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)

REPLY BRIEF OF THE STATE OF CALIFORNIA

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

REGULATIONS

INTRODUCTION

Appellees fail to offer any valid basis to save the Bureau of Land Management's ("BLM") unlawful repeal (the "Repeal") of its 2015 regulations governing hydraulic fracturing on federal and tribal lands ("Fracking Rule" or "Rule"). *See* 82 Fed. Reg. 61,924 (Dec. 29, 2017). As California has explained, the Repeal is invalid because BLM failed to articulate a reasoned explanation for its action or seriously evaluate the environmental risks that will result. Without addressing these arguments, Appellees instead make unsubstantiated attacks on California's standing, and claim that California's objections stem from its mere dislike of BLM's chosen policy. These arguments fail. Consequently, California respectfully requests that the Court reverse the district court's judgment and set aside the Repeal.

STANDARD OF REVIEW

No party disputes that this Court reviews *de novo* the district court's ruling on cross-motions for summary judgment. *See Def. of Wildlife v. Zinke*, 856 F.3d 1248, 1256 (9th Cir. 2017). However, Appellees' other contentions regarding the appropriate standard of review lack merit.

First, while Appellee American Petroleum Institute ("API") claims that "[t]he Court reviews the District Court's factual findings for clear error," Answering Brief of API, Dkt. No. 47-1 ("API Br.") at 1-2, it fails to identify any findings that

would be subject to this standard. In an Administrative Procedure Act ("APA") case, the function of the district court is not to resolve disputed facts or make de novo factual determinations, but "to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985).

Second, Appellees Independent Petroleum Association of America and Western Energy Alliance ("IPAA") are incorrect in arguing that "no heightened standard of judicial scrutiny" applies to the Repeal. *See* Response Brief of IPAA, Dkt. No. 49-1 ("IPAA Br.") at 35; *see also* Answering Brief of Appellee State of Wyoming, Dkt. No. 44 ("Wyo. Br.") at 43 ("more detailed justification" standard "is unsupported by law"). As the U.S. Supreme Court has made clear, and this Court recently reaffirmed, when an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy," the 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) (emphasis added); *see City and Cnty. of San Francisco v. U.S. Citizenship and Immigration Servs*., 981 F.3d 742, 761 (9th Cir. 2020) (applying "more detailed justification" standard to agency's "abrupt change in policy").

Finally, the fact that the 2015 Fracking Rule was preliminary enjoined and later vacated by a Wyoming district court has no relevance to the standard of

review, *see* IPAA Br. at 36, especially given that both of these rulings were vacated by the Tenth Circuit Court of Appeals. *See Wyoming v. Sierra Club*, 2016 WL 3853806 (10th Cir. July 13, 2016); *Wyoming v. Zinke*, 871 F.3d 1133 (10th Cir. 2017).

ARGUMENT

I. CALIFORNIA HAS STANDING TO CHALLENGE THE REPEAL.

Standing is established where a plaintiff shows that it: (1) has suffered an "injury in fact" that is (2) fairly traceable to the challenged action of the defendants, and (3) is likely redressable by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs*., 528 U.S. 167, 180–81 (2000). On appeal, Appellees challenge California's ability to establish direct injury from the Repeal, and that vacating the Repeal would redress California's harms. These arguments lack merit.

It is well established that states are "not normal litigants for the purposes of invoking federal jurisdiction." *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007). Consistent with this "special solicitude," *id*. at 520, the district court properly found that California established concrete, particularized financial harms that are traceable to the Repeal. Excerpts of Record ("ER") at 21-23. "Monetary expenditures to mitigate and recover from harms that could have been prevented absent the [federal rule] are precisely the kind of 'pocketbook' injury that is

