems Council v. U.S. Forest Serv., 418 F.3d 953, 960 (9th Cir. 2005).

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING THE CITIZEN GROUPS' ADMINISTRATIVE PROCEDURE ACT CLAIM FOR LACK OF STANDING.

The district court's refusal to consider the Citizen Groups' APA claim should be reversed for three reasons. First, the court held that another party—the State of California—had standing to assert the same claim seeking the same relief. As a result, the court had jurisdiction to decide that claim and it was unnecessary for the Citizen Groups to separately establish their own standing. Second, the court erred by ruling that because the 2015 Rule would not have eliminated every injury Citizen Group members suffer from oil and gas development, they could not establish any injury caused by its Repeal or that such injuries are redressable. As discussed below, BLM's elimination of protections in the 2015 Rule caused undisputed injuries to Citizen Group members, which the court could remedy.

Third, the court erred by failing to consider whether the Repeal resulted in a substantially increased risk of groundwater contamination and other harms to the Citizen Groups' members, which is sufficient to demonstrate standing.

A. The Citizen Groups Were Not Required to Independently Establish Their Standing Because California Had Standing to Assert the Same Claim.

The district court first erred in holding that it lacked jurisdiction to decide the Citizen Groups' APA claim while the court was resolving the same claim asserted by California. Standing is one element of the Constitutional requirement that a case or controversy must exist for courts to exercise jurisdiction: it requires "plaintiffs to 'alleg[e] such a personal stake in the outcome of the controversy as to ... justify [the] exercise of the court's remedial powers on [their] behalf.'" Town of Chester, N.Y. v. Laroe Ests., Inc., 137 S. Ct. 1645, 1650 (2017) (quoting Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 38 (1976)).

Once one plaintiff with standing establishes a case or controversy, the court has jurisdiction—regardless of whether other parties also have standing. As a result, in cases with multiple plaintiffs, only one needs to have standing for the court to exercise jurisdiction over a particular claim seeking a given remedy. Id. at 1650–51 ("At least one plaintiff must have standing to seek each form of relief requested in the complaint. ... For all relief sought, there must be a litigant with standing"); Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania,

140 S. Ct. 2367, 2379 n.6 (2020); Juliana v. United States, 947 F.3d 1159, 1168 (9th Cir. 2020).

This rule also applies when multiple cases brought by different plaintiffs are consolidated or decided together, because they represent a single case or controversy. See, e.g., Massachusetts v. EPA, 549 U.S. 497, 518 (2007) (holding where multiple petitions filed against EPA decision that "[o]nly one of the petitioners needs to have standing"); Bowsher v. Synar, 478 U.S. 714, 721 (1986) (in consolidated cases, standing of one plaintiff made it unnecessary to address standing of plaintiffs in other case); Sierra Club v. EPA, 762 F.3d 971, 976 (9th Cir. 2014) (in consolidated cases, declining to assess whether Sierra Club had standing after finding other groups did).

The district court erred because the Citizen Groups' APA claim was part of the same case or controversy as California's claim. See Little Sisters, 140 S. Ct. 2379 n.6 (holding that lower court "erred by inquiring into the Little Sisters' independent Article III standing" where another party had standing to seek the same relief). California and the Citizen Groups both filed suit on the same day challenging the same agency decision (the Repeal), Op. at 4, they asserted the same legal claim (violation of the APA), and sought the same relief (an order setting aside the Repeal). Id.; ER000608; ER000612. The court managed them as a single dispute: the cases shared a joint scheduling order, ER000605, BLM and

Defendant-Intervenors filed identical summary judgment briefs in both cases, Op. at 1 n.1, and the court held a joint summary judgment argument. ER000046. The court then resolved both cases with a single order. Op. at 30.

This case is very similar to the Supreme Court's decision in Sec'y of the Interior v. California, 464 U.S. 312 (1984). There, "litigation was instituted through separate but similar complaints filed by the State of California and by the Natural Resources Defense Council [and other conservation groups]." Id. at 319 n.3. The "companion case[s]" were filed on the same day, both challenging Interior Department oil and gas decisions, and had a combined summary judgment argument. California v. Watt, 520 F. Supp. 1359, 1367 (C.D. Cal. 1981) (district court decision in the case). The district court resolved both cases in a single summary judgment order, and dismissed the conservation groups' claims for lack of standing. Id. at 1389; California v. Watt, 683 F.2d 1253, 1270 (9th Cir. 1982) (describing district court ruling).

On appeal, the Supreme Court recognized that because California had standing to assert the same claims, the conservation groups were not required to establish their own standing: "Since the State of California clearly does have standing, we need not address the standing of the other respondents, whose position here is identical to the State's." Sec'y of the Interior, 464 U.S. at 319 n.3. That ruling controls here. As in Secretary of the Interior, the companion cases

brought by California and the Citizen Groups were managed together and the district court exercised its authority to grant or deny relief in a single order. It was error for the court to find that it lacked jurisdiction over the Citizen Groups' APA claim, while deciding the same claim—seeking the same relief—asserted by California.

The district court's error prejudiced the Citizen Groups because it allowed the court to avoid addressing several arguments showing that the Repeal was arbitrary and capricious. The Citizen Groups demonstrated, for example, that BLM's rationale for the Repeal contradicts the agency's own analysis in the administrative record. BLM, in fact, was unable to offer a response to certain of the Citizen Groups' arguments, yet the court's ruling overlooked those issues. See pp. 34–42, infra. It was prejudicial error for the court to reject the Citizen Groups' standing.

B. The Citizen Groups Demonstrated Their Standing.

Regardless of whether it was necessary, the Citizen Groups established their standing to challenge the Repeal. The Citizen Groups collectively have millions of members, many of whom live and recreate on lands where BLM-approved oil and gas development is occurring. ER000484–597; ER000140–216. These members are directly impacted by the Repeal, which rolled back safeguards for every new hydraulically fractured well approved by BLM nationwide across 700 million acres

of federal and Indian lands. 80 Fed. Reg. at 16,129. The Repeal allows thousands of new wells to be drilled each year without measures BLM had determined were necessary to protect groundwater, land, and wildlife. See RIA at 3 (estimating the Repeal affects up to 3,500 wells per year).

To establish Article III standing, a plaintiff must show: (a) an injury-in-fact, (b) caused by or traceable to defendant's conduct, which (c) can likely be redressed by the court. Lujan v. Defs. of Wildlife, 504 U.S. 555, 561–62 (1992). Organizations can assert standing on behalf of their members where these same requirements are satisfied. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 181 (2000).

Threats of future injury to plaintiffs are sufficient for standing where "there is a substantial risk that the harm will occur." Susan B. Anthony List v. Diehaus, 573 U.S. 149, 158, 166 (2014). Plaintiffs also can show injury where they use and enjoy an area affected by defendant's action and "'the aesthetic and recreational values of the area will be lessened' by the challenged activity." Laidlaw, 528 U.S. at 182. The Citizen Groups demonstrated both types of injuries caused the Repeal.

1. The Repeal Injures Citizen Group Members Who Live in the Midst of BLM-approved Drilling.

The Citizen Groups submitted nearly two dozen declarations from members describing how the Repeal harms them. ER000484–597; ER000140–216. For example, BLM approves oil and gas wells and construction of toxic waste pits near

the homes of many members. Some members' homes are literally "surrounded by" BLM-approved development. ER000521 (Hale Decl.); see also ER000525 (J. Bird Bear Decl.). This occurs on Indian lands, as well as "split estate" lands where individuals own the surface but the federal government owns the underlying minerals. In both circumstances, BLM approves drilling operations and waste pits on or near Citizen Group members' property. ER000503–05 (Begaye Decl. describing "checkerboard" pattern of Indian, federal and private lands in New Mexico); ER000510–11 (Pinto Decl.); ER000515 (Baizel Decl.); ER000536 (map depicting oil and gas wells on Fort Berthold Indian reservation); ER000564 (T. Bird Bear Decl.).

Members get drinking water from groundwater sources that would be contaminated by leaks from poorly constructed oil and gas wells or waste pits approved by BLM. ER000513 (Pinto Decl.); ER000515–16 (Baizel Decl.); ER000518–19 (Dronkers Decl.) Numerous oil and gas wells also are drilled near (and under) rivers that supply drinking water. ER000536, ER000567 (hundreds of oil and gas wells surrounding Missouri River on Fort Berthold reservation in North Dakota); ER000526, ER000571 (Missouri River supplies drinking water). That drilling threatens members' health and drinking water, but also economic harm: surface and groundwater contamination would impact their property values and require members to make "significant expenditures for substitute sources of

drinking water." ER000516 (Baizel Decl.). In addition, livestock is sometimes harmed by contact with oil and gas waste pits. ER000512 (describing "cows wading in the wastewater pools" and sheep drinking from them).

These concerns are not hypothetical: members recounted many examples of past damage that the 2015 Rule was designed to prevent, including spills, accidents from poorly constructed wells, and harms from waste pits. ER000511–13 (Pinto Decl.); ER000526 (Bird Bear Decl.); ER000531–32; ER000562. One member described an incident where a BLM-approved well on adjacent land spilled chemical fluids that "crossed over onto my [Indian] trust property." ER000563; see also ER000518–19 (describing nearby residents forced to have "water trucked in" to replace well water following accident at BLM-approved oil and gas well). The administrative record further confirms the reasonableness of members' fears, documenting high rates of faulty well construction and numerous examples of water contamination from oil and gas pits. See pp. 6–8, supra.

Those well-documented risks impact members' enjoyment of their homes and surrounding areas. See, e.g., ER000513 (Pinto Decl.); ER000562 (T. Bird Bear Decl.). Some members, for example, described how they no longer fish in their area, or eat fish caught there, because of concern over drilling-related water contamination on North Dakota's Fort Berthold Indian reservation. ER000521 (Hale Decl.); ER000573 (DeVille Decl.).

The 2015 Rule would have addressed these harms in several ways. By improving well construction standards and eliminating most waste pits, it decreased the likelihood of accidents affecting members' drinking water, livestock and property. See, e.g., ER000510–13; ER000515–16; ER000518–19; ER000571–72. In addition, the 2015 Rule's requirements for disclosure of fracturing chemicals, and the requirement that BLM approve fracturing operations in advance, would also have benefitted Citizen Group members. Those requirements assist BLM and first responders in preventing and addressing accidents, and let members better advocate for protection of their health and property, even before an accident occurs. ER000516; ER000519; ER000533; ER000564.

BLM's elimination of these protections injured the Citizen Groups' members; and an order reinstating the 2015 Rule would redress those injuries. See Air All. Houston v. EPA, 906 F.3d 1049, 1058 (D.C. Cir. 2018) (plaintiffs had standing to challenge delay in regulation that reduced likelihood of accidental chemical releases, where they described past releases in their communities and rule would mitigate future harms by assisting first responders); Nat. Res. Def. Council v. EPA, 749 F.3d 1055, 1062 (D.C. Cir. 2014) (finding standing to challenge rule allowing "unavoidable" equipment malfunctions that would result in air pollution affecting some of plaintiffs' members).

2. The Repeal Injures Citizen Group Members Who Use and Enjoy Lands with BLM-approved Drilling.

The Repeal also causes aesthetic, recreational and scientific injuries to Citizen Group members. Plaintiffs "adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." Laidlaw, 528 U.S. at 182 (internal quotation omitted). A plaintiff may establish an injury-in-fact for standing by showing "a connection to the area of concern sufficient to make credible the connection that the person's life will be less enjoyable ... if the area in question remains or becomes environmentally degraded." W. Watersheds Project v. Kraayenbrink, 632 F.3d 472, 484 (9th Cir. 2011) (quotation omitted).

The Citizen Groups submitted declarations showing that members hike, camp, and view wildlife on public lands near BLM-approved development, and their enjoyment is adversely affected by the Repeal, which allows companies to continue storing huge volumes of waste in earthen pits. For example, one member described discovering an oil and gas pit leaking into same stream drainage he used for drinking water during a backpacking trip in Colorado. See, e.g., ER000593–94 (Hart Decl.). That incident led him to change how he collects drinking water during such excursions. Id. The member also pointed out that BLM-approved drilling in Colorado occurs in steep mountainous terrain, sometimes right at the

border of protected roadless areas and other pristine lands he enjoys. Id. In such locations, oil and gas operations often are "located uphill from nearby streams or adjacent to wetlands" where a large pit-related spill "would be a disaster" for which "remediation of groundwater, soil and the surrounding area would be very difficult if it could be done at all." Id.

