Nos. 20-16157, 20-16158

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA, et al.,
Plaintiffs/Appellants,

v.

UNITED STATES BUREAU OF LAND MANAGEMENT, et al.,
Defendants/Appellees,

and

INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, et al.,
Intervenor-Defendants/Appellees.

On Appeal from the United States District Court
for the Northern District of California

Nos. 18-cv-00521-HSG, 18-cv-00524-HSG
(Hon. Haywood S. Gilliam)

OPENING BRIEF OF THE STATE OF CALIFORNIA

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INTRODUCTION

In December 2017, the United States Department of the Interior's Bureau of Land Management ("BLM") promulgated a full repeal of its 2015 regulation of hydraulic fracturing (also known as fracking) on federal and tribal lands. California filed a lawsuit challenging that action, but the district court denied California's claims. This appeal presents two issues. First, did BLM's repeal violate the basic requirements for agency rulemaking under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq*.? And second, was the repeal a "major federal action" that altered the status quo and required preparation of an environmental impact statement ("EIS") under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*.?

In March 2015, after a nearly five-year long rulemaking process, BLM promulgated the Hydraulic Fracturing on Federal and Indian Lands rule (the "Fracking Rule" or "Rule") to provide a much-needed update to the agency's outdated oil and gas regulations. 80 Fed. Reg. 16,128 (Mar. 26, 2015) (Appellants' Joint Excerpts of Record ("ER") 1287). The Rule was developed in response to the rapid expansion and increasing technological complexity of fracking operations on federal and Indian lands, and instituted

commonsense requirements to protect environmental resources and increase public transparency.

However, within just four months of first announcing its intent to rescind the Fracking Rule, BLM proposed a rule to rescind the entirety of the Rule's requirements. In December 2017, BLM promulgated its final repeal of the Fracking Rule (the "Repeal"). *See* Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Rescission of a 2015 Rule, 82 Fed. Reg. 61,924 (Dec. 29, 2017) (ER 626). The result was a hastily compiled rulemaking that contradicted the factual findings underlying the original Rule. In failing to provide any reasoned explanation for this absolute reversal of policy, let alone the "more detailed justification" required for its reliance on contrary factual findings, BLM violated the basic requirements for agency rulemaking under the APA. Additionally, by dismissing the foreseeable significant impacts of eliminating the entirety of the Rule's environmentally protective measures, BLM violated NEPA.

In upholding the Repeal, the district court perpetuated many of the same legal errors that BLM made when promulgating it, and, significantly, failed to apply the appropriate standards established by this Court. Thus, California requests that the Court correct these errors and reverse the district court's ruling.

JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 28 U.S.C. § 1331 (action arising under the laws of the United States), and 28 U.S.C. § 1361 (action to compel officer or agency to perform duty owed to Plaintiff).

On March 27, 2020, the district court granted the Federal Defendants' and Defendant-Intervenors' cross-motions for summary judgment, and denied California's cross-motion for summary judgment. The district court entered judgment on April 14, 2020, and that judgment became final and appealable on June 13, 2019. On June 12, 2020, California filed a timely notice of appeal. ER 1.

This Court's jurisdiction rests upon 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Did BLM violate the APA by failing to provide the required reasoned explanation for its change of course and its disregard of prior factual findings?

a. Did the district court err when it held that BLM articulated a reasoned explanation for its change in position regarding the sufficiency of preexisting federal rules and state and tribal regulations, despite no change in federal and tribal rules, and the fact that additional state requirements

affected just 1% of BLM lands and overall remained less protective than the Fracking Rule?

b. Did the district court err when it held that BLM did not arbitrarily consider the costs and benefits of the Repeal, even though BLM failed to explain its contrary findings from two years earlier when it promulgated the Fracking Rule?

c. Does Executive Order 13783 provide a reasoned explanation for the Repeal, given that the Fracking Rule imposes minimal costs on operators and does not affect energy production?

2. Did the district court err in determining that BLM adequately considered alternatives to the Repeal's complete rescission of all requirements of the Fracking Rule?

3. Did the district court err in finding that NEPA did not apply to the Repeal, despite the fact that such a finding is beyond the precedent of this Court and BLM admits that there will foreseeably be significant environmental consequences from the Repeal?

STATUTORY ADDENDUM

All pertinent statutes and regulations are set forth in an addendum to this brief.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. The 2015 Fracking Rule

The Department of the Interior and BLM are responsible for administering oil and gas operations on federal and Indian lands. 30 U.S.C. §§ 181, 187; 43 U.S.C. §§ 1701, 1731; 25 U.S.C. §§ 396, 2102. In furtherance of these responsibilities, BLM promulgated the Fracking Rule on March 26, 2015. ER 1287.

Hydraulic fracturing, colloquially known as fracking, is the process of injecting water and other materials at very high pressures into a well in order to create or enlarge fractures in reservoir rock, thereby creating access to oil or gas within the rock. ER 1291. Chemical additives are frequently added to the injection fluids used in hydraulic fracturing operations, the exact makeup of which varies depending on the operator of the well, and the material forming the rock reservoir. *Id.* Many of these additives are known to be hazardous to human health, and impacts from exposure can include cancer, immune system effects, changes in body weight or blood chemistry, cardiotoxicity, neurotoxicity, liver and kidney toxicity, and reproductive and developmental toxicity. ER 1131-1132.

The Fracking Rule was developed in response to growing public concern over the risks associated with the dramatic increase in hydraulic fracturing operations across the country, as well as a Department of Energy subcommittee report recommending best practices at fracking operations. ER 1291, 1976. By 2013, BLM estimated that 90 percent of new wells on federal and Indian lands utilized hydraulic fracturing techniques. ER 1291. This increase coincided with advances in the technologies used in combination with fracturing operations, such as horizontal drilling, which expanded oil and gas explorations to shale deposits across the country that had not previously produced large amounts of oil or gas. *Id.*

BLM's regulations prior to the enactment of the Fracking Rule had not adapted to the growing use and technological sophistication of hydraulic fracturing operations. Much of BLM's existing regulations, found at 43 C.F.R. § 3162.3-1 and Onshore Oil and Gas Orders 1, 2, and 7, were not specific to hydraulic fracturing operations and had remained largely unchanged for 25 years. ER 1289. BLM's only existing regulations specific to hydraulic fracking operations, located at 43 C.F.R. § 3162.3-2, were last revised in 1988. ER 1291. These provisions are limited in scope, and provide that operators performing "routine" fracturing operations need not seek BLM's approval. 43 C.F.R. § 3162.3-2. However, the regulations do

not distinguish "routine" from "non-routine" fracturing operations, which made the rules difficult to apply and were confusing to the regulated public. ER 1354. The Fracking Rule eliminated this distinction, and instead required prior approval for nearly all hydraulic fracturing operations, regardless of whether they were "routine." ER 1306.

The Fracking Rule also implemented a number of requirements to update and supplement existing federal, state, and tribal regulations so as to "establish a consistent standard across Federal and Indian lands and fulfill BLM's stewardship and trust responsibilities." ER 1338. The Fracking Rule required that operators of hydraulic fracturing operations submit detailed information to BLM about their proposed operation, implement a casing and cementing program that would meet performance standards to protect usable groundwater, and perform mechanical integrity tests prior to operations to ensure that wells can withstand the pressure of fracking operations. ER 1289-1290. Additionally, the Rule required that operators monitor pressure during hydraulic fracturing operations, set standards for the storing of injection liquids in secure above-ground tanks, and mandated the disclosure of chemicals used in injection fluids to BLM and the public, with limited exceptions. *Id.*

BLM enacted these requirements to "ensure that wells are properly constructed to protect water supplies, to make certain that the fluids that flow back to the surface as a result of hydraulic fracturing operations are managed in an environmentally responsible way, and to provide public disclosure of the chemicals used in hydraulic fracturing fluids." ER 1288. In particular, the Fracking Rule sought to reduce and identify potential "frack hits," or the unplanned surge of pressurized fluid during a hydraulic fracturing operation into another well, which often results in surface spills. ER 1308.

At the time the Fracking Rule was issued, many state regulations fell short of the requirements imposed by the Fracking Rule. For example, at least six of the nine states where the majority of fracking on federal land occurs did not require the use of tanks, instead of earthen pits, for containing injection waste fluids. *See* ER 1322, 1436-1441. Additionally, most of these nine states' regulations on monitoring and verifying the integrity of cement casing were less protective than the Fracking Rule's requirements. ER 1436-1441.