incurred by the state itself." *Air All. Hous. v. U.S. Envtl. Prot. Agency*, 906 F.3d 1049, 1059–60 (D.C. Cir. 2018); *see also California v. Azar*, 911 F.3d 558, 571–72 (9th Cir. 2018) (finding that a federal rule exempting employers from covering contraceptive care would cause economic harms to California because women would seek care through state-run or state-reimbursed programs). As the declarations submitted by California demonstrate, the Repeal will eliminate an additional layer of regulatory protection on federal lands in California, and as a result, the burden for administering and ensuring compliance with hydraulic fracturing regulations will fall more heavily on the state's resources. *See* Further Excerpts of Record ("FER") at 7 ("[T]he repeal … eliminates an additional layer of regulatory protection on federal lands in California that supplements and bolsters state hydraulic fracturing regulations, including well stimulation requirements, … placing additional burdens on State resources."); *see also* FER 16. BLM also acknowledges that the Repeal will reduce manpower and resources spent on administrating and enforcing the Fracking Rule's requirements – burdens that will now fall more heavily on California. *See* ER 784-791.

BLM now claims that none of these burdens will actually fall on California because "BLM requires operators to follow state law on state lands," and the Repeal does not reduce BLM's resources for "ensuring compliance with federal and applicable state and tribal requirements." *See* Federal Appellees' Answering

Brief, Dkt. No. 43 ("BLM Br.") at 27. But these assertions fall flat because, as the district court noted, "BLM is disavowing any intention to ensure compliance with the additional requirements imposed by the [Rule]." ER 22. Because BLM will not be receiving and processing the information disclosures, applications, and other documentation the Fracking Rule required, not only will BLM shift administrative burdens to the states, but it will also not have access to the necessary information from operators to ensure compliance with state law. This fact is acknowledged by BLM itself in the regulatory impact analysis for the Repeal. ER 788 (noting that without the Rule, BLM will no longer receive verification from operators to confirm they implemented corrective action prior to undergoing fracking operations, and would need to rely on information collected by state or tribal agencies).

Appellees' other arguments as to California's financial harms similarly come up short. BLM argues that because it will still regulate oil and gas drilling under pre-existing federal regulations, California cannot demonstrate harm. BLM Br. at 26. But as the record clearly demonstrates, *see infra* at Part II.A, these existing regulations fall short of the requirements the Fracking Rule imposed. IPAA argues that California cannot establish injury from the Repeal because "very little oil and gas production in California occurs on federal lands." IPAA Br. at 15. However, the declarations California submitted in support of its standing directly refute that

claim: there are approximately 500 producing oil and gas leases on federal land in California, covering about 200,000 acres, and encompassing 7,900 usable oil and gas wells that produce about 9 million barrels of oil annually. FER at 11. Since the Repeal, BLM has opened up hundreds of thousands of additional acres in California to oil and gas leasing. FER 13.

BLM also argues that unlike the *Azar* case, there is no evidence of any injury that could be redressed by the reinstatement of the Fracking Rule because California could simply issue its own regulations.[1] BLM Br. at 26-27 (citing *Azar*, 911 F.3d at 571). This argument is baseless. As discussed above, even with its own regulations, the Repeal places additional burdens on California. In that respect, *Azar* is directly analogous to this case. In *Azar*, this court found that states had a right to challenge the federal government's decision to expand the number of employers who were exempt from complying with the Affordable Care Act's contraceptive coverage requirements. 911 F.3d at 571. Just as the Repeal will

[1] Conversely, IPAA claims that California's regulations on hydraulic fracturing demonstrate that California's regulators believe that the Fracking Rule is not necessary "to protect against the dangers of hydraulic fracturing." IPAA Br. at 15-16. However, even with California's current regulations, the Repeal will cause proprietary harm to the state by placing additional burdens on California to regulate fracking on federal lands. IPAA also claims that California's failure to seek emergency relief means that it has no injury on which to base standing. *Id.* at 16. IPAA provides no citations to support this argument, nor offers any explanation as to how it obviates the economic injuries to California caused by the Repeal.

place additional burdens on California to regulate hydraulic fracturing, *Azar* found that the government's decision would place additional burdens on state-run programs, which provided a basis for standing. *Id.* at 571-72.

Finally, although the district court found that economic harms alone were sufficient to establish standing, California also provided evidence of environmental harms caused by the Repeal. The Fracking Rule provided an additional layer of regulatory protection that supplements State regulations on federal lands, and addressed harm to surface and groundwater resources, increased air pollution, and other impacts that can be caused by hydraulic fracturing operations. FER 7-8, 14-16. Moreover, the Fracking Rule also included requirements over and above California's regulations. *See* FER 16 (noting that the Rule requires shorter reporting and disclosure deadlines than California regulations and requires that records must be retained for longer).