In Utah and other states, the waste pits allowed by the Repeal also are an "eyesore" that cause Citizen Groups members to "spend less time in [an] area they otherwise enjoy for photographing and hiking." ER000578 (Rau Decl.); see also ER000585 (Norris Decl. describing "offensive odors" from oil and gas pits); ER000596–97 (DuBois Decl.).

Other members enjoy wildlife that are threatened by waste pits and improperly constructed wells. The Repeal impacts these members' ability to study and observe such species. For example, endangered fish in the Colorado River Basin are affected by extensive BLM-approved drilling in Colorado, Wyoming and Utah. ER000146 (McKinnon Decl.). BLM and the Fish and Wildlife Service have identified threats to the fish from waste pits and other oil and gas-related incidents near rivers and streams. See ER000148 (noting 583 spills in Utah between 2009-2012, and a large 2014 spill that discharged fluids into river representing critical habitat for endangered fish). In Nevada, a member studies rare fish that depend on spring-fed groundwater in areas BLM has offered for oil and gas development,

which poses greater risks following the Repeal. ER000200–01 (Donnelly Decl.). Groundwater contamination from faulty well construction substantially increases the risk that these species would be driven to extinction. Id. If that occurred, the member would not return to enjoy the area "except maybe to stage a funeral for the species." ER000202.

In Colorado, members enjoy watching the Gunnison sage-grouse, a threatened bird species. ER000214–15 (Zukoski Decl.). Wildlife agencies have identified poisoning from oil and gas waste pits as a threat facing the grouse. Id.; see also ER000487–89 (similar threats to California condor and other wildlife in California); ER000515–16, ER000524–25 (wildlife in North Dakota).

The causation and redressability requirements for standing are also met: the continued use of pits and outdated well construction practices cause the injuries described above, and a court can redress them by setting aside the Repeal. See, e.g., Kraayenbrink, 632 F.3d at 484–85 (plaintiff established standing by identifying specific areas of public lands members visited that would be affected and potentially harmed by new federal grazing regulations); Ctr. for Biological Diversity v. Kempthorne, 588 F.3d 701, 707–08 (9th Cir. 2009) (plaintiffs who

viewed walrus and polar bear in Beaufort Sea region had standing to challenge oil and gas regulation that could result in harm to those species).[3]

C. The District Court Applied the Wrong Legal Standard in Concluding that Injuries to the Citizen Groups Were Not Caused by the Repeal or Redressable by the Court.

In dismissing the evidence above, the district court held that the Citizen Groups could not establish causation or redressability for standing because the 2015 Rule would not have eliminated all the harms their members experience from oil and gas development. That is not the test for standing.

A plaintiff must identify a discrete injury the court can remedy, but is not required to demonstrate that a "favorable decision will relieve his every injury." Larsen v. Valente, 456 U.S. 228, 243 n.15 (1982); Los Angeles Haven Hospice, Inc. v. Sebelius 638 F.3d 644, 655 (9th Cir. 2011) (same); Harris v. Bd. of Supervisors, Los Angeles Cty., 366 F.3d 754, 764 (9th Cir. 2004) (finding redressability even though requested relief would "not eliminate all harm") (emphasis original).

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[3] The district court attempted to distinguish Kempthorne and Kraayenbrink on the ground that the Citizen Groups' injuries here were not caused by the Repeal because BLM lands "remained open to oil and gas development." Op. at 11 n.7. This ruling was contrary to law as discussed in parts I.C and I.D, infra. The court's distinction also fails because just as in this case, the lands in Kraayenbrink and Kempthorne remained open to grazing and oil and gas development, respectively. Kraayenbrink, 632 F.3d at 476, 484–85; Kempthorne, 588 F.3d at 706–08. In those cases, this Court recognized that Interior Department regulations nonetheless caused injuries to plaintiffs. The same is true here.

The district court failed to follow this law. It did not dispute the evidence showing how the 2015 Rule would have benefitted the Citizen Groups by eliminating waste pits and protecting groundwater from contamination, but instead focused on other injuries they might still suffer from BLM-approved oil and gas development if the 2015 Rule went into effect. For example, the court acknowledged the harmful impacts of waste pits on Citizen Group members but dismissed the benefits of the 2015 Rule because using tanks instead of waste pits "was never represented as a solution to all harm to wildlife caused by hydraulic fracturing." Op. at 10 (emphasis added). Similarly, the court dismissed the benefits to members of "curtail[ing] some environmental consequences" from improperly-constructed oil and gas wells because "BLM never represented that the updated [well] casing requirements would prevent all possible leaks." Id. (emphasis added).

In doing so, the court wrongly discounted the Citizen Groups' injuries as caused by "oil and gas activity generally," and then erroneously held that "Plaintiffs cannot trace any alleged recreational or aesthetic harm to the Repeal" because the 2015 Rule did not eliminate all harms from BLM-approved oil and gas development. Id. at 10–11. The court also held that reinstating the 2015 Rule would not redress members' injuries "because the land continues to be open to oil and gas development." Op. at 10.

Establishing standing, however, does not require showing that the 2015 Rule would have shut down all BLM-approved drilling, or that it represented a complete solution to every injury Citizen Group members suffer from oil and gas development. In Massachusetts v. EPA, for example, the Supreme Court held the plaintiff had standing to challenge EPA's failure to address global warming, even if EPA action "will not by itself reverse global warming." 549 U.S. at 525 (emphasis original). It was enough that the court could require "steps to slow or reduce" the injury from climate change. Id. The same is true here. The Citizen Groups demonstrated that members will suffer discrete injuries from BLM's repeal of the 2015 Rule's limits on waste pits, improved well construction standards, and informational requirements. Those injuries were sufficient for standing, even if the rule did not resolve every harm related to oil and gas development. See Larsen, 456 U.S. at 243 n.15; Sebelius 638 F.3d at 655.

D. The District Court Erred in Failing to Recognize that a Substantial Risk of Future Injury Is Sufficient for Standing.

Citizen Group members face injury-in-fact from the substantially increased threat of accidents and groundwater contamination caused by the Repeal. See pp. 19–26, supra. The district court acknowledged that the Citizen Groups provided numerous examples where such accidents had already occurred. The court, however, dismissed this evidence because "past injuries are not sufficient to show

actual or imminent injury" for standing. See Op. at 6. This holding erred as a matter of law.

A future injury can support standing where it is (a) certainly impending, or (b) "there is a substantial risk that the harm will occur." Susan B. Anthony List, 573 U.S. at 158, 166 (quotations omitted); Dep't of Com. v. New York, 139 S. Ct. 2551, 2565 (2019) ("[F]uture injuries ... 'may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur.'").

The district court failed to apply the second part of the test: it held that evidence of past accidents did not demonstrate a "certainly impending" injury to the environment, and stopped there. Op. at 9–10. The court, however, never considered whether there is a "substantial risk that the harm[s] will occur" in the future. Susan B. Anthony List, 573 U.S. at 166; Dep't of Com., 139 S. Ct. at 2565. In fact, the district court contradicted Supreme Court precedent by ruling that "increase[d] risk to [Plaintiffs'] members ... cannot meet the standard of actual and imminent injury" for standing purposes. Op. at 9.[4] The district court's failure to apply the correct legal standard was reversible error.

[4] None of the Defendants or Defendant-Intervenors challenged the Citizen Groups' standing on this basis; the issue made its first appearance in the district court's summary judgment decision. See ER000220–21 (challenging Citizen Groups' standing to bring APA claim only on other theories).

In the context of environmental regulations, the "substantial risk" standard recognizes that threats of environmental and health harms often are "purely probabilistic." Sierra Club v. EPA, 755 F.3d 968, 973 (D.C. Cir. 2014). For that reason, courts do not require plaintiffs to show that future harm "certainly would have been averted" by a different agency decision. Id. Instead, courts applying the substantial risk standard have found standing where "a challenged regulation causes individuals to reasonably fear [future] health or environmental harms and thus prevents them from using or enjoying the aesthetic or recreational value of their area." Cal. Cmtys. Against Toxics v. EPA, 928 F.3d 1041, 1049 (D.C. Cir. 2019); Air All., 906 F.3d at 1058 ("potential harm to members [is] sufficient to provide standing" where they work and live near regulated facilities and "described hazards that they face from accidental releases" made more likely from delay of regulation).

The Citizen Groups meet this standard because their members live in the middle of, and recreate near, extensive BLM-approved oil and gas development. They provided numerous examples of the increased threats they face from waste pits and outdated well construction practices that the 2015 Rule would have prevented, and how those threats impair their enjoyment of their homes and neighborhoods. They also identified ways in which they have had to change their activities in light of the risks allowed by the Repeal. See pp. 21–26, supra. Courts

have found similar injuries sufficient for standing. See, e.g., Cal. Cmtys. Against Toxics, 928 F.3d at 1049 (plaintiffs' members "live, commute, work, and recreate near" facilities affected by waste management regulation and described "how their reasonable fear" of its impacts impaired their enjoyment of area); Sierra Club, 755 F.3d at 973 (same); Air Alliance, 906 F.3d at 1058–59 (similar); Kraayenbrink, 632 F.3d at 484–85 (plaintiff established standing by identifying specific areas of public lands members visited that would be affected and potentially harmed by new federal grazing regulations).

Nor were these fears too "hypothetical" or speculative to represent an injury-in-fact, as the district court held. Op. at 9–10. Citizen Group members have reasonable concerns grounded on numerous past incidents of pit spills, water contamination, and accidents from inadequate well construction. That track record demonstrates that the risk of similar accidents in the future is substantial. See Susan B. Anthony List, 573 U.S. at 164 (past enforcement of law is "good evidence" that "threat of future enforcement … is substantial"); Air All., 906 F.3d at 1058 (plaintiffs had standing where they described past accidents); In re Zappos.com, Inc., 888 F.3d 1020, 1027–28 (9th Cir. 2018) (fact that identity theft

had already occurred from some customers of online retailer defendant supported plaintiffs' claim of injury).[5]

The substantial risk of harm from the Repeal is further supported by BLM's own assessment of the 2015 Rule. In 2015, BLM found that the "potential benefits of the rule are significant" and would "significantly reduce the risks associated with hydraulic fracturing operations … to surface waters and usable groundwater." 80 Fed. Reg. at 16,203. BLM also determined that "[t]he need to assure that hydraulic fracturing fluids are isolated from surface waters, usable groundwater, and other wells is clear. … [I]t is necessary to have adequate requirements in place without further delay." Id. at 16,180. BLM's own admissions thus support the Citizen Groups' standing. See Ctr. for Biological Diversity v. EPA, 861 F.3d 174, 185 (D.C. Cir. 2017) (looking to agency's own assessment of regulation's "significance" in concluding that its impacts were "substantial" for standing purposes).

[5] In contrast, Clapper v. Amnesty Int'l USA, 568 U.S. 398 (2013), cited by the district court, Op. at 10, involved much different facts. In Clapper, plaintiffs who communicated by telephone and e-mail with persons abroad challenged surveillance procedures due to concern that their communications would be intercepted at some point in the future. 568 U.S. at 401, 410. Plaintiffs, however, did not allege that their communications had ever actually been intercepted, and the court found that a "chain of inferences" about conduct by various parties would've been necessary for the harm to occur. Id.; see Susan B Anthony List, 573 U.S. at 164 (distinguishing Clapper on this basis).

Given the evidence presented, the district court erred in holding that the Citizen Groups did not have "a personal stake in the outcome of the controversy" over the 2015 Rule that would "justify [the] exercise of the court's remedial powers on [their] behalf." Town of Chester, 137 S. Ct. at 1650 (internal quotation omitted). The district court's standing ruling should be reversed.

II. BLM'S REPEAL OF THE 2015 RULE WAS ARBITRARY AND CAPRICIOUS.

Because of its erroneous standing ruling, the district court never reached the merits of several APA arguments raised by the Citizen Groups. The Court should reach these issues (as well as the APA claims the court did address) and set aside the Repeal as arbitrary and capricious.

An agency acts arbitrarily and capriciously in violation of the APA when it provides "an explanation for its decision that runs counter to the evidence before the agency," or where it has "failed to consider an important aspect of the problem." Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983) (State Farm); 5 U.S.C. § 706(2).