BLM estimated that the costs of compliance with the Fracking Rule would be minimal – approximately 0.13 to 0.21 percent of the cost of drilling a well, and further noted that such costs may be overstated to the

extent that the Fracking Rule's provisions are already required by state regulations or are consistent with the voluntary, existing practices of operators. ER 1290. States or tribes could also apply for a variance from the requirements of the Fracking Rule. ER 1335-1336. Based on these findings, BLM concluded that the Fracking Rule would not "adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities," and "would not have a significant economic impact on a substantial number of small entities." ER 1355.

B. Litigation Over the Fracking Rule

Shortly after the Fracking Rule was finalized, two industry groups, the States of Wyoming, Colorado, North Dakota, and Utah, and the Ute Indian Tribe (collectively, "Petitioners") filed or intervened in lawsuits challenging the Rule in federal district court in Wyoming. *See Indep. Petroleum Ass'n. of America v. Jewell*, No. 2:15-CV-041-SWS (D. Wyo. petition filed Mar. 20, 2015); *Wyoming v. U.S. Dep't of the Interior*, No. 2:15-CV-043-SWS (D. Wyo. petition filed Mar. 26, 2015). The Sierra Club and other organizations ("Citizen Groups") subsequently moved to intervene in support of BLM on June 2, 2015. Citizen Groups' Unopposed Motion to Intervene as Respondents, *Wyoming v. U.S. Dep't of the Interior*, No. 2:15-

CV-043-SWS (D. Wyo. 2015). Following Petitioners' motions for a preliminary injunction, the court enjoined the Fracking Rule pending resolution of the litigation. *Wyoming v. U.S. Dep't of the Interior*, 136 F. Supp. 3d 1317, 1354 (D. Wyo. 2015). When it reached the merits, the district court agreed with Petitioners' arguments that BLM lacked the statutory authority to regulate fracking on federal and Indian lands, and set aside the Fracking Rule. *Wyoming v. U.S. Dep't of the Interior*, 2016 WL 3509415 (D. Wyo. June 21, 2016). BLM and the Citizen Groups sought review in the U.S. Court of Appeals for the Tenth Circuit. *Wyoming v. Zinke*, 871 F.3d 1133 (10th Cir. 2017).

When the new presidential administration took office in January 2017, the Tenth Circuit requested that BLM provide a statement to the court confirming whether its positions on the issues presented on appeal remained the same. ER 1059. On March 15, 2017, BLM responded to the court that it had begun reviewing the Fracking Rule "for consistency with the policies and priorities of the new Administration," and that this "initial review revealed that the [Fracking Rule] does not reflect those policies and priorities." ER 1051. BLM stated that it had "begun the process to prepare a notice of proposed rulemaking … to rescind the [Fracking Rule]." ER 1052-1053.

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

C. The 2017 Repeal of the Fracking Rule

On March 28, 2017, shortly after BLM's response to the Tenth Circuit, President Trump issued Executive Order 13783, titled, "Promoting Energy Independence and Economic Growth." ER 999. The order establishes that "it is the policy of the United States that … agencies immediately review existing regulations that potentially burden the development or use of domestically produced energy resources." *Id.* Section 7, "Review of Regulations Related to United States Oil and Gas Development," orders the Secretary of the Interior to review the Fracking Rule for consistency with this policy and "if appropriate, shall, as soon as practicable, suspend, revise, or rescind the guidance, or publish for notice and comment proposed rules suspending, revising, or rescinding [the Fracking Rule]." ER 1002.

The following day, Secretary of the Interior Ryan Zinke issued Secretarial Order 3349, titled, "American Energy Independence," in order to implement Executive Order 13783. ER 994. The order states that "as

previously announced by the Department [of the Interior], BLM shall proceed expeditiously with proposing to rescind the [Fracking Rule]." ER 997.

Less than four months later, on July 25, 2017, BLM proposed to repeal Fracking Rule in its entirety (the "Proposed Repeal"). 82 Fed. Reg. 34,464 (July 25, 2017) (ER 973). The eight-page Proposed Repeal stated that BLM reviewed the Fracking Rule at the direction of Executive Order 13783 and Secretarial Order 3349 and as a result, the agency now "believes that compliance costs associated with the [Fracking Rule] are not justified." ER 975-976. BLM also referenced concerns from oil and gas companies and trade associations that the Fracking Rule "would cause substantial harm to the industry." ER 975. The Proposed Repeal concluded that despite originally finding that the Fracking Rule "would not pose a significant burden to industry," it now "recognizes that [the Rule] would pose a financial burden to industry if implemented." *Id.* BLM presented no new information regarding costs or burdens to industry in making these findings. *Id.* Of the more than 100,000 public comments that BLM received on the Proposed Repeal, less than 1 percent supported the Repeal. ER 890.

On December 29, 2017, less than ten months after the agency first announced that it would rescind the Fracking Rule, BLM published the Final

Repeal, which went into effect the same day. ER 626. The Repeal eliminated the provisions added by the Fracking Rule in their entirety and returned the language of BLM regulations to nearly what it was prior to the Fracking Rule's promulgation. *Id.* In addition to removing these new requirements, the Repeal went even further, eliminating the preexisting requirement that operators request BLM approval prior to conducting "non-routine" fracking operations. *Id.*; *see also* 43 C.F.R. § 3162.3-2.

BLM gave several reasons to justify the Repeal. First, BLM stated that it was taking action to "rescind those rules that are inconsistent" with the direction of Executive Order 13783 and Secretarial Order 3349, despite the fact that it had announced its intention to repeal the Rule prior to the Orders' issuance. ER 631. Pursuant to these Orders, BLM claimed that it reviewed the Fracking Rule and concluded that "the compliance costs associated with the 2015 rule are not justified." ER 632. BLM also argued that the Fracking Rule was no longer necessary because preexisting BLM regulations, combined with state and tribal rules, were adequate to ensure the environmentally responsible exploration of oil and gas resources. ER 633-634. Specifically, BLM stated that since the Fracking Rule was promulgated, "an additional 12 states have introduced laws or regulations addressing hydraulic fracturing." ER 634. While BLM admitted that the

Fracking Rule did "provide additional assurance that operators are conducting hydraulic fracturing operations in an environmentally sound and safe manner," and that the Repeal could "reduce these assurances," it dismissed these benefits. ER 633. Ultimately, BLM concluded that eliminating the Rule's requirements "relieved operators of duplicative, unnecessary, costly and unproductive regulatory burdens." ER 631.

Alongside the Repeal, BLM issued a "Regulatory Impact Analysis for the Final Rule to Rescind the 2015 Hydraulic Fracturing Rule" ("RIA"). ER 739. The RIA estimated that the Repeal would "reduce compliance costs by up to about $9,690 per well," which "represents about 0.1 - 0.2% of the costs of drilling a well." ER 795-796. BLM further acknowledged that "the average reduction in compliance costs would be just a small fraction of a percent of the profit margin for small companies, which is not large enough impact to be considered significant." ER 804. The RIA also found that the Repeal will forgo benefits including "reductions in the risks to surface and groundwater resources," and "increased public awareness … of hydraulic fracturing operations." ER 796. Despite the RIA's findings that the saved compliance costs would be minimal, and its acknowledgement that the Repeal would remove the Fracking Rule's expected benefits, BLM

concluded that the "cost savings would exceed the forgone benefits." ER 797.

BLM also published the "Environmental Assessment, Rescinding the 2015 Hydraulic Fracturing on Federal and Indian Lands Rule" ("EA") and a "Finding of No Significant Impact" ("FONSI"). ER 819, 867. "The EA evaluates whether the analyzed actions require preparation of an environmental impact statement (EIS) pursuant to [NEPA]." ER 867. The EA briefly summarized a few impacts caused by the Repeal, including impacts to ground water, surface water, and greenhouse gases, each of which it found to be insignificant. ER 850-853.

The EA included the Repeal's only consideration of alternatives. ER 831. The EA considered four alternatives: (1) no action, (2) the proposed Repeal, which rescinds the Fracking Rule in its entirety, (3) the selected alternative, which implements the Proposed Repeal, but also amends existing regulation 43 C.F.R. § 3162.3-2 to remove the requirement that operators seek approval for "non-routine" fracking operations,[1] and (4) rescinding the requirements of the Fracking Rule, with the exception of the

[1] The EA concludes that Alternative 3 is preferable to the Proposed Repeal because fracking operations on federal lands are all "quite routine by any definition" and therefore the existing requirement that "non-routine" fracturing operations seek approval is not necessary. ER 857.

requirement that operators publicly disclose the chemicals used in hydraulic fracturing operations. ER 831-832.