Appellees' arguments regarding California's standing to bring its National Environmental Policy Act ("NEPA") claims are also unpersuasive. In the NEPA context, it is well established that where an action threatens a litigant's concrete interests, an agency's failure to follow NEPA's procedural mandates can create an injury sufficient for establishing standing. *Douglas Cnty. v. Babbitt*, 48 F.3d 1495, 1500–01 (9th Cir. 1995). "An 'increased risk' to the environment is all that is needed to establish the injury prong for standing in these environmental procedural

claims." *Ecological Rights Found. v. Pacific Lumber, Co.*, 230 F.3d 1141, 1151 (9th Cir. 2000); *see also Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) ("An allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk that the harm will occur.'"). Here, as the district court correctly noted, the Repeal removed numerous requirements designed to reduce environmental harms, thereby increasing environmental risk. ER 23, 626. Moreover, BLM's own analysis shows that the state and tribal regulations fall short of the Rule's requirements and cannot make up for the increased environmental risk the Repeal will create. ER 861-866. In failing prepare an environmental impact statement for the Repeal, BLM created a "a risk that serious environmental impacts will be overlooked," which courts have held is sufficient to form the injury needed for standing. *City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975).

Thus, California has established standing to challenge the Repeal under both the APA and NEPA.

II. APPELLEES FAIL TO SHOW THAT BLM PROVIDED A REASONED EXPLANATION FOR THE REPEAL.

Appellees try to dismiss California's arguments by claiming that the State merely dislikes BLM's chosen policy, and by asserting that the Repeal was justified by "a holistic analysis" of several factors. *See* BLM Br. at 27-37; API Br. at 3-15; IPAA Br. at 35-46; Wyo. Br. at 26, 38-43. Not only do these contentions

fail to address the majority of California's arguments, but they are also unsupported by the record. The primary justifications provided by BLM for the Repeal—the existence of federal, state, and tribal regulations and voluntary industry guidance, a faulty cost-benefit analysis, and unsubstantiated burdens on industry—all contradict BLM's prior findings and fail to provide a coherent, reasoned basis for the Repeal, let alone the "more detailed justification" required for this abrupt change in policy. *FCC v. Fox*, 556 U.S. at 515. Appellees' other stated reasons – such as BLM's alleged "experience" since the 2015 Fracking Rule or "doubts" about the agency's authority – lack any factual basis or constitute post hoc litigation rationales that this Court should disregard.

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

Appellees' attempt to bolster BLM's unsupported contentions that the Fracking Rule is now "unnecessary" and "duplicative" of existing federal, state, and tribal rules, and voluntary industry guidance, fails. In promulgating the Fracking Rule, BLM reached the exact opposite conclusions, and the minimal changes in these requirements and guidance since 2015 fail to provide the justification necessary to disregard these prior findings.

With regard to its own regulations, BLM claims that it "already has an extensive process in place" to regulate hydraulic fracturing. BLM Br. at 28-29. Yet BLM fails to provide any reasoned explanation for contradicting its many

2015 factual findings that such regulations were "in need of revision as extraction technology has advanced," and the Rule was needed to "establish baseline environmental safeguards for hydraulic fracturing operations across all public and Indian lands." ER 1297 (finding that Fracking Rule "provided further assurance of wellbore integrity," "public disclosure of chemicals used in hydraulic fracturing," and "safe management of recovered fluids."); *see also* 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"); ER 1394 (Fracking Rule will "enhance" wellbore integrity requirements and "reduce" the risk of improperly managed and disposed hydraulic fracturing fluids).

Appellees' arguments with regard to state and tribal regulations similarly lack merit. First, BLM cites its "comprehensive state-by-state analysis of state regulation." BLM Br. at 35 (citing ER 779-783, 792). Yet this brief summary of state regulations fails to support BLM's "duplication" argument. Rather, it demonstrates that provisions of the Fracking Rule, such as cement casing requirements, measures to prevent frack hits, and storage tank requirements, are absent from many state and tribal regulations. ER 779-783, 898-903, 907.