BLM offered three reasons for the Repeal: (a) that it would promote energy development by reducing "regulatory burdens," 82 Fed. Reg. at 61,925, (b) that the 2015 Rule was "duplicative" of state and tribal regulations, id. at 61,939, which purportedly "eliminated" any benefits from the 2015 Rule, RIA at 9, and (c) that "[a]ny marginal benefits provided by the 2015 rule do not outweigh the rule's

costs." 82 Fed. Reg. at 61,939. Each of these rationales conflicts with the record, and the Repeal should therefore be set aside as arbitrary and capricious.

Federal agencies are permitted to change policy, and as the district court stated, "elections have consequences." Op. at 19. But an agency cannot promise benefits (like increased jobs and energy development) that the new policy will not provide. Nor can the agency pretend that its policy reversal will have no costs to the environment and public health when the record shows otherwise. Yet that was what BLM did in the Repeal, and it violated the APA. See Michigan v. EPA, 576 U.S. 743, 752 (2015) (reasoned decisionmaking requires agencies to consider both the advantages and disadvantages of their decisions).[6]

A. BLM's Own Analysis Shows that the Repeal Will Not Increase Oil and Gas Development.

First, BLM arbitrarily asserted that the Repeal would promote more energy development. BLM explained the Repeal as "part of President Trump's goal to reduce the burden of federal regulations that hinder economic growth and energy

[6] In ruling on California's arguments, the district court erroneously characterized BLM as explaining the Repeal as a policy decision "to give more weight to socioeconomic costs" than environmental protection, and acknowledging that some "regulatory gaps" would result because state regulations "provide some, but not all, of the same protections" as the 2015 Rule. Op. at 18, 22. As discussed below, that is not what BLM did. Rather, the agency asserted that the Repeal would promote jobs and energy development without any costs to public health and the environment. See 82 Fed. Reg. at 61,939. BLM's explanation was not supported by the record.

development." ER000874; 82 Fed. Reg. at 61,925 (citing directives to promote "Energy Independence" and eliminate regulations that "encumber energy production, constrain economic growth, and prevent job creation"), 61,944 (agreeing with comments claiming that 2015 Rule hinders energy production). This explanation comported with the President's direction, but it contradicted BLM's own findings.

BLM prepared a regulatory impact analysis assessing the Repeal's economic effects (the RIA), which concluded that the Repeal will not, in fact, increase energy development. See RIA at 60 (ER000739) (admitting that "this final rule is unlikely to substantially alter the investment decisions of firms and is unlikely to affect the supply, distribution, or use of energy"). BLM determined the Repeal is "not expected to impact the number of hydraulic fracturing operations" on federal and tribal lands. 82 Fed. Reg. at 61,941; see also ER000844 (Environmental Assessment for 2017 Repeal (EA) at 24) (concluding in EA that Repeal would not "increase or decrease the number of [fracturing] operations that occur in the future").

The record also shows why the Repeal will not promote energy development. A modern hydraulically fractured well typically costs $5.5 million to $7 million to drill and complete, and the 2015 Rule's compliance costs amount to only 0.1% to 0.2% of that expense. RIA at 4, 55 n.35. BLM noted in 2015 that

"the additional cost [of compliance] per hydraulic fracturing operation is insignificant when compared with the drilling costs in recent years, the production gains from hydraulically fractured well operations, and the net incomes of entities within the oil and natural gas industries." 80 Fed. Reg. at 16,217. Indeed, BLM concluded that the market price of crude oil—not federal regulation—was the only factor having "a significant relationship" affecting the number of wells drilled on federal and tribal lands. RIA at 19.

In the district court, BLM did not dispute this flaw in its justification for the Repeal. ER000136–37; ER000236–37 (raising issue). The court, however, did not address this issue or BLM's tacit concession.

BLM's rationale that the Repeal would promote energy development conflicts with the agency's own analysis and is therefore arbitrary and capricious. See State Farm, 463 U.S. at 43; California v. BLM, 286 F. Supp. 3d 1054, 1065–67 (N.D. Cal. 2018) (BLM violated APA in suspending regulation that allegedly "encumbers energy production" where BLM's own analysis reached contrary conclusion).

B. The 2015 Rule Is Not Duplicative of State and Tribal Regulations.

BLM's second explanation for the Repeal also "runs counter to the evidence before the agency." State Farm, 463 U.S. at 43. BLM asserted that the 2015 Rule is "duplicative" of state and tribal regulations, 82 Fed. Reg. at 61,939, and that any

benefit from the 2015 Rule has been "eliminated by existing legal frameworks" under state and tribal laws. RIA at 9 (emphasis added). The record says otherwise.

The contradiction between the facts and BLM's rationale is especially glaring on Indian lands, where state laws do not apply. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980); ER001027–28 (noting inapplicability of state regulations on Indian lands). BLM's RIA states that only "some" tribes have oil and gas regulations at all, RIA at 3, much less protections comparable to the 2015 Rule. BLM admits that "tribal regulations or enforcement mechanisms … are not fully developed" in many areas. 82 Fed. Reg. at 61,939. BLM was more forthcoming in an earlier draft of the Repeal's Preamble, stating that "BLM is aware that only a minority of the oil and gas producing Indian tribes have regulatory programs to address hydraulic fracturing." ER000984. By repealing the 2015 Rule, BLM created a regulatory gap that leaves most tribes and their members protected only by BLM's outdated and inadequate 1980s-era regulations. See, e.g. ER000959 (Sac and Fox commenting that some tribes "may never have the resources to effectively manage and enforce" their own oil and gas regulations).

The agency never reconciled its explanation for the Repeal with the regulatory void it was creating on tribal lands.[7] BLM's rationale is arbitrary and capricious because it contradicts the agency's own analysis and fails to consider an important aspect of the problem. See East Bay Sanctuary Covenant v. Barr, 964 F.3d 832, 850–52 (9th Cir. 2020) (agency claim that Mexico provided "feasible alternative" for refugees denied asylum was arbitrary where record showed the opposite); Ctr. for Biological Diversity v. Zinke, 900 F.3d 1053, 1068 (9th Cir. 2018) (agency's finding arbitrary where it contradicted study by agency's scientists cited elsewhere in same decision).[8]

Outside tribal lands, state regulations also fail to provide the same level of protection as the 2015 Rule. For example, the 2015 Rule's limits on the use of waste pits, and requirement for prior review and approval of fracturing operations (referred to as a sundry application), go well beyond most state laws. See RIA at 38–42, 51. The EPA made the same point in comments on the proposed Repeal,

[7] In its rush to complete the Repeal, BLM also neglected to consult with several tribes until mid-January 2018—three weeks after the Repeal was finalized. ER000621; see also ER000886 (Nov. 29, 2017 email describing numerous tribal consultations that were "not complete").

[8] The district court never addressed the Citizen Groups' argument on this point. See Op. at 18–19 (quoting BLM discussion of Indian lands without mentioning contradiction between BLM's explanation for Repeal and regulatory gap it created); ER000237–39 (raising issue).

noting that BLM's claim "does not appear to be supported by the facts that BLM has provided" in the RIA. ER000877–78.

BLM had recognized the shortcomings of state regulation when it adopted the 2015 Rule. BLM explained that "state regulations range from not regulating [hydraulic fracturing] activity at all in some states to fairly comprehensive regulation in other states." 80 Fed. Reg. at 16,190. The agency concluded that "not all of the states to which this final rule is applicable have the same requirements and, therefore, this standard is necessary to protect Federal and tribal lands." Id. at 16,161. BLM described the 2015 Rule as "establish[ing] baseline environmental safeguards for hydraulic fracturing operations across all public and Indian lands." Id. at 16,137; see also id. at 16,180 (explaining that BLM "has the responsibility of ensuring for the public and tribes that specific minimum standards are adhered to").

In the Repeal, BLM claimed state regulation had substantially expanded in the two years since 2015 because the number of states with laws "addressing hydraulic fracturing" increased from 20 to 32 states. 82 Fed. Reg. at 61,925.[9] This explanation does nothing to address the gap in protections on tribal lands. Further,

[9] The Repeal also states that "BLM has several pre-existing regulations that it will continue to rely on" in addition to state and tribal regulations. 82 Fed. Reg. at 61,926. Those outdated 1980s-era regulations, however, provide none of the protections added by the 2015 Rule. 2015 EA at 4.

the states with new regulations account for a combined total of less than 1% of BLM-approved oil and gas development. RIA at 38–39. More than 99% of BLM-approved drilling occurs in nine states—and all nine of those states already had regulations "addressing hydraulic fracturing" in 2015, when BLM deemed them inadequate. Id.; 2015 RIA at 51, 56 (ER001204). That circumstance did not change by 2017: BLM's RIA for the Repeal assessed those nine states in detail and confirmed that most of their regulations still do not mandate the same protections as the 2015 Rule. Compare RIA at 38–42 with 2015 RIA at 51–56.[10]

BLM's 2017 conclusion that state regulations have eliminated the benefits of the 2015 Rule was arbitrary and capricious. Barr, 964 F.3d at 850–52; Ctr. for Biological Diversity, 900 F.3d at 1068

C. BLM Arbitrarily Ignored the 2015 Rule's Benefits.

BLM's claim that the costs of the 2015 Rule outweighed its benefits was also arbitrary and capricious. In 2015, BLM had recognized that the "potential benefits of the rule are significant." 80 Fed. Reg. at 16,203. Just two years later,

[10] Because states with new regulations account for less than 1% of BLM-approved drilling, those laws cannot materially affect the environmental benefits from the 2015 Rule. But even for the small number of BLM-approved operations in those states, the 2015 Rule adds significant protections. For example, the administrative record indicates that Alabama and Louisiana allow fracturing waste to be stored in open pits, a practice that would be sharply limited by the 2015 Rule's requirements to use tanks. See RIA at 51; EA at 41. Further, the 2015 Rule requirement for pre-fracturing approvals and post-fracturing disclosures would benefit all new wells in those states. RIA at 51.

BLM completely reversed position in the Repeal. While conceding the rule's minimal compliance costs (only 0.1% to 0.2% of the cost of drilling each new well, RIA at 4), BLM nonetheless asserted that "[a]ny marginal benefits provided by the 2015 rule do not outweigh the rule's costs." 82 Fed. Reg. at 61,939. BLM could only reach this conclusion by using regulatory sleight-of-hand to obscure many benefits of the 2015 Rule.

BLM claimed that the rule's costs outweighed its benefits because "[a]ny potential increase in risk as a result of this" Repeal—i.e., the foregone benefits of the 2015 Rule—"would be partially or completely offset by state and other Federal regulations that would still apply." RIA at 56; 82 Fed. Reg. at 61,939. This finding was arbitrary and capricious because the agency's compliance cost estimates already accounted for other regulations: BLM assigned a cost to the 2015 Rule only where it required action beyond what was already required by other laws.[11]

For example, the agency assumed zero compliance costs for requirements like mechanical integrity testing and well pressure monitoring because they already were required by most or all states or were standard industry practice. See RIA at 48. Conversely, BLM predicted that the 2015 Rule's requirements to use tanks

[11] BLM's cost-benefit assessment was also arbitrary because state and tribal regulations do not match protections provided by the 2015 Rule. See pp. 36–40, supra.

instead of pits, and for cement evaluation logs to ensure adequate well construction, would cost companies money because many states lack similar requirements. Id. at 46–49, 51.

While the tanks and cementing requirements involve costs, they also yield benefits by protecting groundwater and other resources beyond what is required by other laws. See id. at 46–49, 51, 55–56. BLM could not rationally conclude that those benefits were already provided by other state and federal regulations. See Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 446–48 (4th Cir. 1996) (agencies cannot rely on inaccurate economic assumptions).[12]

In effect, BLM's cost-benefit balancing addressed the 2015 Rule's costs while ignoring its benefits. This is classic arbitrary and capricious agency decision making. See Michigan, 576 U.S. at 752 (APA requires agencies to consider both costs and benefits of their decisions); Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172, 1198–1203 (9th Cir. 2008) (agencies "cannot put a thumb on the scale by undervaluing the benefits and overvaluing the costs of more stringent standards").

[12] BLM had no response the Citizen Groups' argument pointing out this flaw. See generally ER000225-28; ER000239–41 (raising issue). The district court, however, did not address the issue.

III. BLM FAILED TO EXPLAIN ITS REVERSAL ON WHETHER THE 2015 RULE WAS REQUIRED TO MEET ITS LEGAL DUTIES.

BLM also arbitrarily reversed itself on a key legal issue without any explanation. In 2015, BLM concluded that the 2015 Rule was necessary to meet its obligations as a land manager under the Mineral Leasing Act (MLA) and Federal Land Policy and Management Act (FLPMA), and as a trustee on Indian lands. In 2017, BLM reached the opposite conclusion without acknowledging its change in position. This reversal violated the APA.