The EA argues that repealing the entirety of the Rule is appropriate because state, tribal, and preexisting BLM regulations will "reduce the risks associated with hydraulic fracturing." ER 853. In support of this, the EA includes a "State-by-state Comparison of Hydraulic Fracturing Laws and Regulations" that provides a brief comparison of state regulations that are "generally consistent" with the Fracking Rule. ER 861-866. However, the comparison demonstrates that state regulations are still less protective than the Fracking Rule in many areas, including cement casing requirements, baseline water testing, storage tank requirements, and records retention. *Id.* Second, the EA provides a summary of American Petroleum Institute ("API") guidance documents, and notes that BLM has no data on the amount of operators that actually comply with this voluntary guidance. ER 853-855. Finally, the EA concludes that "the reduction in compliance costs that are anticipated as a result of rescinding the [Fracking Rule] appear to be an appropriate tradeoff for any potential lessening of assurances [that operators will conduct hydraulic fracturing in a responsible manner]." ER 856. Based on this analysis, the EA concludes that the impacts of the Repeal are not likely to be significant.

II. PROCEDURAL HISTORY

On January 24, 2018 California and the Citizen Groups filed related actions challenging the Repeal in the Northern District of California. ER 612. California alleged that BLM violated the APA by failing to provide a reasoned analysis for the Repeal. ER 613. Additionally, California alleged that BLM violated NEPA by failing to take a hard look at the environmental impacts of the Repeal and failing to prepare an EIS to evaluate the significant impacts of this action. ER 614. The Citizen Groups alleged that BLM violated the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, for failing to consult with the U.S. Fish and Wildlife Service in enacting the Repeal. ER 610. The American Petroleum Institute ("API"), Independent Petroleum Association of America ("IPAA"), Western Energy Alliance ("WEA"), and the State of Wyoming (collectively, "Intervenor-Defendants") intervened in support of BLM. ER 19-20.

The parties then filed cross-motions for summary judgment. ER 217, 229, 233. In its cross-motion, in addition to denying California's and the Citizen Group's claims, BLM alleged that both California and the Citizen Groups did not have standing to challenge the Repeal and that NEPA was not applicable because there was no change to the environmental status quo. ER 220.

On March 27, 2020, the district court granted BLM and the Intervenor-Defendants' motions for summary judgment as to the APA, NEPA, and ESA claims. ER 16-17. The district court also found that (1) California had standing to bring all claims, and (2) the Citizen Groups had standing to bring their NEPA and ESA claims, but not their APA claims. ER 20-28.

On April 14, 2020, the district court entered judgment in favor of BLM and the Intervenor-Defendants. ER 15. California and the Citizen Groups timely appealed to this Court. ER 1, 7.

SUMMARY OF THE ARGUMENT

1. On the merits of California's APA claims, the district court erred by disregarding the well-established requirements for agency rulemaking, as set forth by the U.S. Supreme Court and this Court, in finding that BLM met the "low bar" of arbitrary and capricious review. Not only is BLM's rationale for the Repeal unsupported by the administrative record, but it is entirely contradicted by its own findings from just two years earlier when it promulgated the Fracking Rule. In promulgating the Repeal, BLM failed to provide a reasoned explanation for its complete reversal in position, let alone the "more detailed justification" required to explain its contradictory findings.

a. First, BLM failed to justify its contradictory finding that state and tribal regulations, as well as preexisting federal regulations and industry guidance are "duplicative" of the Fracking Rule's requirements, when the record reflects that these requirements fall significantly short of the Fracking Rule's requirements and will not provide the consistent national baseline that BLM specified as one of its main reasons for promulgating the Rule in 2015.

b. Second, BLM failed to provide a reasoned analysis for its conclusion that the cost savings of the Repeal exceed the Fracking Rule's benefits when, among other things, the costs savings it estimates are less than the costs it estimated in 2015, and state, tribal and preexisting federal regulations are insufficient to make up for the foregone benefits of the Fracking Rule.

c. Third, Executive Order 13783, which the district court did not address in its order, does not provide a reasoned explanation for the Repeal because the record does not show that there has been any burden on energy resources, and BLM's findings underlying this analysis completely contradict its prior findings that the costs of the Fracking Rule would be minimal.

2. The district court also erred when it dismissed, in a footnote, California's claim that BLM violated the APA by failing to consider significant policy alternatives to the Repeal in order to engage in reasoned decisionmaking. The U.S. Supreme Court recently reaffirmed that a reasoned analysis of a repeal rule must include a consideration of such alternatives, an analysis which BLM entirely failed to include in the Repeal.

3. With regard to California's NEPA claims, the district court misapplied the precedent of this Court in finding that the Repeal was not subject to that statute because it did not change the environmental status quo. To the contrary, the Repeal altered the status quo by eliminating the environmentally protective requirements of the Fracking Rule, resulting in significant impacts that trigger NEPA's requirement for the preparation of an EIS.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's rulings granting or denying cross-motions for summary judgment. *Def. of Wildlife v. Zinke*, 856 F.3d 1248, 1256 (9th Cir. 2017).

"The APA sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts." *Dep't of Homeland Security v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891,

1905 (2020) ("*Regents*") (internal quotations and citation omitted). Under the APA, a "reviewing court shall ... hold unlawful and set aside" agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "in excess of statutory jurisdiction, authority or limitations," or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (C), (D). An agency action is arbitrary and capricious under the APA where the agency (i) has relied on factors which Congress has not intended it to consider; (ii) entirely failed to consider an important aspect of the problem; (iii) offered an explanation for its decision that runs counter to the evidence before the agency; or (iv) is so implausible that it could not be ascribed to a difference of view or the product of agency expertise. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*").

An "agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change." *Id.* at 42; *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) ("Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change."); *see Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 968 (9th Cir. 2015) (finding that "even when reversing a policy after an election, an agency may not simply discard prior factual findings without a

reasoned explanation"). "[W]hen an agency rescinds a prior policy its reasoned analysis must consider the 'alternative[s]' that are 'within the ambit of the existing [policy].'" *Regents*, 140 S. Ct. at 1913 (quoting *State Farm*, 463 U.S. at 51).

Furthermore, when "its new policy rests upon factual findings that contradict those which underlay its prior policy," an agency must "provide a *more detailed justification* than what would suffice for a new policy created on a blank slate." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("*FCC v. Fox*") (emphasis added). Any "unexplained inconsistency" between a rule and its repeal is "a reason for holding an interpretation to be an arbitrary and capricious change." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005); *see Kake*, 795 F.3d at 966-67 (holding that an agency's contrary conclusions "[o]n precisely the same record" were arbitrary and capricious).

Each of these failures by an agency can provide a separate basis for finding a rule to be arbitrary and capricious under the APA. *Regents*, 140 S. Ct. at 1913 ("That omission [of alternatives analysis] *alone* renders Acting Secretary Duke's decision arbitrary and capricious.") (emphasis added); *Air Alliance Houston v. EPA*, 906 F.3d 1049, 1066 (D.C. Cir. 2018) ("EPA's explanations for its changed position on the appropriate effective and

compliance dates are inadequate under [*FCC v.*] *Fox* and *State Farm*, and therefore arbitrary and capricious, for several reasons").

ARGUMENT

I. BLM FAILED TO PROVIDE A REASONED EXPLANATION FOR THE REPEAL.

BLM's rationale for the Repeal fails to meet the basic standards for agency rulemaking as set forth by the U.S. Supreme Court and this Court. *See FCC v. Fox*, 556 U.S. at 515-16; *State Farm*, 463 U.S. at 42, 48; *Kake*, 795 F.3d at 966-68. Not only is BLM's rationale unsupported by the administrative record, but it is entirely contradicted by its own findings from just two years earlier when it promulgated the Fracking Rule. Furthermore, as the record makes clear, BLM decided to repeal the Fracking Rule and then scrambled after the fact to come up with a justification for this action, even though the facts do not support its justifications. In doing so, BLM has failed to engage in the "reasoned decisionmaking" required by the APA. *See FCC v. Fox*, 556 U.S. at 520; *see also East Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 849 (9th Cir. 2020) ("[T]he touchstone of 'arbitrary and capricious' review ... is 'reasoned decisionmaking.'") (citations omitted).

A. BLM Has Failed to Justify the Repeal Based on Existing Federal, State, and Tribal Rules and Voluntary Industry Guidance.

BLM's first justification for the Repeal is its unsupported contention that the Fracking Rule is "unnecessary" and "duplicative" of preexisting federal requirements, state and tribal regulations, and voluntary industry guidance, which BLM now claims are sufficient to protect the public and the environment from the risks associated with hydraulic fracturing. ER 633. These conclusory assertions are expressly contradicted by both the record for the Fracking Rule and the Repeal, which demonstrate that such regulations are not as comprehensive or protective as the Fracking Rule. BLM has failed to provide the justification necessary to disregard its previous factual findings on this issue. *See Kake*, 795 F.3d at 969 ("The 2003 [Rule] does not explain why an action that it found posed a prohibitive risk to the Tongass environment only two years before now poses merely a 'minor' one. The absence of a reasoned explanation for disregarding previous factual findings violates the APA.").