BLM also argues that in 2015, "nearly 40 percent of states with federal oil and gas leases lacked regulations," but now "all such states" have at least some form of regulation. BLM Br. at 35 (citing ER 634). Yet, this completely ignores the fact that the "additional 12 states" that enacted regulations since 2015 account for a combined total of less than 1% of BLM-approved oil and gas development. ER 634, 779-780. BLM further claims that some states had "strengthened" their regulations since 2015, and that disclosure "was more prevalent in 2017 than in 2015." BLM Br. at 29-30 (citing ER 634, 669-70, 781); Wyo. Br. at 40-41 (citing ER 781). However, the record demonstrates very little change in state regulations during this time period. *See* ER 781. Moreover, the Fracking Rule mandated the disclosure of much more information than reported to FracFocus (the chemicals used in injection fluids), such as information regarding the sources and locations of water used in the fluid. *See* ER 1326-1327.

With regard to tribal rules, BLM simply restates its contention that "[s]ome tribes" have "taken steps to regulate oil and gas operations, including hydraulic fracturing, on their lands," BLM Br. at 30 (citing ER 634), without any discussion or analysis regarding which tribes have taken such steps or how those measures compare to the Fracking Rule. *See* ER 692 (BLM admitting that "tribal regulations or enforcement mechanisms ... are not fully developed" in many areas). BLM also fails to explain how its existing regulations and "enforcement mechanisms" are

somehow now sufficient to fulfill this regulatory gap. *See* BLM Br. at 36 (citing ER 692).

Moreover, Appellees' arguments ignore BLM's 2015 findings that 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, 1338. Nor do Appellees address the fact 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; *see* ER 1338 (explaining why state regulation alone is insufficient and finding that Fracking Rule "establish[es] a consistent standard across Federal and Indian lands and fulfill[s] BLM's stewardship and trust responsibilities"). And BLM says nothing about why the variance process in the Fracking Rule was insufficient to address any concerns about duplication. ER 1290.

Finally, Appellees cite to "voluntary standards" governing hydraulic fracturing," including "two updated guidance documents after BLM issued the 2015 Rule" by API. BLM Br. at 31, 37 (citing ER 709, 769, 853-854); API Br. at 11-15 (ER 767-768, 770, 786-787, 853-854). While BLM claims that such guidance is "highly influential in the oil and gas industry," it admits that there is "no data to support an estimate of the percentage of operators that voluntarily

comply with the API recommendations when not required by State, Federal, or tribal regulations." ER 769; *see* ER 855. As such, Appellees have failed to provide any reasoned explanation for contradicting BLM's 2015 finding that the Fracking Rule was necessary because of the mandatory nature of the Rule's requirements, which allowed BLM to ensure that "minimum standards are adhered to." ER 1340.

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 San Francisco v. USCIS*, 981 F.3d at 761.

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

Appellees fail to point to any evidence that justifies BLM's complete reversal in position regarding the cost and benefits of regulating hydraulic fracturing. First, BLM claims that California does "not meaningfully dispute BLM's calculation of costs." BLM Br. at 20, 49-50. However, BLM's precise "calculation of costs" of implementing the Rule, which the agency determined were even less in 2017 than it calculated in 2015, is not at issue. *See* ER 795. What is contested is BLM's unexplained reversal in position from its 2015 findings that such costs were

"insignificant," and benefits were "significant," ER 1363, 1368, to its 2017 determination that "the potential cost savings" of Repeal "would *exceed* the forgone benefits" of the Fracking Rule. ER 796-797 (emphasis added). BLM's reversal is further undermined by its admission that "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." ER 633; *see* ER 797.

BLM next claims that its 2015 findings regarding environmental benefits "were speculative and almost entirely conclusory." BLM Br. at 48, 50 n.7 (citing ER 633, 797). Yet BLM doesn't cite to any actual examples of such conclusory assertions in the rulemaking for the 2015 Fracking Rule. These *post-hoc* arguments cannot satisfy the requirements for agency decision making under the APA and should not be considered by the Court. *See Humane Soc'y of U.S. v. Locke*, 626 F.3d 1040, 1050 (9th Cir. 2010) ("Defendants' post-hoc explanations serve only to underscore the absence of an adequate explanation in the administrative record itself.").