When an agency changes position, the APA requires it to (a) "display awareness that it is changing position;" (b) show that the new policy is permissible under governing statutes; (c) explain why the agency believes the new policy is better than the old one; and (d) "show that there are good reasons for the new policy." Fed. Commc'ns Comm'n v. Fox Television Stations, Inc., 556 U.S. 502, 515–16 (2009). An "unexplained inconsistency in agency policy is a reason for holding [its legal] interpretation to be an arbitrary and capricious change from agency practice." Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2126 (2016) (quotations and alterations omitted); see also California v. Azar, 911 F.3d 558, 577 (9th Cir. 2018) (rejecting agency's "unexplained about-face" on legal issue related to Affordable Care Act regulations).

The 2015 Rule sought to discharge several BLM statutory obligations. For example, FLPMA directs BLM to manage public lands for multiple uses "in a

manner that will protect the quality of … ecological, environmental, air and atmospheric, water resource," and other values. 43 U.S.C. §§ 1701(a)(8), 1702(c). In addition, the MLA charges BLM with requiring that companies use "reasonable diligence, skill, and care," and instructs BLM to protect the "interests of the United States" and "the public welfare." 30 U.S.C. § 187. On Indian lands, the Indian Mineral Leasing Act (IMLA), 25 U.S.C. § 396d, and the government's trust relationship with Indians, impose a duty to manage mineral development "for the benefit of the Indian landowners." Woods Petroleum Corp. v. Dep't of the Interior, 47 F.3d 1032, 1038 (10th Cir. 1995) (en banc); Assiniboine & Sioux Tribes of Fort Peck Indian Reservation v. Bd. of Oil & Gas Conservation of Mont., 792 F.2d 782, 794 (9th Cir. 1986).

In 2015, BLM "determined that the collections of information in the [2015 Rule] are necessary to enable the BLM to meet its statutory obligations to regulate operations associated with Federal and Indian oil and gas leases [under MLA and IMLA]; prevent unnecessary or undue degradation [under FLPMA]; and manage public lands using the principles of multiple use and sustained yield [under FLPMA]; and protect resources associated with Indian lands [pursuant to IMLA and the trust obligation]." 80 Fed. Reg. at 16,154. BLM also stated that it was promulgating the 2015 Rule "consistent with its trust responsibilities on tribal lands and with its obligations [under FLPMA]" because its "current regulations …

lack substantive provisions to assure that wellbores will be able to withstand the high pressures" associated with hydraulic fracturing, "assure proper management of recovered fluids," and prevent other accidents. 2015 EA at 4–5. BLM found that "it is necessary to have adequate requirements in place without further delay." 80 Fed. Reg. at 16,180.

In 2015, BLM also rejected calls to leave regulation to states and tribes because doing so would violate FLPMA and other laws. The agency noted that "none of the BLM's statutory authorities authorize delegation of the BLM's regulatory duties to state or tribal agencies," 80 Fed. Reg. at 16,176, and that "[t]he BLM's regulations are necessary because the BLM is unable to delegate its responsibilities to the states and tribes," id. at 16,190. It explained that "a major impetus for a separate BLM rule is that states are not legally required to meet the stewardship standards that apply to public lands and do not have trust responsibilities for Indian lands under Federal laws." Id. at 16,133. Because state regulations vary widely, BLM determined that it "needs a baseline set of standards" that "meet the agency's unique responsibilities under the FLPMA, the Indian mineral leasing acts, and other statutes to administer oil and gas operations in a manner that protects Federal and Indian lands." Id. at 16,190.

Two years later, BLM disregarded these legal conclusions without acknowledging them. The agency reversed course and chose to defer to state

regulations it had previously discounted as inadequate, relying on "states and tribes taking the lead for regulating most hydraulic fracturing activities." 82 Fed. Reg. at 61,945. BLM also asserted that state and tribal laws "provide a better framework than the 2015 rule for mitigating the impacts of associated with hydraulic fracturing operations." Id. at 61,939. BLM, however, never reconciled this approach with its earlier legal conclusion that doing so would be contrary to law. See id. at 61,935 (asserting Repeal complies with law but not mentioning its contrary 2015 conclusion). Nor did BLM demonstrate, or even claim, that existing state and tribal regulations satisfy FLPMA, the MLA, the IMLA, or BLM's trust responsibilities.

The Repeal fails the FCC v. Fox requirements. BLM ignored its earlier legal conclusions, and thus did not "display awareness" that it was changing position. FCC v. Fox, 556 U.S. at 515. Nor did BLM explain why its new legal interpretation is better. Id. And BLM failed to supply "good reasons" for its reversal. Id. at 515–16. BLM's unexplained legal about-face was arbitrary and capricious. Encino Motorcars, 136 S. Ct. at 2126; Azar, 911 F.3d at 577; Or. Nat. Desert Ass'n v. Rose, 921 F.3d 1185, 1189–90 (9th Cir. 2019) (BLM's

unexplained re-interpretation of "roads and trails" under Steens Act was arbitrary and capricious).[13]

IV. THE REPEAL VIOLATED NEPA.

BLM also failed to comply with NEPA. NEPA requires the preparation of a detailed environmental impact statement (EIS) for any "major federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). An agency also may prepare a shorter environmental assessment (EA) to assess whether an EIS is required. See 40 C.F.R. § 1508.9 (2019). NEPA analysis serves two purposes: it requires agencies to consider environmental impacts in advance, so that "important effects will not be overlooked or underestimated." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). In addition, the "broad dissemination of relevant environmental information" allows the public to effectively comment and participate in agency decisionmaking. Id. at 349–50.

[13] Unlike other Citizen Group arguments, the district court did address this issue. In a footnote, the court erroneously ruled that BLM's reversal was not arbitrary and capricious because the agency only needs to explain factual reversals, not legal reversals. Op. at 15 n.9; see also ER000234 (raising issue). But an unexplained legal inconsistency is just as arbitrary as a factual one. While the APA requires a more detailed explanation where the "new policy rests upon factual findings that contradict those which underlay its prior policy," FCC v. Fox, 556 U.S. at 515–16, an agency cannot reverse its legal position with no explanation at all. Encino, 136 S. Ct. at 1189; Azar, 911 F.3d at 577; Rose, 921 F.3d at 1189–90. That is what BLM did in the Repeal, and it violated the APA.

The Repeal eliminated protections for wildlife, land, and groundwater on thousands of BLM-approved oil and gas wells each year across the country. The agency, however, prepared just a brief EA that devoted a scant 10 pages to analyzing the impacts of BLM's 2017 decision. EA at 30–39 (ER000844). That cursory analysis had serious flaws. See pp. 55–62, infra; ER000235 (raising issue).

The district court sidestepped those flaws by ruling that (even though BLM had prepared a NEPA analysis) NEPA did not apply. This holding misapplied controlling precedent and contradicted the record.

A. The District Court Erred in Finding that No NEPA Analysis Was Required.

The district court did not address the flaws in BLM's EA. Instead, it accepted BLM's argument that no NEPA analysis was required because the Repeal did not change the "environmental status quo." Op. at 25–26. BLM's defense was an improper post hoc rationalization that the court should have rejected.

"It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." State Farm, 463 U.S. at 50; Dep't of Homeland Security v. Regents, 140 S. Ct. 1891, 1907 (2020). Accordingly, "[p]ost hoc explanations of agency action by appellate counsel cannot substitute for the agency's own articulation of the basis for its decision." Arrington v. Daniels, 516 F.3d 1106, 1113 (9th Cir. 2008).

When issuing the Repeal, BLM did not contend that it maintained the status quo, or that NEPA analysis was unnecessary. To the contrary, the agency recognized that NEPA applied by preparing an EA. That EA, moreover, expressly anticipated the 2015 Rule would be "fully implemented" if BLM did not act. EA at 3. BLM explained in the EA that under the no-action alternative, it "would not rescind the 2015 final rule," and that rule would take effect. Id. The arguments offered by BLM's lawyers cannot be found in the EA itself, and therefore must be rejected.

BLM's EA accurately reflected the status quo: the 2015 Rule was about to go into effect unless the agency acted to rescind it. When BLM finalized the Repeal in December 2017, the Tenth Circuit had vacated the lower court ruling setting aside the 2015 Rule, and that regulation would have taken effect upon issuance of the Tenth Circuit's mandate. Zinke, 871 F.3d at 1146; pp. 9–11, supra. BLM rushed to change that status quo by finalizing the Repeal before the mandate could issue. The agency even invoked the APA's emergency provisions to make the Repeal immediately effective. See p. 10, supra The district court erred in accepting BLM's post hoc excuse that the Repeal did not alter the status quo.

Counsel's argument in the district court "cannot substitute for the agency's own articulation of the basis for its decision."[14] Arrington, 516 F.3d at 1113.

BLM's defense also is wrong on the merits. Cases holding that NEPA does not apply to actions maintaining the status quo address decisions where both action and inaction have the same environmental impacts. See Burbank Anti-Noise Group v. Goldschmidt, 623 F.2d 115, 115–17 (9th Cir. 1980) (financial support for purchase of an existing airport that would not alter its operations); Nat'l Wildlife Fed'n v. Espy, 45 F.3d 1337, 1343–1344 (9th Cir. 1995) (transfer of title to land that would not affect its management) (both cited in Op. at 25). In contrast, decisions repealing substantive environmental protections change the status quo. As the D.C. Circuit explained: "the baseline for measuring the impact of a change or rescission of a final rule is the requirements of the rule itself, not the world as it would have been had the rule never been promulgated." Air Alliance, 906 F.3d at 1068; see generally Kootenai Tribe v. Veneman, 313 F.3d 1094, 1114 (9th Cir. 2002) (rejecting argument that NEPA did not apply to adoption of rule protecting national forest lands).

[14] Moreover, BLM obligated itself to comply with NEPA's requirements once it decided to do a NEPA analysis. See Sierra Club v. Sigler, 695 F.2d 957, 966 (5th Cir. 1983) ("If the agency follows a particular [NEPA] procedure, it is only logical to review the agency's adherence to that procedure, not to some altogether different one that was not used.").

Where an agency must act to prevent termination of an environmentally damaging requirement, that action changes the status quo and NEPA applies. In Pit River Tribe v. U.S. Forest Serv., 469 F.3d 768 (9th Cir. 2006), this Court rejected an argument that the extension of leases to build a geothermal power plant did not require a NEPA analysis. Under the pre-extension status quo, the project proponent "owned rights to produce geothermal steam valid through [the expiration date], after which [the company] owned nothing." Id. at 784. The Court reasoned that NEPA analysis was required because "[w]ithout the affirmative re-extension of the [ ] leases, [the proponent] ... would not have been able to go forward with the" project. Id. Similarly, the December 2017 status quo involved termination of BLM's 1980s-era regulations. When it issued the Repeal, BLM changed that status quo.

BLM's theory directly conflicts with controlling precedent. In California ex rel. Lockyer v. U.S. Department of Agriculture, 575 F.3d 999 (9th Cir. 2009), this Court rejected an argument very similar to BLM's "status quo" claim in this case. There, a Wyoming district court enjoined the U.S. Department of Agriculture's (USDA) "Roadless Rule," which prohibited road building and timber cutting on certain national forest lands. Id. at 1004–05. While that decision was on appeal to the Tenth Circuit, USDA promulgated the "States Petition Rule," which "effected a repeal of the Roadless Rule." Id. at 1005–06. The USDA, however, did not

prepare a NEPA analysis for its repeal. Id. When several plaintiffs challenged the States Petition Rule as violating NEPA, the agency asserted that the Wyoming injunction blocking the Roadless Rule from taking effect made its repeal just "procedural" or a "paper exercise." Id. at 1015–16.