Preexisting Federal Regulations

When promulgating the Fracking Rule, BLM found that preexisting federal requirements, including its regulations at 43 C.F.R. § 3162.3-1 and Onshore Oil and Gas Orders 1, 2 and 7, were not sufficient to ensure that oil

and gas operations were conducted in an environmentally safe manner. ER 1297. Specifically, BLM stated that "[t]he regulations and Onshore Orders that have been in place to this point have served to provide reasonable certainty of environmentally responsible development of oil and gas resources on public lands, but are in need of revision as extraction technology has advanced." *Id*.; *see* ER 1354-1355 ("the information that the BLM currently requires ... is inadequate and does not reflect the complex nature of the [hydraulic fracturing] operations… . [Additional] knowledge of the hydraulic fracturing operations will help the BLM better manage and protect public and tribal resources"). As BLM found, the Fracking Rule "provided further assurance of wellbore integrity," "public disclosure of chemicals used in hydraulic fracturing," and "safe management of recovered fluids." ER 1297.

For example, with regard to Onshore Order 2, which provides BLM's standards for the minimum levels of performance for operators when conducting drilling operations on Federal and Indian lands, the Fracking Rule added new provisions, such as requiring operators to document any indications of inadequate cementing and to report any such indications to an authorized officer within 24 hours. ER 1296, 1318. BLM found that these additional requirements, "in conjunction with the casing and cementing

requirements of Onshore Order 2, will sufficiently isolate and protect usable water." ER 1318. Moreover, the Fracking Rule, unlike the requirements for disposal of produced water in Onshore Order 7, "requires storage of recovered fluids in rigid enclosed, covered, or netted and screened above-ground tanks" prior to receiving approval to dispose of the fluids, thereby prohibiting storage in unlined earthen pits. ER 1322. As BLM found, "above-ground tanks, when compared to pits, are less prone to leaking, are safer for wildlife, and will have less air emissions." *Id*.

Inexplicably, BLM now bases its Repeal on the exact opposite finding, *i.e*., that these preexisting federal requirements are adequate for the protection of the environment. ER 635-636. Yet the record provides no basis to support this contention. BLM makes no effort to explain how the agency's preexisting regulations and Onshore Orders now provide sufficient protection from the risks the Fracking Rule was designed to address. To the contrary, BLM continues to admit that the Repeal could reduce "such assurances." ER 633.

The district court acknowledged California's argument as to preexisting federal regulations, but never addressed BLM's complete reversal in position. In doing so, the court erred in failing to apply established precedent. *See Kake*, 795 F.3d at 968 ("an agency may not simply discard

prior factual findings without a reasoned explanation"). And rather than applying the standard articulated by the Supreme Court in *FCC v. Fox*, the district court relied on outdated circuit precedent in suggesting that it need only determine "whether the admitted policy change represented by the Repeal was so inadequately explained as to be arbitrary and capricious." ER 34 (citing *Nat'l Med. Enterprises, Inc. v. Sullivan*, 957 F.2d 664, 669 (9th Cir. 1992)). There is no legal basis for the district court's "so inadequately explained" test, especially where the agency's "new policy rests upon factual findings that contradict those which underlay its prior policy," and a "more detailed justification" is required.

In sum, BLM's reversal on preexisting federal regulations is arbitrary and capricious because it failed to offer a reasoned explanation for "returning to its pre-[2015] Rule regulatory framework." *See California v. U.S. Dep't of the Interior*, 381 F. Supp. 3d 1153, 1166-68 (N.D. Cal. 2019) ("*California v. DOI*") (vacating repeal of Interior Department regulation governing royalties for oil, gas and coal developed on public lands).

State and Tribal Regulations

BLM's claim that state and tribal regulations will address the risks posed by hydraulic fracturing similarly falls flat. When promulgating the Fracking Rule in 2015, BLM found that "state regulations range from not

regulating [hydraulic fracturing] activity at all in some states to fairly comprehensive regulation in other states." ER 1350; *see also* ER 1338 (finding that state and tribal regulations "continue to be inconsistent across states"). BLM emphasized that the Fracking Rule was "more protective than the previous proposed rules and current regulations," and that it "strengthens oversight and provides the public with more information than is currently available." ER 1288. One of the important benefits of the Fracking Rule was that it created "a consistent, predictable, regulatory framework" that would "establish a consistent baseline" across federal lands. ER 1288, 1290.

Moreover, as BLM stated, "[i]t is important to recognize 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." ER 1293, 1381. Thus, the Rule established "a consistent standard across Federal and Indian lands and fulfill[ed] BLM's stewardship and trust responsibilities." ER 1338. To address potential duplication between the Fracking Rule and state or tribal requirements, BLM specifically provided that "in situations in which specific state or tribal regulations are demonstrated to be equal to or more protective than the BLM's rules, the state or tribe may obtain a

variance" to "allow for enforcement of the more protective state or tribal rule." ER 1290, 1381.

In the Repeal, BLM now argues that the Fracking Rule is "duplicative" of state and tribal regulations because "since the promulgation of the [Fracking Rule] an additional 12 states have introduced laws or regulations addressing hydraulic fracturing," and "some tribes with oil and gas resources have also taken steps to regulate oil and gas operations, including hydraulic fracturing, on their lands." ER 634. However, these "additional 12 states" account for a combined total of less than 1% of BLM-approved oil and gas development. ER 779-780. In contrast, more than 99% of BLM-administered oil and gas development occurs in nine states with inconsistent hydraulic fracking regulations that existed when the Fracking Rule was enacted in 2015. ER 779, 782-783 (noting that California, Colorado, Montana, New Mexico, North Dakota, Oklahoma, Texas, Utah, and Wyoming account for "99.2% of the total well completions on Federal and Indian lands nationwide").

As was the case in 2015, these state requirements continue to differ significantly from the Fracking Rule, especially with regard to mechanical integrity testing, pressure monitoring during hydraulic fracturing operations, and post-fracturing disclosure requirements. *See* ER 782-783, 898-903, 907.

BLM's own review of state regulations reflects this disparity, demonstrating that the Fracking Rule remains more stringent and protective than most state rules. *See* ER 861-866 (demonstrating that most states do not match the Fracking Rule's requirements regarding storage tanks, cement casing, or water testing); ER 779-783. For example, a majority of states, including most of the major states with hydraulic fracturing activities, do not meet the Fracking Rule's cement casing requirements, nor the minimum requirements for storage tanks or records retention. ER 863-864; *see* ER 789 (BLM admitting that rescinding the tank requirement creates "the potential for incremental environmental harm" and "could increase the potential risk to surface and groundwater resources through spills and contamination.").

Moreover, even those state regulations that BLM represents as "generally consistent" with Fracking Rule provisions still fall short in important ways. *See* ER 864. In particular, BLM finds that nearly all the states it reviewed require chemical disclosure of hydraulic fracturing fluids to FracFocus,[2] and concludes that because use of FracFocus is "more

[2] FracFocus is a website managed by the Ground Water Protection Council, a non-profit organization of state water quality regulatory agencies, and by the Interstate Oil and Gas Compact Commission, a multi-state government agency charged with balancing oil and gas development with environmental protection. ER 1290.

prevalent than in 2015, there is no continuing need for a federal chemical disclosure requirement." ER 634; *see* ER 861-866. However, the Fracking Rule mandated the disclosure of much more information than just the chemicals used in injection fluids, such as information regarding the sources and locations of water used in the fluid. *See* ER 1326-1327.[3] BLM did not conduct a similar review of tribal rules, and continues to admit that many tribes do not have regulations for hydraulic fracturing at all. ER 692 ("We acknowledge that not all oil and gas producing tribes have exercised their sovereignty to regulate hydraulic fracturing activities"); ER 691 (BLM admitting that "tribal regulations or enforcement mechanisms ... are not fully developed" in many areas).