Appellees also repeatedly refer to the alleged "rarity of adverse environmental impacts" from hydraulic fracturing since promulgation of the 2015 Fracking Rule. BLM Br. at 1, 13-14, 32, 34-35, 37, 41 (citing ER 636-637, 657, 661-662, 686); IPAA Br. at 43-45. There are several problems with this assertion. First, this

rationale does not appear in BLM's economic analysis for the Repeal, and thus does not provide any justification for its unsupported reversal in position regarding costs and benefits.

Second, BLM rejected this same rationale in 2015 when it promulgated the Fracking Rule, and BLM provides no justification for its reversal in position here. *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"). In fact, one of the primary goals of the Fracking Rule was to increase the amount of reporting and transparency regarding hydraulic fracturing and address the lack of information regarding adverse incidents. *See* ER 1290 ("this final rule will add to existing requirements by providing information to the BLM and the public on the location, geology, water resources, location of other wells or fracture zones in the area, and fracturing plans for the operation before the well is permitted"). As BLM stated in 2015:

> From a resource management perspective, the current regulation results in incomplete information being provided to the BLM. That lack of information restricts the BLM's ability as the resource manager to make informed resource decisions about hydraulic fracturing operations or to respond effectively to incidents that may occur. Knowledge of the hydraulic fracturing operations will help the BLM better manage and protect public and tribal resources.

ER 1354-1355; *see also* ER 1394, 1486. Without the Fracking Rule, BLM found that it would not receive information to verify that a hydraulic fracturing operation

was performed as planned and without an adverse incident, as it "receives only a subsequent report that a fracking operation was done, with few details." ER 1241; *see* ER 1289. Given that the Fracking Rule never went into effect, there is no reasoned basis for BLM's sudden reversal in position on this issue.[2]

Finally, citing *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032 (D.C. Cir. 2012), IPAA contends that "the agency merely changed its mind" regarding compliance costs and did not "disregard facts and circumstances that underlay the prior policy." IPAA Br. at 39-41. However, BLM did not assert that it was placing greater weight on costs than it previously had. Rather, the agency simply ignored its own prior factual findings regarding the magnitude of those costs. *See* ER 796-797. This is directly contrary to this Court's admonition that, even after an election, "an agency may not simply discard prior factual findings without a reasoned explanation." *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 968 (9th Cir. 2015); *see also California v. Bureau of Land Mgmt.*, 286 F. Supp. 3d 1054, 1069 (N.D. Cal. 2018) ("BLM cannot have it both ways" by claiming vast compliance cost savings while trivializing or ignoring the forgone benefits).

[2] For these same reasons, BLM's and API's claims that California did not "identify specific contamination" resulting from hydraulic fracturing are beside the point. *See* BLM Br. at 32 n.4; API Br. at 4-5, 7.

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

In the Repeal, BLM repeatedly cited the language of Executive Order 13783, and claimed that its review under this order determined that the Fracking Rule "imposes administrative burdens and compliance costs that are not justified." ER 626; *see* ER 631-632, 685-686, 742, 748, 828-829, 830, 832, 838, 868, 869. Rather that contesting California's arguments that this rationale lacks any reasoned basis, *see* California Br. at 43-48, BLM now states that Executive Order 13783 is "irrelevant" because BLM's justifications "do not depend on the Order's applicability." BLM Br. at 19-20, 46. California agrees that Executive Order 13783 is "irrelevant," but for the reason that it cannot support the Repeal in light of the Fracking Rule's insignificant compliance costs and lack of burdens on energy production. California Br. at 43-48.