The court rejected this argument for several reasons that also apply to this case. First, it noted that in spite of pending legal challenges, the Roadless Rule was an existing regulation that the State Petitions Rule "specifically removed [ ] from the Code of Federal Regulations." Id. at 1013; see id. at 1015 ("a primary purpose of the State Petitions Rule was taking substantive environmental protections off the books"). The same is true here: the 2015 Rule and its protective requirements remained part of the Code of Federal Regulations despite pending litigation. See 43 C.F.R. § 3162.3-3 (2017). In the Repeal, BLM changed the status quo by taking those "protections off the books." Lockyer, 575 F.3d at 1015; 82 Fed. Reg. at 61,924 (explaining that Repeal removed 2015 Rule from Code of Federal Regulations).[15]

Second, Lockyer rejected USDA's attempt to "have it both ways" by taking "deliberate action" to moot a pending appeal and thus avoid appellate review of the Roadless Rule injunction, while relying on that same injunction "to avoid

[15] The Repeal further changed the status quo by eliminating BLM's pre-2015 regulation mandating notice of "nonroutine" fracturing operations. See p. 11, supra.

compliance with procedures mandated by environmental laws." 575 F.3d at 1013. This Court explained: "[W]e cannot condone a marked change in roadless area management without environmental analysis because it was the USDA's preferred response to an untested district court injunction that was subject to possible reversal in a pending appeal." Id. at 1015–16.

That is exactly what BLM did here: it short-circuited appellate review of the Wyoming ruling on the 2015 Rule by announcing plans to repeal the rule. See pp. 9–11, supra. BLM then relied on that same Wyoming decision to argue that the Repeal did not actually change the status quo and thus "avoid compliance with procedures mandated by" NEPA. 575 F.3d at 1015–16. The Court should reject this maneuver, just as it did in Lockyer.

At bottom, the USDA in Lockyer did the same thing BLM attempts here: the agency moved "to free itself of any future constraints imposed by the" repealed regulation. Id. at 1015; Op. at 27 n.12 (noting that BLM's Repeal "prospectively altered the regulatory landscape"). NEPA applied to the Repeal, just as it did to the State Petitions Rule in Lockyer.

The district court attempted to distinguish Lockyer because the Roadless Rule had been in effect for seven months before being enjoined, while the 2015 Rule was enjoined before its effective date. Op. at 26. This is a distinction without a difference: in both cases, the regulation in question remained in the Code of

Federal Regulations but had been blocked by a district court ruling that was subject to pending appeal. The "status quo" at the time of the Repeal was not affected by whether or not the 2015 Rule had been effective at some earlier stage.[16]

If anything, NEPA was more clearly applicable to the Repeal than in Lockyer. In Lockyer, the State Petitions Rule was issued while the Tenth Circuit appeal was pending. At that point, the Wyoming injunction remained in effect and the fate of the Roadless Rule was uncertain. Here, by contrast, the Tenth Circuit had vacated the Wyoming decision and there was no question that BLM's 2015 Rule was about to take effect. Moreover, unlike in Lockyer, BLM did prepare a NEPA analysis for the Repeal. Its argument that NEPA does not apply is an improper post hoc excuse. The district court's ruling should be reversed because it defies this Court's precedent.

[16] In fact, Lockyer rejected a similar argument that NEPA did not apply because the Roadless Rule had not been effective long enough to be "meaningfully in force." The Court recognized that such a standard could "defeat the purposes of [NEPA] .... For example, an incoming administration might conclude that many of the outgoing administration's regulations were not in place long enough to 'make any meaningful difference' and simply set them aside." Id. at 1014 n.9. Ironically, the district court here recognized the same point: it acknowledged that its holding "potentially defeat[s] NEPA's purpose," but misinterpreted Lockyer to reach the opposite result. Op. at 26 n.12.

B. BLM Violated NEPA by Failing to Take a Hard Look at the Repeal's Impacts.

BLM's cursory EA did not satisfy NEPA. Among other flaws, the agency: (1) ignored the Repeal's disparate impact on Native American communities; (2) overlooked the harms from continuing to allow waste pits; and (3) arbitrarily concluded that the Repeal's environmental impacts were not "significant," and thus did not require an EIS.

1. BLM Failed to Analyze Impacts to Tribal Lands.

As discussed above, the Repeal creates a major regulatory gap on Indian lands because most tribes lack their own oil and gas regulations. The effects of that gap, which leaves Native American communities vulnerable to drilling-related harm, should have been analyzed in BLM's EA. See Council on Envtl. Quality, Environmental Justice, Guidance Under the National Environmental Policy Act, at 9 (1997) (NEPA analysis should address "whether there may be disproportionately high and adverse human health or environmental effects on" Native Americans).[17] Instead, BLM's cursory environmental justice analysis addressed only federal lands. This omission violated NEPA's requirement to "consider every significant aspect of the environmental impact of a proposed action." Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, 462 U.S. 87, 97 (1983).

[17] Available at https://www.doi.gov/sites/doi.gov/files/uploads/EJ-under-NEPA.pdf.

Federal regulation is a critical safeguard for many Native American communities because state regulations do not apply on tribal land. The Repeal left Native American communities covered only by BLM's outdated 1980s-era regulations. See pp. 37–38, supra. BLM's NEPA analysis, however, made no mention of this regulatory gap. Instead, its environmental justice section stated that the Repeal would not have disproportionate "effects on minority and low-income populations," because "most of the states where Federal and Indian oil and gas activities are taking place" have regulations that "apply on Federal lands." EA at 39 (emphasis added).

BLM ignored the greater risks it was causing Native Americans, despite being well aware that the Repeal affects Indian lands differently from federal lands. See pp. 37–38, supra; ER000990 (interagency comments recommending EA "consider the impact of the rule on Indian lands where no tribal regulations exist"); ER000961 (Sac and Fox Nation commenting that "[r]elying on existing state regulations is inadequate" because some tribes lack resources to develop and enforce regulations); ER001045 (BLM noting Repeal "[h]as potential substantial direct effects on tribes").[18]

[18] The record illustrates the significant adverse impacts the Repeal will cause on tribal lands. See, e.g., ER000959–62 (describing "permanent and irreparable pollution of the Sac and Fox Nation's groundwater by oil and gas activities" and "multiple oil spills"); ER001202 (Pawnee describing "serious water supply crisis … due to [the] … groundwater supply [now being] threatened by … fracking");

This omission violates NEPA and arbitrarily ignores the Repeal's disproportionate impact on tribal communities. See California v. Bernhardt, __ F. Supp. 3d __, 2020 WL 4001480, *34–35 (N.D. Cal. July 15, 2020) (repeal of BLM rule violated NEPA where "EA does not mention, much less address" disproportionate impacts to tribal communities); Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 255 F. Supp. 3d 101, 140 (D.D.C. 2017) (EA containing only "bare-bones conclusion that [tribe] would not be disproportionately harmed" violated NEPA).

2. BLM Failed to Take a Hard Look at Impacts from Waste Pits.

The 2015 Rule required companies to store hydraulic fracturing wastes in tanks to avoid the significant harm that pits cause to groundwater, wildlife, and air quality. See 80 Fed. Reg. at 16,162–63, 16,203–04. The EA for the Repeal almost entirely ignored those impacts.

The EA included only a handful of passing references to the types of harms caused by waste pits. See EA at 18 (including "unlined pits" in list of oil and gas impacts identified by 2016 EPA study), 29 (mentioning "air emissions" from pits), 31–32 (including "torn pit liners" and "retaining pit spills" in list of types of spills).

ER000964 (describing impacts to Fort Berthold); ER000967 (same); ER000892–94 (describing potential groundwater contamination from hydraulic fracturing on Wind River Reservation in Wyoming).

These cursory references did not discuss the extent or scope of such impacts or how badly groundwater, wildlife and other resources will be harmed. Id. They do not satisfy NEPA's requirement to "provid[e] a reasonably thorough discussion of the significant aspects of the probable environmental consequences" of a proposed action. NHTSA, 538 F.3d at 1194. A "general statement[] about possible effects and some risk. … do[es] not constitute a hard look absent a justification for why an agency could not supply more definitive information." Rose, 921 F.3d at 1191 (quotations omitted).

The EA was particularly inadequate because the record extensively documents the harms caused by pits, see pp. 6–8, supra, and indicates that the Repeal would result in up to 350 new waste pits every year on public and tribal lands. See EA at 28–29 (tank requirement impacts up to 10% of new wells); RIA at 3 (estimating up to 3,500 new wells annually); but see 82 Fed. Reg. at 61,937 (indicating BLM may have undercounted pits). While estimating the number of pits, BLM failed to analyze the reasonably foreseeable impacts from those pits, such as whether they are likely to be located in close proximity to homes, or in steep and difficult-to-remediate mountain terrain. See pp. 19–24, supra. The EA's lack of discussion violated NEPA, given the more detailed information BLM had available. See, e.g., Diné Citizens Against Ruining Our Env't v. Bernhardt, 923

F.3d 831, 856–59 (10th Cir. 2019) (NEPA analysis inadequate where BLM "had non-speculative figures that it could use to quantify" impacts of drilling).

The EA also provided a misleading picture of the impacts from not requiring tanks. In 2015 BLM concluded that tanks provide major environmental benefits over pits because tanks are more effective at containing the often-toxic waste fluids produced in hydraulic fracturing. See 2015 EA at 43 (ER001204); see also pp. 6–8, supra. For the Repeal, however, the EA obscured those benefits by focusing only on the relatively limited impacts from tanks, without comparing them to pits. For example, the EA stated that "[r]eleases are … possible from tanks," EA at 31, without discussing the far greater threats of releases and groundwater contamination from pits. Cf. 80 Fed. Reg. at 16,162 (2015 finding that leaks are less common from tanks). Similarly, the EA asserted there "may be some additional truck traffic to transport storage tanks," EA at 28, 39, but disregarded the significant harms to wildlife and air quality from pits. The EA's one-sided discussion of tanks violates NEPA. See Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 811 (9th Cir. 1999) ("one-sided" agency analysis violated NEPA where it "focuse[d] solely on the beneficial impact [of] the [land] exchange" and did not discuss impacts from resulting timber harvesting). It was arbitrary and capricious and contrary to law to present such a misleading picture of the Repeal's impacts.

3. BLM Violated NEPA by Not Preparing an EIS.

NEPA only allows agencies to rely on an EA if a proposed action "will not have a significant effect" on the environment. 40 C.F.R. § 1508.13 (2019). If a proposed action may have a significant impact, NEPA requires an EIS. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.18 (2019). To avoid preparing an EIS, an agency must make a "finding of no significant impact" (FONSI) for its proposed action. 40 C.F.R. § 1508.13 (2019). In deciding whether to prepare an EIS, NEPA regulations require agencies to consider "both context and intensity." 40 C.F.R. § 1508.27 (2019).

Here, BLM issued a FONSI determining that the Repeal would have no significant impact on the environment and thus no EIS was required. EA at 47–53.[19] This was arbitrary and capricious. First, regarding "context," the Repeal is a nationally applicable regulation that affects thousands of new oil and gas wells drilled each year on federal and Indian lands. RIA at 3. This is exactly the kind of action that warrants an EIS. See, e.g., 40 C.F.R. § 1502.4(b) (2019) (EISs "may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency … regulations"). At very least, there are "substantial questions" about the significance of a nationwide rule that affects thousands of

[19] In BLM's haste to complete the Repeal, the agency "inadvertently omitted" to sign the FONSI until April 2019, more than a year after the Repeal was finalized. ER000604.

new oil and gas wells annually. Anderson v. Evans, 371 F.3d 475, 488 (9th Cir. 2004) (EIS required for even "substantial questions whether a project may have a significant effect on the environment.") (internal quotation omitted).

The EA's assertion that additional NEPA analyses will be prepared later for individual drilling permits is unavailing. EA at 48–49. Such project-by-project analysis will never consider the full, cumulative effects of this nationwide regulation. See Sierra Club v. Bosworth, 510 F.3d 1016, 1027–30 (9th Cir. 2007) (conclusion that nationally-applicable rule would not have significant impacts was arbitrary and capricious despite prospect of additional analysis at project level); Cal. ex rel. Lockyer v. U.S. Dep't of Agric., 459 F. Supp. 2d 874, 907 (N.D. Cal. 2006) (rejecting the argument that future site-specific decisions were sufficient for the nationwide rule).

Regarding "intensity," the NEPA regulations list ten factors for determining whether an action warrants an EIS. 40 C.F.R. § 1508.27(b) (2019). The presence of any "one of these factors may be sufficient to require 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). The FONSI's findings were arbitrary and capricious. For example, BLM asserted that the Repeal could "alleviate some adverse on-the-ground indirect impacts" from tanks, but never addressed the far greater impacts resulting from the hundreds of additional pits it allowed. EA at 49

(addressing 40 C.F.R. § 1508.27(b)(1) (2019)). Similarly, BLM asserted that the Repeal would not have a significant adverse impact on "public health or safety," have "cumulatively significant impacts," or have "highly controversial," "uncertain" or "unknown" environmental effects, 40 C.F.R. § 1508.27(b)(2), (4), (5), (7) (2019), because most states have "appropriate regulatory programs." EA at 50–52. But as discussed above, this rationale ignores the lack of tribal regulations, and the significant differences between state regulations and the 2015 Rule. See pp. 36–40, supra; see also Ocean Advocates, 402 F.3d at 866 ("A patently inaccurate factual contention can never support an agency's determination that a project will have 'no significant impact' on the environment.").