The U.S. Environmental Protection Agency ("EPA") similarly questioned BLM's rationale regarding state regulations during its

[3] As the record shows, BLM's review of state regulations did not begin until after the agency had publicly announced that it would rescind the Rule. For example, BLM did not begin requesting information from states on their fracturing regulations or conducting research on state regulations until after the March 15, 2017 announcement that it would repeal the Rule. *See, e.g.*, ER 1019-1021, 1017-1018, 1008-1012 (BLM emails requesting information from states on hydraulic fracturing operations and conversations on status of review process from March 21 – 27, 2017). Other emails from BLM employees directly reference that they are reviewing state regulations following the decision to repeal. *See, e.g.*, ER 1017, 1004, 1014.

interagency review of the Repeal. In response to BLM's statement that repealing the Fracking Rule would "relieve operators of duplicative, unnecessary, and unproductive regulatory burdens," EPA noted, "This statement does not appear to be supported by the facts that BLM has provided (e.g., table 2.12 in the RIA). Table 2.12 shows that several states do not have a specified requirement in areas outlined in the 2015 rule." ER 880.[4]

Moreover, BLM fails to consider many of the other benefits of the Fracking Rule with regard to state and tribal requirements. For example, BLM does not address that the Fracking Rule provided "a consistent, predictable, regulatory framework" that would "establish a consistent baseline." ER 1290. BLM also fails to consider that unlike BLM, states do not need to comply with the stewardship standards and trust responsibilities

[4] *See also* ER 881 (EPA commenting that "Please clarify as this statement implies that all of these states have requirements that were in 2015 final rule which is not consistent with Table 2.12 in the RIA."); ER 882 (EPA commenting that "State regulations vary widely; it is difficult to say that the rule is broadly duplicative."); ER 883 (EPA commenting that "Table 2.12 shows several instances where states did not have specific regulations aligning with existing BLM rules. It is difficult to state that all 32 states have applicable regulations."); ER 884 (EPA commenting that "This statement does not seem to be consis[te]nt with Table 2.12. Within that table there appears to be several states that do not appear to have aspects that are described within BLM's rule."); ER 885 (same).

applicable to federal and Indian lands. ER 1293. Nor does it address why the variance process in the Fracking Rule is insufficient to address any concerns about duplication. ER 1290.

As with preexisting federal regulations, the district court failed to apply the "more detailed justification" standard for following BLM's reversal of factual findings with regard to state requirements. *FCC v. Fox*, 556 U.S. at 515. Instead, the district court found sufficient, citing only to the EA, BLM's explanation that "additional state regulations provided some, though not all, of the same protections imposed by the 2015 Rule." ER 33. Additionally, while the Court also agreed that "the same level of detail is not provided for the purported additional tribal regulations," it found – again citing to the EA – that "BLM adequately detailed its analysis." *Id.* However, there is no "analysis" showing that tribal regulations have changed since 2015. *FCC v. Fox*, 556 U.S. at 515. Thus, the district court failed to hold BLM to the standard mandated by the APA.

Voluntary Industry Practice

Finally, BLM attempts to justify the Repeal by arguing that the requirements of the Fracking Rule are "consistent with industry practice" and that companies are already complying with certain requirements, such as chemical disclosure, voluntarily. ER 633; *see also* ER 853-855. However,

as with preexisting federal and state regulations, the Repeal once again fails to consider or explain its complete reversal on this issue.

When BLM promulgated the Fracking Rule, it specifically acknowledged that many of its provisions were consistent with industry practices. ER 1290, 1315, 1319. Despite this, BLM emphasized that the Fracking Rule was still necessary because of the mandatory nature of the Rule's requirements, which allowed BLM to fulfill its trust responsibilities and ensure that "minimum standards are adhered to." ER 1340. In the Repeal, BLM has provided no justification for these conflicting findings or explanation for how it will ensure that minimum standards are adhered to without the Rule's provisions. This failure is even more significant given that BLM acknowledges that "it has no data to support an estimate of the percentage of operators that voluntarily comply with [industry guidance]." ER 855.

Rather than holding BLM accountable for these failures, the district court simply accepted BLM's explanation that "industry recommended practices require many of the well protections detailed by the [Fracking Rule]." ER 34. As with BLM's other contradictions, the district court did not require any additional explanation from BLM to explain why voluntary

guidance, that BLM acknowledged and dismissed in 2015, can now form the basis for a completely opposite regulatory action.

In sum, BLM has failed to provide a reasoned explanation regarding how preexisting federal, state, and tribal requirements, as well as voluntary industry guidance, now render the Fracking Rule "duplicative" or "unnecessary," let alone the more detailed justification necessary to overcome its prior contradictory findings. For this reason, the Repeal is arbitrary and capricious. *See California v. DOI*, 381 F. Supp. 3d at 1168 (agency's conclusory explanation fails to satisfy its obligation to explain the inconsistencies between its prior findings in enacting rule and its decision to repeal, thereby rendering repeal arbitrary and capricious).

B. BLM's Analysis of the Costs and Benefits of the Repeal Is Arbitrary and Capricious.

BLM also fails to provide any reasoned explanation for the Repeal based on its new analysis of the costs and benefits of the Fracking Rule, especially given its unexplained change in position from 2015. *See* ER 632-633. As noted above, in 2015, BLM found that the costs of the Rule would amount to per-operation compliance costs of about $11,400, which represent about 0.13 to 0.21 percent of the cost of drilling a well. ER 1290, 1388, 1467. BLM further stated that "the additional cost 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." ER 1368.

With regard to benefits, in 2015, BLM presented a qualitative discussion, finding that the Fracking Rule will "provide significant benefits to all Americans by avoiding potential damages to water quality, the environment, and public health." ER 1290, 1388, 1462-1465. Among other benefits, BLM determined that the Fracking Rule "will reduce the risks associated with hydraulic fracturing operations on Federal and Indian lands," including "potential risks to surface and groundwater resources," will "increase the assurance that operators conduct hydraulic fracturing in an environmentally sound and safe manner," and will "provide for increased public access to detailed information about the hydraulic fracturing operations taking place, including the chemicals used during the operations and the location and nature of the operation." *Id.*; ER 1322 (noting "that above-ground tanks, when compared to pits, are less prone to leaking, are safer for wildlife, and will have less air emissions"); ER 1323 (concluding that use of tanks "limits potential environmental impacts ... eliminates longer term environmental risk, reduces risks of spills or leaks, and increases

safety"); ER 1340 (finding that the Rule is needed "to assure that hydraulic fracturing fluids are isolated from surface waters, usable groundwater, and other wells"); ER 1363 ("the rule will significantly reduce the risks associated with hydraulic fracturing operations on Federal and Indian lands, particularly risks to surface waters and usable groundwater"). BLM also found that the Fracking Rule "creates a consistent, predictable, regulatory framework, in accordance with the BLM's stewardship responsibilities for hydraulic fracturing under the FLPMA and the Indian mineral leasing statutes." ER 1290. Although insufficient data prevented quantification of the Fracking Rule's benefits, BLM determined that the "potential benefits of the rule are *significant*." ER 1363 (emphasis added).

In the Repeal, BLM inexplicably concludes that "the potential cost savings" of Repeal "would *exceed* the forgone benefits" of the Fracking Rule. ER 796-797 (emphasis added); ER 649 ("Any marginal benefits provided by the 2015 rule do not outweigh the rule's costs, even if those costs are a small percentage of the cost of a well"). However, nothing in the record for the Repeal supports this complete reversal in position. With regard to costs, BLM determined that the expected costs of the Fracking Rule are even *less* than it estimated in 2015. ER 795 ("We estimate that this final rule would reduce per-well compliance costs by an average of about

$9,690 ... . In contrast ... we estimated that the [Fracking Rule] would have increased per-well compliance costs by about $11,400.").

On the benefit side, while BLM restates some of the qualitative findings from 2015, the only explanation it provides is the following statement:

> Due to this final rule, we would not expect a reduction in the putative risks associated with hydraulic fracturing operations, a reduction in the risks to surface and groundwater resources, or increased public awareness and understanding of hydraulic fracturing operations. Any potential increase in risk as a result of this final rule would be partially or completely offset by state and other Federal regulations that would still apply to the subject hydraulic fracturing operations. But those state requirements, since they may vary in detail, may not provide a consistent level of assurance that the requirements in the 2015 final rule would have afforded.

ER 797.

There are several problems with this contradictory explanation. First, as BLM admits in this statement and as discussed above in Section I.A., state requirements remain insufficient to fulfill the substantial regulatory gap that the Fracking Rule was designed to address. *See* ER 863-866, 989–903, 907. Second, BLM makes no effort to explain how the agency's preexisting regulations, which remain unchanged since the time BLM promulgated the Fracking Rule in 2015, now provide sufficient protection from the risks the Fracking Rule was designed to address. ER 633 ("rescission of the 2015

rule could potentially reduce any such assurances" that "operators are conducting hydraulic fracturing operations in an environmentally sound and safe manner"). Third, BLM says nothing about tribal regulations or provides any evidence that such rules have changed since the agency determined them to be inadequate in 2015. *See* ER 692 ("We acknowledge that not all oil and gas producing tribes have exercised their sovereignty to regulate hydraulic fracturing activities"). In short, this conclusory statement, which entirely fails to consider many of the important findings that the agency made in 2015, does not fulfill the APA's requirements for reasoned decisionmaking. *See Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014) ("[C]onclusory statements will not do; an agency's statement must be one of reasoning.") (internal quotations and citation omitted); *State Farm*, 463 U.S. at 43 (agency decision is arbitrary when it "entirely failed to consider an important aspect of the problem.").