In response to California's argument that the district court failed to even address this rationale, API now claims that it was unnecessary for the district court to reach this issue because it found for BLM on other grounds. API Br. at 6-7 n.5. This is incorrect for two reasons. First, as the Supreme Court recently reaffirmed, each failure by an agency to justify its decision can provide a separate basis for finding a rule to be arbitrary and capricious under the APA. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) ("*Regents*")

("That omission [of alternatives analysis] *alone* renders Acting Secretary Duke's decision arbitrary and capricious.") (emphasis added). Second, courts in the Ninth Circuit have repeatedly found that federal agencies' improper reliance on Executive Order 13783 can provide a basis for finding an agency rule to be arbitrary and capricious. *See California v. Bernhardt*, 472 F. Supp. 3d 573, 604-05 (N.D. Cal. 2020), *appeal docketed*, No. 20-16793 (9th Cir. Sept. 16, 2020); *California v. DOI*, 381 F. Supp. 3d 1153, 1170 (N.D. Cal. 2019); *California v. BLM*, 286 F. Supp. 3d at 1067.

In sum, BLM cannot justify its reliance on Executive Order 13783, or claim that the Fracking Rule unnecessarily burdens energy development or imposes unjustified compliance costs, as a basis for the Repeal.

D. Appellees' Other Justifications for the Repeal Lack Merit.

The remaining arguments offered by Appellees fail to provide the reasoned basis required by the APA. First, Appellees repeatedly cite BLM's "[d]esire to eliminate further litigation about BLM's statutory authority." *See* BLM Br. at 28, 31 (citing ER 631 ("Commenters and a District Court have raised doubts about BLM's statutory authority to regulate hydraulic fracturing operations on Federal and Indian lands")); Wyo. Br. at 38-40; IPAA Br. at 36-37. However, "doubts" raised by the Wyoming district court and commenters about BLM's statutory authority – a position that BLM itself has disputed in litigation – hardly provide a

reasoned basis for the Repeal. ER 631; *see Wyoming v. U.S. Dep't of Interior*, 2016 WL 3509415, *4 (D. Wyo. June 21, 2016) ("BLM asserts authority to promulgate the Fracking Rule under an array of various statutes, … granting it 'broad authority' to regulate all oil and gas operations on federal and Indian lands"). Not only has the Wyoming district court's opinion been vacated, but, as demonstrated by the extensive arguments made by Intervenor-Appellees, the Repeal has not eliminated litigation on this issue. *See* IPAA Br. at 26-35; Wyo. Br. at 26-38. Furthermore, to the extent that BLM's own authority remains in "doubt," so does the adequacy of BLM's preexisting regulations to regulate this practice.

BLM further cites its "experience while the 2015 Rule was not in effect." BLM Br. at 33. To the extent that BLM is citing such "experience" as further evidence of the "rarity" of adverse environmental impacts, the lack of evidence regarding this reversal in position is discussed above. *See supra* Part I.B. In any event, the majority of BLM's "experience" between promulgation of the Fracking Rule in March 2015 and its Repeal in December 2017 was spent defending the agency's authority to promulgate the Fracking Rule, as well as the need for these requirements, in federal court. *See Wyoming*, 2016 WL 3509415, **1-2, 4.

Finally, other concerns raised by Intervenor-Appellees, such as BLM's supposed lack of authority or the "desire to avoid potential harm and costs associated with unnecessary disclosure of proprietary information," IPAA Br. at

37, represent the positions of Intervenors and not BLM's stated justification for the Repeal.

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

It is well established that agencies are required under the APA to consider significant and obvious alternatives as a part of their obligations to provide a reasoned explanation for regulatory decisions. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.,* 463 U.S. 29, 48-51 (1983); *Action for Children's Television v. FCC*, 821 F.2d 741, 748 (D.C. Cir. 1987). Moreover, the U.S. Supreme Court has clearly established that where, as here, an agency's justification only extends to a portion of the rule it is trying to repeal, it must consider a more narrowly tailored alternative to a full repeal. *See Regents*, 140 S. Ct. at 1913 (citing *State Farm*, 463 U.S. at 43, 51). Given this precedent, Appellees fall short of demonstrating that the Repeal's consideration of alternatives meets the requirements of the APA.