Because there are, at minimum, "substantial questions" about the significance of environmental impacts from the Repeal, BLM must prepare an EIS. See Anderson, 371 F.3d at 488.

CONCLUSION

For the reasons stated above, the district court decision should be REVERSED.

Respectfully submitted this 21st day of October, 2020.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Ninth Circuit Rule 28.1-1(b), because it contains 13,972 words, excluding the parts of the brief exempted by Ninth Circuit Rule 28.1-1(e) and Federal Rule of Appellate Procedure 32(f).

/s/ Michael Freeman
Michael S. Freeman

Citizen Group Plaintiffs-Appellants

OPENING BRIEF

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United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 7. Judicial Review (Refs & Annos)

5 U.S.C.A. § 706

§ 706. Scope of review

Currentness

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

Notes of Decisions (4781)

5 U.S.C.A. § 706, 5 USCA § 706
Current through P.L. 116-169.

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United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 12. Lease, Sale, or Surrender of Allotted or Unallotted Lands

25 U.S.C.A. § 396d

§ 396d. Rules and regulations governing operations; limitations on oil or gas leases

Currentness

All operations under any oil, gas, or other mineral lease issued pursuant to the terms of sections 396a to 396g of this title or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior. In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of sections 396a to 396g of this title shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil or gas from land covered by such lease.

CREDIT(S)

(May 11, 1938, c. 198, § 4, 52 Stat. 348.)

Notes of Decisions (18)

25 U.S.C.A. § 396d, 25 USCA § 396d
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United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 83. Courts of Appeals (Refs & Annos)

28 U.S.C.A. § 1291

§ 1291. Final decisions of district courts

Currentness

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; Pub.L. 85-508, § 12(e), July 7, 1958, 72 Stat. 348; Pub.L. 97-164, Title I, § 124, Apr. 2, 1982, 96 Stat. 36.)

Notes of Decisions (3470)

28 U.S.C.A. § 1291, 28 USCA § 1291
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End of Document

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 85. District Courts; Jurisdiction (Refs & Annos)

28 U.S.C.A. § 1331

§ 1331. Federal question

Currentness

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 930; Pub.L. 85-554, § 1, July 25, 1958, 72 Stat. 415; Pub.L. 94-574, § 2, Oct. 21, 1976, 90 Stat. 2721; Pub.L. 96-486, § 2(a), Dec. 1, 1980, 94 Stat. 2369.)

Notes of Decisions (3124)

28 U.S.C.A. § 1331, 28 USCA § 1331
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United States Code Annotated
Title 30. Mineral Lands and Mining
Chapter 3A. Leases and Prospecting Permits (Refs & Annos)
Subchapter I. General Provisions (Refs & Annos)

30 U.S.C.A. § 187

§ 187. Assignment or subletting of leases; relinquishment of rights under leases; conditions in leases for protection of diverse interests in operation of mines, wells, etc.; State laws not impaired

Currentness

No lease issued under the authority of this chapter shall be assigned or sublet, except with the consent of the Secretary of the Interior. The lessee may, in the discretion of the Secretary of the Interior, be permitted at any time to make written relinquishment of all rights under such a lease, and upon acceptance thereof be thereby relieved of all future obligations under said lease, and may with like consent surrender any legal subdivision of the area included within the lease. Each lease shall contain provisions for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property; a provision that such rules for the safety and welfare of the miners and for the prevention of undue waste as may be prescribed by said Secretary shall be observed, including a restriction of the workday to not exceeding eight hours in any one day for underground workers except in cases of emergency; provisions prohibiting the employment of any child under the age of sixteen in any mine below the surface; provisions securing the workmen complete freedom of purchase; provision requiring the payment of wages at least twice a month in lawful money of the United States, and providing proper rules and regulations to insure the fair and just weighing or measurement of the coal mined by each miner, and such other provisions as he may deem necessary to insure the sale of the production of such leased lands to the United States and to the public at reasonable prices, for the protection of the interests of the United States, for the prevention of monopoly, and for the safeguarding of the public welfare. None of such provisions shall be in conflict with the laws of the State in which the leased property is situated.

CREDIT(S)

(Feb. 25, 1920, c. 85, § 30, 41 Stat. 449; Pub.L. 95-554, § 5, Oct. 30, 1978, 92 Stat. 2074.)

Notes of Decisions (5)

30 U.S.C.A. § 187, 30 USCA § 187
Current through P.L. 116-169.

End of Document

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedLimitation Recognized by Miccosukee Tribe of Indians of Florida v. U.S. Army Corps of Engineers, 11th Cir.(Fla.), Sep. 15, 2010

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United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 55. National Environmental Policy (Refs & Annos)
Subchapter I. Policies and Goals (Refs & Annos)

42 U.S.C.A. § 4332

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

Currentness

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall--

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.[1]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

CREDIT(S)

(Pub.L. 91-190, Title I, § 102, Jan. 1, 1970, 83 Stat. 853; Pub.L. 94-83, Aug. 9, 1975, 89 Stat. 424.)

EXECUTIVE ORDERS

EXECUTIVE ORDER NO. 13352

<Aug. 26, 2004, 69 F.R. 52989>

Facilitation of Cooperative Conservation

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Purpose. The purpose of this order is to ensure that the Departments of the Interior, Agriculture, Commerce, and Defense and the Environmental Protection Agency implement laws relating to the environment and natural resources in a manner that promotes cooperative conservation, with an emphasis on appropriate inclusion of local participation in Federal decisionmaking, in accordance with their respective agency missions, policies, and regulations.

Sec. 2. Definition. As used in this order, the term "cooperative conservation" means actions that relate to use, enhancement, and enjoyment of natural resources, protection of the environment, or both, and that involve collaborative activity among Federal, State, local, and tribal governments, private for-profit and nonprofit institutions, other nongovernmental entities and individuals.

Sec. 3. Federal Activities. To carry out the purpose of this order, the Secretaries of the Interior, Agriculture, Commerce, and Defense and the Administrator of the Environmental Protection Agency shall, to the extent permitted by law and subject to the availability of appropriations and in coordination with each other as appropriate:

(a) carry out the programs, projects, and activities of the agency that they respectively head that implement laws relating to the environment and natural resources in a manner that:

(i) facilitates cooperative conservation;

(ii) takes appropriate account of and respects the interests of persons with ownership or other legally recognized interests in land and other natural resources;

(iii) properly accommodates local participation in Federal decisionmaking; and

(iv) provides that the programs, projects, and activities are consistent with protecting public health and safety;

(b) report annually to the Chairman of the Council on Environmental Quality on actions taken to implement this order; and

(c) provide funding to the Office of Environmental Quality Management Fund (42 U.S.C. 4375) for the Conference for which section 4 of this order provides.

Sec. 4. White House Conference on Cooperative Conservation. The Chairman of the Council on Environmental Quality shall, to the extent permitted by law and subject to the availability of appropriations:

(a) convene not later than 1 year after the date of this order, and thereafter at such times as the Chairman deems appropriate, a White House Conference on Cooperative Conservation (Conference) to facilitate the exchange of information and advice relating to (i) cooperative conservation and (ii) means for achievement of the purpose of this order; and

(b) ensure that the Conference obtains information in a manner that seeks from Conference participants their individual advice and does not involve collective judgment or consensus advice or deliberation.

Sec. 5. General Provision. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees or agents, or any other person.

George W. Bush

Notes of Decisions (4995)

Footnotes

1 So in original. The period probably should be a semicolon.

42 U.S.C.A. § 4332, 42 USCA § 4332
Current through P.L. 116-169.

End of Document

United States Code Annotated
Title 43. Public Lands (Refs & Annos)
Chapter 35. Federal Land Policy and Management (Refs & Annos)
Subchapter I. General Provisions

43 U.S.C.A. § 1701

§ 1701. Congressional declaration of policy

Currentness

(a) The Congress declares that it is the policy of the United States that--

(1) the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest;

(2) the national interest will be best realized if the public lands and their resources are periodically and systematically inventoried and their present and future use is projected through a land use planning process coordinated with other Federal and State planning efforts;

(3) public lands not previously designated for any specific use and all existing classifications of public lands that were effected by executive action or statute before October 21, 1976, be reviewed in accordance with the provisions of this Act;

(4) the Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress delineate the extent to which the Executive may withdraw lands without legislative action;

(5) in administering public land statutes and exercising discretionary authority granted by them, the Secretary be required to establish comprehensive rules and regulations after considering the views of the general public; and to structure adjudication procedures to assure adequate third party participation, objective administrative review of initial decisions, and expeditious decisionmaking;

(6) judicial review of public land adjudication decisions be provided by law;

(7) goals and objectives be established by law as guidelines for public land use planning, and that management be on the basis of multiple use and sustained yield unless otherwise specified by law;

(8) the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use;

(9) the United States receive fair market value of the use of the public lands and their resources unless otherwise provided for by statute;

(10) uniform procedures for any disposal of public land, acquisition of non-Federal land for public purposes, and the exchange of such lands be established by statute, requiring each disposal, acquisition, and exchange to be consistent with the prescribed mission of the department or agency involved, and reserving to the Congress review of disposals in excess of a specified acreage;

(11) regulations and plans for the protection of public land areas of critical environmental concern be promptly developed;

(12) the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 (84 Stat. 1876, 30 U.S.C. 21a) as it pertains to the public lands; and

(13) the Federal Government should, on a basis equitable to both the Federal and local taxpayer, provide for payments to compensate States and local governments for burdens created as a result of the immunity of Federal lands from State and local taxation.

(b) The policies of this Act shall become effective only as specific statutory authority for their implementation is enacted by this Act or by subsequent legislation and shall then be construed as supplemental to and not in derogation of the purposes for which public lands are administered under other provisions of law.

CREDIT(S)

(Pub.L. 94-579, Title I, § 102, Oct. 21, 1976, 90 Stat. 2744.)

Notes of Decisions (34)

43 U.S.C.A. § 1701, 43 USCA § 1701
Current through P.L. 116-169.

End of Document

43 U.S.C.A. § 1702

§ 1702. Definitions

Currentness

Without altering in any way the meaning of the following terms as used in any other statute, whether or not such statute is referred to in, or amended by, this Act, as used in this Act--

(a) The term "areas of critical environmental concern" means areas within the public lands where special management attention is required (when such areas are developed or used or where no development is required) to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources or other natural systems or processes, or to protect life and safety from natural hazards.

(b) The term "holder" means any State or local governmental entity, individual, partnership, corporation, association, or other business entity receiving or using a right-of-way under subchapter V of this chapter.

(c) The term "multiple use" means the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.

(d) The term "public involvement" means the opportunity for participation by affected citizens in rulemaking, decisionmaking, and planning with respect to the public lands, including public meetings or hearings held at locations near the affected lands, or advisory mechanisms, or such other procedures as may be necessary to provide public comment in a particular instance.

(e) The term "public lands" means any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership, except--

(1) lands located on the Outer Continental Shelf; and

(2) lands held for the benefit of Indians, Aleuts, and Eskimos.

(f) The term "right-of-way" includes an easement, lease, permit, or license to occupy, use, or traverse public lands granted for the purpose listed in subchapter V of this chapter.

(g) The term "Secretary", unless specifically designated otherwise, means the Secretary of the Interior.

(h) The term "sustained yield" means the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use.

(i) The term "wilderness" as used in section 1782 of this title shall have the same meaning as it does in section 1131(c) of Title 16.

(j) The term "withdrawal" means withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program; or transferring jurisdiction over an area of Federal land, other than "property" governed by the Federal Property and Administrative Services Act, as amended from one department, bureau or agency to another department, bureau or agency.

(k) An "allotment management plan" means a document prepared in consultation with the lessees or permittees involved, which applies to livestock operations on the public lands or on lands within National Forests in the eleven contiguous Western States and which:

(1) prescribes the manner in, and extent to, which livestock operations will be conducted in order to meet the multiple-use, sustained-yield, economic and other needs and objectives as determined for the lands by the Secretary concerned; and

(2) describes the type, location, ownership, and general specifications for the range improvements to be installed and maintained on the lands to meet the livestock grazing and other objectives of land management; and

(3) contains such other provisions relating to livestock grazing and other objectives found by the Secretary concerned to be consistent with the provisions of this Act and other applicable law.