The district court not only failed to address many of California's arguments on this issue, but the findings that it does make are both legally and factually incorrect. First, citing *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1038 (D.C. Cir. 2012), the district court found that "it was 'well within [the] agency's discretion' to give more weight to socioeconomic costs than it had previously given." ER 36. But BLM here

did not assert that it was placing greater weight on costs than it previously had; instead, the agency ignored its own prior factual findings regarding the magnitude of those costs. *See* ER 796-797. While it may be true that "elections have policy consequences," it is also well established that "an agency may not simply discard prior factual findings without a reasoned explanation." *Kake*, 795 F.3d at 968. Moreover, a "more detailed justification" is required where, as here, the agency's "new policy rests upon factual findings that contradict those which underlay its prior policy." *FCC v. Fox*, 556 U.S. at 515. The district court failed to apply these standards to the situation here.

For example, nowhere in the record did BLM claim, as the district court states, that it "prioritized overall cost reduction when weighing the costs and benefits of the Repeal." ER 37. Moreover, while the district court agreed that "BLM did not explicitly point to consistency in nationwide regulation as a foregone benefit," the district court claimed that the agency "inherently considered this benefit in its" state-by-state analysis. ER 35. However, there is no legal authority to support the district court's "inherent consideration" standard, which would render meaningless the U.S. Supreme Court's requirement that an agency provide a "more detailed justification" for a change in policy that contradicts its prior findings. Further, the district

court's reliance on rationales "inherently" but not actually considered in the record is impermissible under the APA, and cannot be used to prop up BLM's faulty analysis. *See Regents*, 140 S. Ct. at 1907 ("It is a foundational principle of administrative law that judicial review of agency action is limited to the grounds that the agency invoked when it took the action.") (*citing Michigan v. EPA*, 576 U.S. 743 (2015)) (internal quotations omitted).

Additionally, for the reasons discussed more fully in Part I.A., there is no reasoned basis for BLM's benefit calculation to have changed based on "preexisting" regulations or "the existence of additional state and tribal regulations," as the district court found. ER 36. The preexisting federal regulations – unchanged from 2015 – that purportedly allow BLM to impose "site-specific protective measures" fail to provide any reasoned basis for BLM's complete reversal in position. ER 37. Nor do the additional state requirements which BLM relies so heavily upon. In fact, these additional measures apply to just 1% of BLM lands, and BLM provides no evidence of additional tribal regulations.

Finally, to the extent that BLM's new conclusion is based on the finding that adverse impacts from hydraulic fracturing operations are a "rarity," ER 36 (citing ER 636), the rationale does not appear in the economic analysis, was expressly rejected by BLM two years earlier, and is

contradicted by the record. *See* ER 1340 (rejecting comments claiming there was "no reason to promulgate the regulations because there was no evidence that hydraulic fracturing operations have caused contamination of groundwater"); ER 241-242.

Consequently, BLM's failure to provide any reasoned basis for its conclusions regarding costs and benefits, let alone the more detailed justification required for disregarding its previous findings, further renders the Repeal arbitrary and capricious. *See Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1198-1203 (9th Cir. 2008) (finding economic analysis to be arbitrary and capricious where agency "undervalue[ed] the benefits and overvalu[ed] the costs of more stringent standards"); *see also California v. Bureau of Land Mgmt*., 286 F. Supp. 3d 1054, 1069 (N.D. Cal. 2018) ("*California v. BLM*") (district court finding that "BLM cannot have it both ways" by claiming vast compliance cost savings while trivializing or ignoring the forgone benefits); *Ctr. for Biological Diversity v. Bureau of Land Mgmt*., 422 F. Supp. 2d 1115, 1149 (N.D. Cal. 2006) (finding it arbitrary and capricious for agency's economic analysis "to rely on a critical assumption that lacks support in the record to justify" decision).

C. Executive Order 13783 Provides No Basis for the Repeal.

To justify the Repeal, BLM also cites to the language of Executive Order 13783 that directs agencies to review "and, as appropriate, suspend, revise, or rescind those that unduly burden domestic energy resources regulations." ER 632; *see also* ER 685-686. BLM claims that after conducting this review, it determined that the Fracking Rule "imposes administrative burdens and compliance costs that are not justified." ER 626; *see* ER 686 ("As a result of this review, the BLM now believes that the 2015 rule imposes unnecessary and unjustified compliance costs and burdens."). However, these conclusory statements not only lack support, but they are directly contradicted by the record for both the Repeal and the Fracking Rule. To the contrary, the Fracking Rule would impose insignificant compliance costs on oil and gas operators and have a minimal, if any, impact on energy development.

To begin, as BLM found in 2015, compliance costs of the Fracking Rule would be small, amounting to just $11,400 per well, or "approximately 0.13 to 0.21 percent of the cost of drilling a well." ER 1290. BLM further found that the Fracking Rule would "not have a significant economic impact on a substantial number of small entities," would "not adversely affect in a material way the economy, a sector of the economy, productivity,

competition, [or] jobs," and would "not alter the investment or employment decisions of firms." ER 1355, 1369. Furthermore, BLM found that "[s]ince the estimated compliance costs are not substantial when compared with the total costs of drilling a well, the BLM believes that the rule is unlikely to have an effect on the investment decisions of firms, and the rule is unlikely to affect the supply, distribution, or use of energy." ER 1368.

Moreover, during promulgation of the Fracking Rule, BLM considered and addressed many of the concerns that the agency now argues warrant the Repeal, without any reasoned explanation. For example, some commenters on the Fracking Rule claimed that the costs were overly burdensome and unnecessary and "would negatively affect jobs, revenue, and effective government." *See*, *e.g.*, ER 1307, 1320, 1322-1323, 1340. BLM responded that it "evaluated these [cost] concerns as a part of its economic analysis and found the overall impacts to be nominal in relation to current overall costs of drilling operations." ER 1340. Moreover, BLM determined that these costs were necessary to achieve the purposes of the Fracking Rule and "would be easily outweighed by revenues that operators might expect from a geologically attractive area." ER 1307, 1346.

In the Repeal, BLM fails to provide any reasoned explanation for its complete reversal in position. In fact, BLM's factual findings for the Repeal

do not differ in any material way from its findings in 2015. For example, BLM admits that the "average reduction in compliance costs will be a small fraction of a percent of the profit margin for small companies, which is not a large enough impact to be considered significant." ER 729, 803. In the Repeal, BLM actually finds that compliance costs are lower than it had initially calculated in the Rule. ER 632-633 (estimating costs of Rule at "$9,690 per well, or about 0.1 percent to 0.2 percent of the cost of drilling a well"); ER 856 (same). BLM continues to admit that the Repeal "will not have a significant economic effect on a substantial number of small entities," will not affect the investment or employment decisions of firms, and "is likely to have a positive effect, if any, on the supply, distribution, or use of energy." ER 733-734; *see* ER 696 (Repeal is "not expected to impact the number of hydraulic fracturing operations" on federal and tribal lands).

Courts in the Ninth Circuit have repeatedly found that federal agencies must provide some evidence that a rule will actually burden energy development in order to justify a repeal based on Executive Order 13783 under the APA. In *California v. Bernhardt*, ___ F. Supp. 3d ___, 2020 WL 4001480 (N.D. Cal. July 15, 2020), *appeal docketed*, No. 20-16793 (9th Cir. Sept. 16, 2020), the district court held that BLM's reliance on Executive Order 13783 to justify the repeal of a 2016 rule to prevent waste of natural

gas from oil and gas operations of federal and tribal lands was arbitrary and capricious. *Id*. at *19-20. Strikingly similar to the situation here, the court noted BLM's prior findings that the 2016 rule "contained economical, cost-effective, and reasonable requirements and that compliance costs only represented 0.15% of even small companies' revenues," discussed that its findings for the Repeal "do not differ in any material way," and thus held that "BLM's reliance on Executive Order 13783 falls short of supplying the required 'reasoned explanation'" required by the APA. *Id*.

Similarly, in *California v. DOI*, the district court found that the Office of Natural Resources Revenue's ("ONRR") assertions that its Valuation Rule would burden the development of domestic energy sources, as defined by Executive Order 13783, were inadequate where ONRR "failed to provide any data or analysis to support them" and where the agency's position contradicted earlier findings. 381 F. Supp. 3d at 1170 (*citing Kake*, 795 F.3d at 969); *see also California v. BLM*, 286 F. Supp. 3d at 1067 (finding that BLM failed to provide an adequate explanation because it failed to "point to any fact that justifies its assertion that the Waste Prevention Rule encumbers energy production. Its concern remains unfounded.").