BLM argues that it need not consider a more narrow alternative to a full repeal because "the APA does not mandate that BLM consider any particular alternatives to the proposed action." BLM Br. at 40. However, this argument reveals a fundamental misunderstanding of BLM's legal obligations. BLM is correct that the APA does not require the analysis of a particular number or amount of alternatives, but it does require agencies to provide reasoned bases for their

decisions. *State Farm*, 463 U.S. at 42. Where an agency repealing a rule has left a gap in its analysis, and only provided justification for the repeal of a portion of a rule, courts have consistently required that the agency consider a more narrow repeal tailored to the agency's particular concerns. *See Regents*, 140 S. Ct. at 1913.

Here, while BLM relies heavily on the Fracking Rule's alleged duplication with state and federal requirements, BLM Br. at 40-41, the record reflects that many provisions, specifically, storage tank and cement casing requirements and measures to prevent frack hits, remain largely unregulated. ER 779-783, 861-866. This regulatory gap was extensively documented by commenters to the Repeal. *See*, *e.g.*, ER 679-685; ER 912-913; ER 921-924; ER 899-903; ER 906-908. Despite this, the Repeal eliminates all provisions of the Fracking Rule, and does not offer any explanation of why an alternative tailored to BLM's specific criticisms—*i.e.*, an alternative that eliminated only the requirements actually duplicated in state and tribal law—could not be implemented.[3] Far from requiring BLM to consider an endless list of alternatives, this would only have required

[3] BLM's open acknowledgment of this regulatory gap, *see* BLM Br. at 40, only highlights the significance of an alternative to the Repeal which retains these unregulated requirements. *See Farmer's Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1511 (D.C. Cir. 1984) (holding that the responsibility of an agency to analyze reasonable alternatives "becomes especially important when the agency admits its own choice is substantially flawed.").

BLM to address the well-documented analytical gaps left by its incomplete justification for the Repeal.

Appellees' attempts to argue that the alternatives analysis is sufficient fall short. Appellees claim that a more narrow alternative need not be considered because adverse incidents at fracking operations are a "rarity." BLM Br. at 41; IPAA Br. at 48. Yet this rationale is unsupported by the record and fails to address BLM's prior findings regarding the need for the Rule. *See supra* Part II.B. Similarly, pre-existing federal regulations and voluntary guidance, also do not justify only a complete Repeal. *See supra* Part II.A.

Confusingly, Appellees also assert that BLM met its APA obligations to consider alternatives because it considered alternatives under a completely different statute: NEPA. BLM Br. at 40; API Br. at 25. More specifically, BLM argues that because the environmental assessment concluded that environmental impacts would be minimal, the agency was only required to analyze a small number of alternatives under NEPA. BLM Br. at 39-40. BLM's questionable conclusion that the Rule will have "minimal environmental impacts" notwithstanding,[4] these arguments entirely fail to address the point. BLM is obligated to provide a reasoned explanation for the Repeal under the APA,

[4] As discussed *infra* Section IV, the record does not support BLM's conclusion that the Repeal will not cause significant environmental impacts.

including evaluating obvious alternatives. Its failure to do so here undermines its analysis in the Repeal.

In addition to its attempts to justify its inadequate consideration of alternatives, BLM also argues that California cannot preserve this claim for litigation because it did not raise it in comments on the Repeal. However, courts have repeatedly held that exhaustion is not applicable where the issue is sufficiently obvious that the agency had an obligation to consider the issue on their own. *See Okla. Dep't of Envtl. Quality v. EPA*, 740 F.3d 185, 192 (D.C. Cir. 2014) (finding that there would be no "[u]nfair surprise" to an agency where the issue raised involved "key assumptions" that the agency would already be required to consider); *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1132 (9th Cir. 2011) (finding that an environmental document's flaws can be "so obvious that there is no need for a commentator to point them out specifically").[5] Here, BLM left a clear gap in explaining its decision to repeal the entirety of the Rule's requirements, and it was obligated, regardless of whether it was raised by commenters, to explain why it could not implement a more narrowly-tailored alternative. *See State Farm*, 463 U.S. at 46-47 (holding that failure to consider

[5] Moreover, this issue was raised by other commenters during the rulemaking process. FER 29-30; *see CTIA-Wireless Ass'n v. FCC*, 466 F.3d 105, 117 (D.C. Cir. 2006) (recognizing that issue exhaustion may be excused where another party has raised identical issue).

alternatives to complete repeal was "[t]he first and most obvious reason for finding the rescission arbitrary and capricious").