(l) The term "principal or major uses" includes, and is limited to, domestic livestock grazing, fish and wildlife development and utilization, mineral exploration and production, rights-of-way, outdoor recreation, and timber production.

(m) The term "department" means a unit of the executive branch of the Federal Government which is headed by a member of the President's Cabinet and the term "agency" means a unit of the executive branch of the Federal Government which is not under the jurisdiction of a head of a department.

(n) The term "Bureau[1] means the Bureau of Land Management.

(o) The term "eleven contiguous Western States" means the States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

(p) The term "grazing permit and lease" means any document authorizing use of public lands or lands in National Forests in the eleven contiguous western States for the purpose of grazing domestic livestock.

CREDIT(S)

(Pub.L. 94-579, Title I, § 103, Oct. 21, 1976, 90 Stat. 2745.)

Notes of Decisions (5)

Footnotes

1 So in original. Probably should have a close quote.

43 U.S.C.A. § 1702, 43 USCA § 1702

Current through P.L. 116-169.

End of Document

Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1502. Environmental Impact Statement (Refs & Annos)

This section has been updated. Click here for the updated version.

40 C.F.R. § 1502.4

§ 1502.4 Major Federal actions requiring the preparation of environmental impact statements.

Effective: [See Text Amendments] to September 13, 2020

(a) Agencies shall make sure the proposal which is the subject of an environmental impact statement is properly defined. Agencies shall use the criteria for scope (§ 1508.25) to determine which proposal(s) shall be the subject of a particular statement. Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.

(b) Environmental impact statements may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs or regulations (§ 1508.18). Agencies shall prepare statements on broad actions so that they are relevant to policy and are timed to coincide with meaningful points in agency planning and decisionmaking.

(c) When preparing statements on broad actions (including proposals by more than one agency), agencies may find it useful to evaluate the proposal(s) in one of the following ways:

(1) Geographically, including actions occurring in the same general location, such as body of water, region, or metropolitan area.

(2) Generically, including actions which have relevant similarities, such as common timing, impacts, alternatives, methods of implementation, media, or subject matter.

(3) By stage of technological development including federal or federally assisted research, development or demonstration programs for new technologies which, if applied, could significantly affect the quality of the human environment. Statements shall be prepared on such programs and shall be available before the program has reached a stage of investment or commitment to implementation likely to determine subsequent development or restrict later alternatives.

(d) Agencies shall as appropriate employ scoping (§ 1501.7), tiering (§ 1502.20), and other methods listed in §§ 1500.4 and 1500.5 to relate broad and narrow actions and to avoid duplication and delay.

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

End of Document

Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1508. Terminology and Index (Refs & Annos)

This section has been updated. Click here for the updated version.

40 C.F.R. § 1508.9

§ 1508.9 Environmental assessment.

Effective: [See Text Amendments] to September 13, 2020

Environmental assessment:

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

SOURCE: 43 FR 56003, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

End of Document

Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1508. Terminology and Index (Refs & Annos)

This section has been updated. Click here for the updated version.

40 C.F.R. § 1508.13

§ 1508.13 Finding of no significant impact.

Effective: [See Text Amendments] to September 13, 2020

Finding of no significant impact means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

SOURCE: 43 FR 56003, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

End of Document

Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1508. Terminology and Index (Refs & Annos)

This section has been updated. Click here for the updated version.

40 C.F.R. § 1508.18

§ 1508.18 Major Federal action.

Effective: [See Text Amendments] to September 13, 2020

Major Federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 et seq., with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(b) Federal actions tend to fall within one of the following categories:

(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 et seq.; treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based.

(3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

SOURCE: 43 FR 56003, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

End of Document

Code of Federal Regulations - 2016

Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1508. Terminology and Index (Refs & Annos)

40 C.F.R. § 1508.27

§ 1508.27 Significantly.

Currentness

Significantly as used in NEPA requires considerations of both context and intensity:

(a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The 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.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

Credits

[43 FR 56003, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

SOURCE: 43 FR 56003, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514 (Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

Current through July 14, 2016; 81 FR 45954.

40 C. F. R. § 1508.27, 40 CFR § 1508.27

End of Document

Code of Federal Regulations
Title 43. Public Lands: Interior
Subtitle B. Regulations Relating to Public Lands
Chapter II. Bureau of Land Management, Department of the Interior
Subchapter C. Minerals Management(3000)
Part 3160. Onshore Oil and Gas Operations (Refs & Annos)
Subpart 3162. Requirements for Operating Rights Owners and Operators (Refs & Annos)

This section has been updated. Click here for the updated version.

43 C.F.R. § 3162.3–3

§ 3162.3–3 Subsequent well operations; Hydraulic fracturing.

Effective: June 24, 2015 to December 28, 2017

(a) Activities to which this section applies. This section, or portions of this section, apply to hydraulic fracturing as shown in the following table:

If . . .	Then
(1) No APD was submitted as of June 24, 2015	The operator must comply with all paragraphs of this section.
(2) An APD was submitted but not approved as of June 24, 2015	
(3) An APD or APD extension was approved before June 24, 2015, but the authorized drilling operations did not begin until after June 24, 2015	To conduct hydraulic fracturing within 90 days after the effective date of this rule, the operator must comply with all paragraphs of this section, except (c) and (d).
(4) Authorized drilling operations began, but were not completed before June 24, 2015	
(5) Authorized drilling operations were completed after December 26, 2014.	
(6) Authorized drilling activities were completed before December 26, 2014.	The operator must comply with all paragraphs of this section.

(b) Isolation of usable water to prevent contamination. All hydraulic fracturing operations must meet the performance standard in section 3162.5–2(d) of this title.

(c) How an operator must submit a request for approval of hydraulic fracturing. A request for approval of hydraulic fracturing must be submitted by the operator and approved by the authorized officer before commencement of operations. The operator may submit the request in one of the following ways:

(1) With an application for permit to drill; or

(2) With a Sundry Notice and Report on Wells (Form 3160–5) as a notice of intent (NOI).

(3) For approval of a group of wells submitted under either paragraph (c)(1) or (2) of this section, the operator may submit a master hydraulic fracturing plan. Submission of a master hydraulic fracturing plan does not obviate the need to obtain an approved APD from the BLM for each individual well.

(4) If an operator has received approval from the authorized officer for hydraulic fracturing operations, and the operator has significant new information about the geology of the area, the stimulation operation or technology to be used, or the anticipated impacts of the hydraulic fracturing operation to any resource, then the operator must submit a new NOI (Form 3160–5). Significant new information includes, but is not limited to, information that changes the proposed drilling or completion of the well, the hydraulic fracturing operation, or indicates increased risk of contamination of zones containing usable water or other minerals.

(d) What a request for approval of hydraulic fracturing must include. The request for approval of hydraulic fracturing must include the information in this paragraph. If the information required by this paragraph has been assembled to comply with State law (on Federal lands) or tribal law (on Indian lands), such information may be submitted to the BLM authorized officer as provided to the State or tribal officials as part of the APD or NOI (Form 3160–5).

(1) The following information regarding wellbore geology:

(i) The geologic names, a geologic description, and the estimated depths (measured and true vertical) to the top and bottom of the formation into which hydraulic fracturing fluids are to be injected;

(ii) The estimated depths (measured and true vertical) to the top and bottom of the confining zone(s); and

(iii) The estimated depths (measured and true vertical) to the top and bottom of all occurrences of usable water based on the best available information.

(2) A map showing the location, orientation, and extent of any known or suspected faults or fractures within one-half mile (horizontal distance) of the wellbore trajectory that may transect the confining zone(s). The map must be of a scale no smaller than 1:24,000.

(3) Information concerning the source and location of water supply, such as reused or recycled water, rivers, creeks, springs, lakes, ponds, and water supply wells, which may be shown by quarter-quarter section on a map or plat, or which may be described in writing. It must also identify the anticipated access route and transportation method for all water planned for use in hydraulically fracturing the well;

(4) A plan for the proposed hydraulic fracturing design that includes, but is not limited to, the following:

(i) The estimated total volume of fluid to be used;

(ii) The maximum anticipated surface pressure that will be applied during the hydraulic fracturing process;

(iii) A map at a scale no smaller than 1:24,000 showing:

(A) The trajectory of the wellbore into which hydraulic fracturing fluids are to be injected;

(B) The estimated direction and length of the fractures that will be propagated and a notation indicating the true vertical depth of the top and bottom of the fractures; and

(C) All existing wellbore trajectories, regardless of type, within one-half mile (horizontal distance) of any portion of the wellbore into which hydraulic fracturing fluids are to be injected. The true vertical depth of each wellbore identified on the map must be indicated.

(iv) The estimated minimum vertical distance between the top of the fracture zone and the nearest usable water zone; and

(v) The measured depth of the proposed perforated or open-hole interval.

(5) The following information concerning the handling of fluids recovered between the commencement of hydraulic fracturing operations and the approval of a plan for the disposal of produced fluid under BLM requirements:

(i) The estimated volume of fluid to be recovered;

(ii) The proposed methods of handling the recovered fluids as required under paragraph (h) of this section; and

(iii) The proposed disposal method of the recovered fluids, including, but not limited to, injection, storage, and recycling.

(6) If the operator submits a request for approval of hydraulic fracturing with an NOI (Form 3160–5), the following information must also be submitted:

(i) A surface use plan of operations, if the hydraulic fracturing operation would cause additional surface disturbance; and

(ii) Documentation required in paragraph (e) or other documentation demonstrating to the authorized officer that the casing and cement have isolated usable water zones, if the proposal is to hydraulically fracture a well that was completed without hydraulic fracturing.

(7) The authorized officer may request additional information prior to the approval of the NOI (Form 3160–5) or APD.

(e) Monitoring and verification of cementing operations prior to hydraulic fracturing.

(1)(i) During cementing operations on any casing used to isolate and protect usable water zones, the operator must monitor and record the flow rate, density, and pump pressure, and submit a cement operation monitoring report for each casing string used to isolate and protect usable water to the authorized officer prior to commencing hydraulic fracturing operations. The cement operation monitoring report must be provided at least 48 hours prior to commencing hydraulic fracturing operations unless the authorized officer approves a shorter time.

(ii) For any well completed pursuant to an APD that did not authorize hydraulic fracturing operations, the operator must submit documentation to demonstrate that adequate cementing was achieved for all casing strings designed to isolate and protect usable water. The operator must submit the documentation with its request for approval of hydraulic fracturing operations, or no less than 48 hours prior to conducting hydraulic fracturing operations if no prior approval is required, pursuant to paragraph (a) of this section. The authorized officer may approve the hydraulic fracturing of the well only if the documentation provides assurance that the cementing was sufficient to isolate and to protect usable water, and may require such additional tests, verifications, cementing or other protection or isolation operations, as the authorized officer deems necessary.

(2) Prior to starting hydraulic fracturing operations, the operator must determine and document that there is adequate cement for all casing strings used to isolate and protect usable water zones as follows:

(i) Surface casing. The operator must observe cement returns to surface and document any indications of inadequate cement (such as, but not limited to, lost returns, cement channeling, gas cut mud, failure of equipment, or fallback from the surface exceeding 10 percent of surface casing setting depth or 200 feet, whichever is less). If there are indications of inadequate cement, then the operator must determine the top of cement with a CEL, temperature log, or other method or device approved in advance by the authorized officer.

(ii) Intermediate and production casing.

(A) If the casing is not cemented to surface, then the operator must run a CEL to demonstrate that there is at least 200 feet of adequately bonded cement between the zone to be hydraulically fractured and the deepest usable water zone.

(B) If the casing is cemented to surface, then the operator must follow the requirements of paragraph (e)(2)(i) of this section.

(3) For any well, if there is an indication of inadequate cement on any casing used to isolate usable water, then the operator must:

(i) Notify the authorized officer within 24 hours of discovering the inadequate cement;

(ii) Submit an NOI (Form 3160–5) to the authorized officer requesting approval of a plan to perform remedial action to achieve adequate cement. The plan must include the supporting documentation and logs required under paragraph (e)(2) of this section. In emergency situations, an operator may request oral approval from the authorized officer for actions to be undertaken to remediate the cement. However, such requests must be followed by a written notice filed not later than the fifth business day following oral approval;

(iii) Verify that the remedial action was successful with a CEL or other method approved in advance by the authorized officer;

(iv) Submit a Sundry Notice and Report on Wells (Form 3160–5) as a subsequent report for the remedial action including:

(A) A signed certification that the operator corrected the inadequate cement job in accordance with the approved plan; and

(B) The results from the CEL or other method approved by the authorized officer showing that there is adequate cement.