Once again, BLM's claimed reliance on Executive Order 13783 appears to be an unsupported rationalization for a decision it had already

made. To begin, the Executive Order was not even issued until March 28, 2017 – two weeks after BLM had already announced that it was repealing the Fracking Rule. *See* ER 999. And, while the Executive Order called for "review" of the Fracking Rule, ER 1002, a day later—without any review—Secretarial Order 3349 reaffirmed that BLM was moving directly to achieving its desired outcome: "[a]s previously announced by the Department, BLM shall proceed expeditiously with proposing to rescind" the Fracking Rule. ER 997. Further, while the Department of the Interior did go through the motions of the review called for under Executive Order 13783, it did not complete that review until October 24, 2017, three months *after* it proposed the Repeal. 81 Fed. Reg. 50,532 (Nov. 1, 2017) ("Final Report: Review of the Department of the Interior Actions That Potentially Burden Domestic Energy").[5]

Notably, despite the extensive briefing on this issue by the Plaintiffs, the district court did not address this argument in its Order. This failing is significant, as BLM's failure to provide any reasoned basis for its reliance

[5] Contrary to the evidence in the record, as discussed above, this report makes the unsubstantiated finding that the Repeal "has the potential to reduce regulatory burdens by enabling oil and gas operations to occur under one set of regulations within each state or tribal lands, rather than two," and "may result in additional interest in oil and gas development on public lands, especially under higher commodity prices." 81 Fed. Reg. at 50,535.

on Executive Order 13783, let alone the "more detailed justification" required by the U.S. Supreme Court to explain these contradictory factual findings, on its own, renders the Repeal arbitrary and capricious. *See Regents*, 140 S. Ct. at 1913 (finding a single defect sufficient to render an agency decision arbitrary and capricious). In sum, BLM cannot justify its reliance on Executive Order 13783, or its claim that the Fracking Rule will unnecessarily burden energy development, as a justification for the Repeal.

II. BLM FAILED TO CONSIDER OBVIOUS ALTERNATIVES TO A COMPLETE REPEAL

It is well established that agencies must consider significant policy alternatives in rulemaking actions in order to achieve reasoned regulatory decisions. *See State Farm*, 463 U.S. at 46-47 (holding that failure to consider alternatives to complete repeal was "[t]he first and most obvious reason for finding the rescission arbitrary and capricious"); *see also Action for Children's Television v. FCC*, 821 F.2d 741, 748 (D.C. Cir. 1987) ("It is beyond cavil that an agency must examine significant policy alternatives in order to come to 'reasoned' regulatory decisions"); *Pub. Citizen v. Steed*, 733 F.2d 93, 103 (D.C. Cir. 1984) (agency action was "arbitrary and capricious because the agency failed to pursue available alternatives that might have corrected the deficiencies in the program"); *California v. DOI*,

381 F. Supp. 3d at 1168 ("When considering revoking a rule, an agency must consider alternatives in lieu of a complete repeal, such as by addressing the deficiencies individually" and citing cases). As the Supreme Court explained in *State Farm*, where an agency provides justification for repealing only certain provisions of a rule, the agency must consider alternative approaches that eliminate the provisions at issue but retain other provisions unaffected by the agency's rationale. *State Farm*, 436 U.S. at 48-50.

The Supreme Court's recent holding in the *Regents* case illustrates this point well. *Dep't of Homeland Security v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020). In that case, the Department of Homeland Security attempted to rescind the entirety of the Deferred Action for Childhood Arrivals and the Deferred Action for Parents of Americans and Lawful Permanent Residents programs. *Id.* at 1903. In justifying its reasoning for the repeal of these programs, the Department identified only legal defects with the elements of the programs which conferred eligibility for benefits, such as work authorization, to persons with unauthorized status. *Id.* at 1912. The Department did not address defects with the other important component of the programs – namely the forbearance policy that deferred removal from the United States. *Id*. Thus, because no reason was provided for why the

forbearance policy was terminated, the Supreme Court concluded that it was arbitrary for the Department to have failed to consider an alternative which would have eliminated the benefits portion of the programs, but retained the forbearance policy. *Id.* at 1912-13 (holding that "[t]hat omission alone renders Acting Secretary Duke's decision arbitrary and capricious") (*citing State Farm*, 43 U.S. at 51).

The Repeal of the Fracking Rule parallels the facts in the *Regents* case in many important respects. Here, the record reflects that BLM's stated reason for repeal – namely that the Fracking Rule was duplicative with state and federal requirements and therefore imposed unnecessary costs on operators – only applied to portions of the Rule. ER 631-636. As discussed above in Part I.A., BLM identified several provisions of the Fracking Rule, such as cement casing requirements, measures to prevent frack hits, and storage tank requirements, that are largely unregulated by the states, and therefore would not result in duplication. ER 779-783, 861-866. However, BLM provides no consideration of an alternative that would retain these measures, and in turn, the important environmental benefits they confer, while eliminating the allegedly "duplicative" measures BLM identifies as problematic. This directly conflicts with the Supreme Court's holdings in *State Farm* and *Regents*.

Moreover, the district court's brief analysis of this issue fails to apply the clear rulings of the Supreme Court. The district court, in a footnote, dismissed California's alternatives arguments, stating that "a court is not to ask whether a regulatory decision is better than the alternatives," and noting that agencies do not need to consider "endless" alternatives. ER 38, n.10 (*citing FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760 (2016)). But as *State Farm* and *Regents* instruct, asking an agency to offer an explanation for rescinding *all* components of a Rule when it has only justified some, is not seeking consideration of "endless alternatives." Nor is it asking BLM or the Court to select some preferred alternative of the plaintiffs. Rather, considering alternatives "properly tailored" to an agency's stated concerns is simply a part of offering a full, reasoned analysis of an agency's actions. *See California v. DOI*, 381 F. Supp. 3d at 1169. In failing to do so, the Repeal violates the APA.

III. THE REPEAL TRIGGERED NEPA ANALYSIS

NEPA "is our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a).[6] Congress enacted NEPA in 1969 to "establish a

[6] On July 16, 2020, the Council on Environmental Quality ("CEQ") finalized an update to its 1978 regulations implementing NEPA, which took effect on September 14, 2020. 85 Fed. Reg. 43,304 (July 16, 2020). Because the Repeal was finalized in 2017, only the prior 1978 regulations are cited here.

national policy for the environment ... and to create and maintain conditions under which man and nature can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. § 4321. NEPA has two fundamental purposes: (1) to guarantee that agencies take a "hard look" at the consequences of their actions before the actions occur by ensuring that "the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts;" and (2) to ensure that "the relevant information will be made available to the larger audience that may also play a role in both the decision making process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349–50 (1989).

To achieve these purposes, NEPA requires the preparation of a detailed EIS for any "major federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). NEPA's implementing regulations broadly define such actions to include "new or revised agency rules, regulations, plans, policies, or procedures." 40 C.F.R. § 1508.18. As a preliminary step, an agency may prepare an EA to decide whether the environmental impact of a proposed action is significant enough to warrant preparation of an EIS. *See* 40 C.F.R. § 1508.9.

This Court has consistently held that the threshold for whether environmental analysis is triggered under NEPA is low. *Cal. ex rel. Lockyer v. U.S. Dep't of Agriculture*, 575 F.3d 999, 1012 (9th Cir. 2009) ("*Lockyer*"). To prevail on a claim that a federal agency should have prepared an EIS, a plaintiff need only "raise substantial questions whether the project will have significant impacts on the environment." *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998). This Court has also established that "NEPA procedures do not apply to federal actions that maintain the environmental status quo." *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1114 (9th Cir. 2002).

In practice, these standards become one and the same: the Ninth Circuit has applied the threshold "substantial questions" test in order to determine whether a federal action alters the environmental status quo. *See id.* at 1115 (finding that because repeal of a U.S. Forest Service rule that would reduce forest management would alter the environmental status quo, preparation of an EIS is required under NEPA); *see also Lockyer*, 575 F.3d at 1018 (rejecting the government's claim that there was no change to the environmental status quo because the threshold for environmental analysis under NEPA, that substantial questions were raised as to whether the project will have significant impacts, was met).

Here, California has raised substantial questions as to whether BLM's Repeal of the Fracking Rule will have significant impacts on the environment, and in consequence, the Repeal alters the status quo and triggers NEPA's requirement for full preparation of an EIS. The district court's finding that NEPA does not even apply to the Repeal is therefore incorrect and must be reversed.