(v) The operator must submit the results from the CEL or other method approved by the authorized officer (see paragraph (e)(3)(iv)(B) of this section) at least 72 hours before starting hydraulic fracturing operations.

(f) Mechanical integrity testing prior to hydraulic fracturing. Prior to hydraulic fracturing, the operator must perform a successful mechanical integrity test, as follows:

(1) If hydraulic fracturing through the casing is proposed, the casing must be tested to not less than the maximum anticipated surface pressure that will be applied during the hydraulic fracturing process.

(2) If hydraulic fracturing through a fracturing string is proposed, the fracturing string must be inserted into a liner or run on a packer-set not less than 100 feet below the cement top of the production or intermediate casing. The fracturing string must be tested to not less than the maximum anticipated surface pressure minus the annulus pressure applied between the fracturing string and the production or intermediate casing.

(3) The mechanical integrity test will be considered successful if the pressure applied holds for 30 minutes with no more than a 10 percent pressure loss.

(g) Monitoring and recording during hydraulic fracturing.

(1) During any hydraulic fracturing operation, the operator must continuously monitor and record the annulus pressure at the bradenhead. The pressure in the annulus between any intermediate casings and the production casing must also be continuously monitored and recorded. A continuous record of all annuli pressure during the fracturing operation must be submitted with the required Subsequent Report Sundry Notice (Form 3160–5) identified in paragraph (i) of this section.

(2) If during any hydraulic fracturing operation any annulus pressure increases by more than 500 pounds per square inch as compared to the pressure immediately preceding the stimulation, the operator must stop the hydraulic fracturing operation, take immediate corrective action to control the situation, orally notify the authorized officer as soon as practicable, but no later than 24 hours following the incident, and determine the reasons for the pressure increase. Prior to recommencing hydraulic fracturing operations, the operator must perform any remedial action required by the authorized officer, and successfully perform a mechanical integrity test under paragraph (f) of this section. Within 30 days after the hydraulic fracturing operations are completed, the operator must submit a report containing all details pertaining to the incident, including corrective actions taken, as part of a Subsequent Report Sundry Notice (Form 3160–5).

(h) Management of Recovered Fluids. Except as provided in paragraphs (h)(1) and ((2) of this section, all fluids recovered between the commencement of hydraulic fracturing operations and the authorized officer's approval of a produced water disposal plan under BLM requirements must be stored in rigid enclosed, covered, or netted and screened above-ground tanks. The tanks may be vented, unless Federal law, or State regulations (on Federal lands) or tribal regulations (on Indian lands) require vapor recovery or closed-loop systems. The tanks must not exceed a 500 barrel (bbl) capacity unless approved in advance by the authorized officer.

(1) The authorized officer may approve an application to use lined pits only if the applicant demonstrates that use of a tank as described in this paragraph (h) is infeasible for environmental, public health or safety reasons and only if, at a minimum, all of the following conditions apply:

(i) The distance from the pit to intermittent or ephemeral streams or water sources would be at least 300 feet;

(ii) The distance from the pit to perennial streams, springs, fresh water sources, or wetlands would be at least 500 feet;

(iii) There is no usable groundwater within 50 feet of the surface in the area where the pit would be located;

(iv) The distance from the pit to any occupied residence, school, park, school bus stop, place of business, or other areas where the public could reasonably be expected to frequent would be greater than 300 feet;

(v) The pit would not be constructed in fill or unstable areas;

(vi) The construction of the pit would not adversely impact the hydrologic functions of a 100–year floodplain; and

(vii) Pit use and location complies with applicable local, State (on Federal lands), tribal (on Indian lands) and other Federal statutes and regulations including those that are more stringent than these regulations.

(2) Pits approved by the authorized officer must be:

(i) Lined with a durable, leak-proof synthetic material and equipped with a leak detection system; and

(ii) Routinely inspected and maintained, as required by the authorized officer, to ensure that there is no fluid leakage into the environment. The operator must document all inspections.

(i) Information that must be provided to the authorized officer after hydraulic fracturing is completed. The information required in paragraphs (i)(1) through (10) of this section must be submitted to the authorized officer within 30 days after the completion of the last stage of hydraulic fracturing operations for each well. The information is required for each well, even if the authorized officer approved fracturing of a group of wells (see § 3162.3–3(c)). The information required in paragraph (i)(1) of this section must be submitted to the authorized officer through FracFocus or another BLM–designated database, or in a Subsequent Report Sundry Notice (Form 3160–5). If information is submitted through FracFocus or another BLM–designated database, the operator must specify that the information is for a Federal or an Indian well, certify that the information is both timely filed and correct, and certify compliance with applicable law as required by paragraph (i)(8)(ii) or (iii) of this section using FracFocus or another BLM–designated database. The information required in paragraphs (i)(2) though (10) of this section must be submitted to the authorized officer in a Subsequent Report Sundry Notice (Form 3160–5). The operator is responsible for the information submitted by a contractor or agent, and the information will be considered to have been submitted directly from the operator to the BLM. The operator must submit the following information:

(1) The true vertical depth of the well, total water volume used, and a description of the base fluid and each additive in the hydraulic fracturing fluid, including the trade name, supplier, purpose, ingredients, Chemical Abstract Service Number (CAS), maximum ingredient concentration in additive (percent by mass), and maximum ingredient concentration in hydraulic fracturing fluid (percent by mass).

(2) The actual source(s) and location(s) of the water used in the hydraulic fracturing fluid;

(3) The maximum surface pressure and rate at the end of each stage of the hydraulic fracturing operation and the actual flush volume.

(4) The actual, estimated, or calculated fracture length, height and direction.

(5) The actual measured depth of perforations or the open-hole interval.

(6) The total volume of fluid recovered between the completion of the last stage of hydraulic fracturing operations and when the operator starts to report water produced from the well to the Office of Natural Resources Revenue. If the operator has not begun to report produced water to the Office of Natural Resources Revenue when the Subsequent Report Sundry Notice is submitted, the operator must submit a supplemental Subsequent Report Sundry Notice (Form 3160–5) to the authorized officer documenting the total volume of recovered fluid.

(7) The following information concerning the handling of fluids recovered, covering the period between the commencement of hydraulic fracturing and the implementation of the approved plan for the disposal of produced water under BLM requirements:

(i) The methods of handling the recovered fluids, including, but not limited to, transfer pipes and tankers, holding pond use, re-use for other stimulation activities, or injection; and

(ii) The disposal method of the recovered fluids, including, but not limited to, the percent injected, the percent stored at an off-lease disposal facility, and the percent recycled.

(8) A certification signed by the operator that:

(i) The operator complied with the requirements in paragraphs (b), (e), (f), (g), and (h) of this section;

(ii) For Federal lands, the hydraulic fracturing fluid constituents, once they arrived on the lease, complied with all applicable permitting and notice requirements as well as all applicable Federal, State, and local laws, rules, and regulations; and

(iii) For Indian lands, the hydraulic fracturing fluid constituents, once they arrived on the lease, complied with all applicable permitting and notice requirements as well as all applicable Federal and tribal laws, rules, and regulations.

(9) The operator must submit the result of the mechanical integrity test as required by paragraph (f) of this section.

(10) The authorized officer may require the operator to provide documentation substantiating any information submitted under paragraph (i) of this section.

(j) Identifying information claimed to be exempt from public disclosure.

(1) For the information required in paragraph (i) of this section, the operator and the owner of the information will be deemed to have waived any right to protect from public disclosure information submitted with a Subsequent Report Sundry Notice (Form 3160–5) or through FracFocus or another BLM–designated database. For information required in paragraph (i) of this section that the owner of the information claims to be exempt from public disclosure and is withheld from the BLM, a corporate officer, managing partner, or sole proprietor of the operator must sign and the operator must submit to the authorized officer with the Subsequent Report Sundry Notice (Form 3160–5) required in paragraph (i) of this section an affidavit that:

(i) Identifies the owner of the withheld information and provides the name, address and contact information for a corporate officer, managing partner, or sole proprietor of the owner of the information;

(ii) Identifies the Federal statute or regulation that would prohibit the BLM from publicly disclosing the information if it were in the BLM's possession;

(iii) Affirms that the operator has been provided the withheld information from the owner of the information and is maintaining records of the withheld information, or that the operator has access and will maintain access to the withheld information held by the owner of the information;

(iv) Affirms that the information is not publicly available;

(v) Affirms that the information is not required to be publicly disclosed under any applicable local, State or Federal law (on Federal lands), or tribal or Federal law (on Indian lands);

(vi) Affirms that the owner of the information is in actual competition and identifies competitors or others that could use the withheld information to cause the owner of the information substantial competitive harm;

(vii) Affirms that the release of the information would likely cause substantial competitive harm to the owner of the information and provides the factual basis for that affirmation; and

(viii) Affirms that the information is not readily apparent through reverse engineering with publicly available information.

(2) If the operator relies upon information from third parties, such as the owner of the withheld information, to make the affirmations in paragraphs (j)(1)(vi) through (viii) of this section, the operator must provide a written affidavit from the third party that sets forth the relied-upon information.

(3) The BLM may require any operator to submit to the BLM any withheld information, and any information relevant to a claim that withheld information is exempt from public disclosure.

(4) If the BLM determines that the information submitted under paragraph (j)(3) of this section is not exempt from disclosure, the BLM will make the information available to the public after providing the operator and owner of the information with no fewer than 10 business days' notice of the BLM's determination.

(5) The operator must maintain records of the withheld information until the later of the BLM's approval of a final abandonment notice, or 6 years after completion of hydraulic fracturing operations on Indian lands, or 7 years after completion of hydraulic fracturing operations on Federal lands. Any subsequent operator will be responsible for maintaining access to records required by this paragraph during its operation of the well. The operator will be deemed to be maintaining the records if it can promptly provide the complete and accurate information to BLM, even if the information is in the custody of its owner.

(6) If any of the chemical identity information required in paragraph (i)(1) of this section is withheld, the operator must provide the generic chemical name in the submission required by paragraph (i)(1) of this section. The generic chemical name must be only as nonspecific as is necessary to protect the confidential chemical identity, and should be the same as or no less descriptive than the generic chemical name provided to the Environmental Protection Agency.

(k) Requesting a variance from the requirements of this section.

(1) Individual variance: The operator may make a written request to the authorized officer for a variance from the requirements under this section. A request for an individual variance must specifically identify the regulatory provision of this section for which the variance is being requested, explain the reason the variance is needed, and demonstrate how the operator will satisfy the objectives of the regulation for which the variance is being requested.

(2) State or tribal variance: In cooperation with a State (for Federal lands) or a tribe (for Indian lands), the appropriate BLM State Director may issue a variance that would apply to all wells within a State or within Indian lands, or to specific fields or basins within the State or the Indian lands, if the BLM finds that the variance meets the criteria in paragraph (k)(3) of this section. A State or tribal variance request or decision must specifically identify the regulatory provision(s) of this section for which the variance is being requested, explain the reason the variance is needed, and demonstrate how the operator will satisfy the objectives of the regulation for which the variance is being requested. A State or tribal variance may be initiated by the State, tribe, or the BLM.

(3) The authorized officer (for an individual variance), or the State Director (for a State or tribal variance), after considering all relevant factors, may approve the variance, or approve it with one or more conditions of approval, only if the BLM determines that the proposed alternative meets or exceeds the objectives of the regulation for which the variance is being requested. The decision whether to grant or deny the variance request must be in writing and is entirely within the BLM's discretion. The decision on a variance request is not subject to administrative appeals either to the State Director (for an individual variance) or under 43 CFR part 4.

(4) A variance under this section does not constitute a variance to provisions of other regulations, laws, or orders.

(5) Due to changes in Federal law, technology, regulation, BLM policy, field operations, noncompliance, or other reasons, the BLM reserves the right to rescind a variance or modify any conditions of approval. The authorized officer must provide a written justification before a variance is rescinded or a condition of approval is modified.

Credits

[52 FR 5391, Feb. 20, 1987; 53 FR 17363, May 16, 1988; 53 FR 22847, June 17, 1988; 80 FR 16218, March 26, 2015; 80 FR 16577, March 30, 2015]

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