A. The Environmental Consequences of Repeal Cannot Be Reduced to a Paper Exercise

This Court has consistently limited exempting actions from NEPA review to situations where the agency's action was consistent with its past conduct, and the action itself results in merely a "paper exercise." *Lockyer*, 575 F.3d at 1016; *see also Burbank Anti-Noise Grp. v. Goldschmidt*, 623 F.2d 115, 116 (9th Cir. 1980) (finding that the continued operation of a facility did not alter the status quo); *Idaho Conservation League v. Bonneville Power Admin.*, 826 F.3d 1173, 1176 (9th Cir. 2016) (finding no change to the status quo because the agency "was doing what it had always done"). In contrast to this authority, the Repeal represents a complete reversal of BLM's policies. By definition, the Repeal's main purpose is to eliminate prior substantive requirements imposed on hydraulic fracturing operations. ER 626. This complete change from BLM's prior conduct

renders it well outside the precedent of cases that have found NEPA to be inapplicable.

Further, BLM's own decision to prepare an EA pursuant to NEPA exemplifies that BLM believed that the Repeal altered the status quo. The EA for the Repeal specifically states that its purpose is to evaluate "whether the analyzed actions require preparation of an [EIS] pursuant to [NEPA]." ER 867. There is no discussion in the EA analyzing whether NEPA was applicable in the first place. BLM's post hoc arguments to the district court that the Repeal does not alter the status quo because the Fracking Rule was enjoined before it could go into effect reflect the agency's last-ditch effort to avoid compliance with NEPA, and should not be considered by this Court. *See* ER 40; *Humane Soc'y v. Locke*, 626 F.3d 1040, 1049-50 (9th Cir. 2010) (counsel's "post hoc rationalization" serves only "to underscore the absence of an adequate explanation in the administrative record itself.").

Moreover, the Repeal's elimination of the Fracking Rule's important protections raises substantial questions about whether the Repeal will have significant impacts on the environment, triggering NEPA review. In 2015 when BLM originally promulgated the Fracking Rule, BLM discussed extensively the significant impacts that would likely occur if the requirements of the Fracking Rule were not imposed. ER 1234-1241. These

impacts included increased risk of frack hits, increased risk of contamination to surface and groundwater resources, and less information available to the public on the chemicals injected during fracking operations. ER 1234, 1237-1238, 1241. BLM still acknowledges these significant impacts. The record on Repeal discusses the risks to the public from a lack of disclosure of potentially hazardous chemicals used in hydraulic fracturing operations, the potential for surface or groundwater contamination, and the potential for contamination of drinking water that the Repeal could cause. ER 850-852, 855-856.

Rather than engaging in a full discussion of these potential impacts, BLM makes a variety of attempts to dismiss the risks of the Repeal in order to conclude that the impacts are unlikely to be significant. These attempts fall short. BLM argues that state regulations and voluntary industry guidance will somehow eliminate the risks posed by the Repeal. ER 852-855, 861-866. However, as discussed above, the EA's own analysis reflects that state regulations are still less protective than the Fracking Rule in many areas, and BLM acknowledges it has no information on how many operators are voluntarily complying with industry guidance. ER 855, 861-866. BLM also attempts to justify the impacts of Repeal by stating that any impacts are an "appropriate tradeoff" for purported reductions in compliance costs. ER

856. However, cost reductions cannot prevent an agency from preparing an EIS under NEPA when the appropriate significance standards have been met. *See* 40 C.F.R. § 1508.27; *Klamath-Siskiyou Wildlands Ctr. v. U.S. Forest Serv.*, 373 F. Supp. 2d 1069, 1086 (E.D. Cal. 2004) ("Neither the net long term benefits of the program, nor the risk associated with not implementing the project, relieve [an agency] of its duty to conduct an EIS when the project will have significant environmental impacts."). Thus, despite BLM's attempt to impermissibly dismiss the risks of the Repeal,[7] the Record demonstrates that the Repeal will result in significant environmental impacts.

In sum, the Repeal is a complete reversal of policy which the record demonstrates will result in foreseeable significant environmental impacts. It must be required to undergo full NEPA review.

B. *Lockyer* Supports a Finding that the Repeal Alters the Status Quo

The district court relies heavily on *Lockyer* to conclude that the Repeal does not change the environmental status quo. ER 41. In *Lockyer*, the Ninth

[7] Agencies "cannot avoid preparing an EIS by making conclusory assertions that an activity will only have an insignificant impact on the environment." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 864 (9th Cir. 2005); *see also Alaska Ctr. for Env't v. U.S. Forest Serv.*, 189 F.3d. 851, 859 (9th Cir. 1999) (same).

Circuit held that the U.S. Forest Service's actions to repeal the requirements of the Roadless Rule, which prohibited construction and timber harvesting in roadless areas of national forests, did alter the environmental status quo and trigger NEPA review.[8] *Lockyer*, 575 F.3d at 1006, 1018. Similar to the situation here, the Roadless Rule was enjoined by the Wyoming district court and was pending review in the Tenth Circuit when the Forest Service took action to eliminate the requirements of the rule. *Id.* at 1007. The *Lockyer* decision analyzes a number of factors, including that the Roadless Rule was in effect for seven months before the injunction, in holding that its repeal required NEPA review. *Id.* at 1014-1018.

The district court interprets the *Lockyer* decision to "compel the conclusion that NEPA does not apply here, because [the Fracking Rule] was never implemented." ER 41, n.12. However, a close reading of *Lockyer* reveals that its discussion of the Roadless Rule's implementation – which is limited to a short paragraph – is not by itself dispositive of whether NEPA is applicable in this case. Rather, it is only one part of the opinion's larger

[8] In *Lockyer*, the Forest Service attempted to avoid NEPA review by asserting that the removal of the Roadless Rule's requirements fell into a categorical exemption. 575 F.3d at 1013. The basis for the exemption, however, was that the rule was merely a "paper exercise" that did not alter the environmental status quo. *Id.* at 1013-1015. As a result, this Court's analysis is directly relevant to this case.

consideration of whether substantial questions are raised that the repeal of the Roadless Rule would create significant impacts. *See Lockyer*, 575 F.3d at 1018. It is this larger analysis that should be conducted when determining whether NEPA review was triggered by the Repeal.

In contrast to the district court's conclusion, when *Lockyer's* larger analysis is considered, this authority directly *supports* a finding that the Repeal required NEPA review. *Lockyer* emphasizes that the removal of the Roadless Rule's provisions was a change meriting environmental review, because its "primary purpose … was taking substantive environmental protections off the books." *Lockyer*, 575 F.3d at 1015. The opinion elaborates that the repeal had the effect of mooting a pending appeal of the Roadless Rule, which could have resulted in the reinstatement of the rule had the repeal not gone into effect. *Id.* at 1016. In short, by "permanently removing the Roadless Rule from the Code of Federal Regulations … [the U.S. Forest Service] purported to ensure that future land management decisions would never again be constrained by the Roadless Rule." *Id.* at 1018.

Such is the case with BLM's Repeal of the Fracking Rule. Although the Fracking Rule was not in effect at the time of the Repeal, the Repeal was implemented with the intention of removing the Fracking Rule from the

Code of Federal Regulations, mooting the pending appeal in the Tenth Circuit,[9] and ensuring that no future oil and gas operation would need to comply with the Rule's requirements. *See* ER 631 ("BLM believes that it is not only better to rescind the [Fracking Rule] to relieve operators of duplicative, unnecessary, costly and unproductive regulatory burdens, but it also eliminates the need for further litigation about BLM's statutory authority."). Moreover, as in *Lockyer*, the Repeal eliminated environmentally protective requirements, which as discussed above, would have reduced risks of ground and surface water contamination, among others. In short, the Repeal is far from a mere "paper exercise." *Lockyer*, 575 F.3d at 1016. It is the elimination of an environmentally beneficial rule that merited review under NEPA.

Thus, because the Repeal was a complete reversal of prior policy, and California has raised substantial questions as to whether it will result in significant environmental impacts, not only does NEPA apply, but BLM

[9] *See Wyoming v. Zinke*, 871 F.3d at 1142 ("BLM has clearly expressed its intent to rescind [the Fracking Rule], and whether all or part of [the Rule] will be rescinded is now an open question … . These appeals present an 'unusual circumstance' that requires us to conclude that these appeals are unfit for review.") (*quoting Abbott Labs. v. Gardner*, 387 U.S. 163 (1967)).

must prepare an EIS to evaluate the significant environmental impacts of Repeal.

CONCLUSION

California respectfully requests that this Court reverse the district court's judgment on California's APA and NEPA claims, and therefore set aside the Repeal as arbitrary and capricious and contrary to law.

Dated: October 21, 2020

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STATEMENT OF RELATED CASES

Counsel is aware of no related cases within the meaning of Circuit Rule 28-2.6.

Dated: October 21, 2020

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 20-16157, 20-16158

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