IV. THE REPEAL TRIGGERED 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). Despite the fact that NEPA's implementing regulations define such actions to include "new or revised agency rules, regulations, plans, policies, or procedures," Appellees assert that NEPA is inapplicable. Moreover, Appellees claim that even if NEPA is required, the Environmental Assessment ("EA") accurately concluded that the Repeal would not have significant impacts on the environment, and that no EIS was required. Both of these claims fail.

A. Appellees Cannot Demonstrate that NEPA Is Inapplicable.

It is well settled, and the parties agree, that an EIS is not required when a federal action does not affect the environmental status quo. *Burbank Anti-Noise Group v. Goldschmidt*, 623 F.2d 115, 116 (9th Cir. 1980). However, courts have consistently applied this exception very narrowly, limiting its use to procedural and administrative actions that are consistent with an agency's prior actions and policies. *See id*. (finding NEPA did not apply to the purchase of an airport, because it resulted in the mere continued use of the facility); *Idaho Conservation*

League v. Bonneville Power Admin., 826 F.3d 1173, 1175, 1178 (9th Cir. 2016) (returning to a policy of fluctuating lake water levels did not change the environmental status quo because it was "within the range originally available to it"). BLM now asserts that the Repeal, which explicitly eliminated its own prior regulations and constituted a complete reversal of the agency's prior position, is merely the agency "doing what it had always done." BLM Br. at 53. This interpretation of the Repeal not only defies common sense, but it contravenes NEPA.

Appellees' arguments that NEPA is not applicable to the Repeal are almost entirely premised on the fact that the Fracking Rule never went into effect prior to being repealed, and as such, purportedly never altered the environmental status quo. BLM Br. at 44; IPAA Br. at 50-51; Wyo. Br. at 44. Appellees cite *California ex rel. Lockyer v. U.S. Department of Agriculture*, 575 F.3d 1006 (9th Cir. 2009), in which this Court held that NEPA did apply to 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. *Id*. at 1006, 1018. Appellees argue that because *Lockyer*'s analysis discusses that the Roadless Rule was in effect for a seven-month period prior to being enjoined, and conversely that the Fracking Rule was enjoined prior to its effective date, it must follow that the

Repeal did not change the status quo. BLM Br. at 53-54; IPAA Br. at 51-53; Wyo. Br. at 45. However, there is nothing in *Lockyer* that supports that theory.

In fact, a closer examination of *Lockyer* reflects that the Court only addressed the Roadless Rule's effectiveness in response to the U.S. Forest Service's argument that seven months was not long enough for the rule to be "'meaningfully' in force." *Lockyer*, 575 F.3d at 1014. The court rejected that characterization, finding that simply because the rule was not in effect long enough to change forest planning did not mean that it was "without beneficial effect," and further noting the impracticalities of implementing a "meaningfully in force" standard. *Id.* at 1014, & n.9. But *Lockyer* never concluded that a change in the status quo could never occur absent a rule going into effect. Indeed, much of the Court's analysis focused on fact that the Roadless Rule repeal represented a complete departure from the agency's prior conduct: an act that itself represented a change in the status quo. *Id.* at 1015 ("Whether one calls it a 'replacement' or a 'repeal,' the end result is the same: the [Forest Service] took deliberate action to prevent appellate review of the Wyoming injunction and to free itself from the restrictions the Roadless Rule would impose on roadless area management if the injunction were lifted.").

IPAA claims that California is too focused on changes to the regulatory text in arguing that the Repeal represents a change from the status quo. IPAA Br. at 53. But this argument ignores the substantial effects to environmental planning that

regulatory changes can entail. Moreover, it completely disregards *Lockyer's* own emphasis on the changes to the regulatory text that the repeal of the Roadless Rule effectuated. For example, *Lockyer* found that "[b]y permanently removing the Roadless Rule from the Code of Federal Regulations, [the repeal rule] did much more than establish a new procedure … it purported to ensure that future land management decisions would never again be constrained by the [rule]." *Lockyer*, 575 F.3d at 1018. *Lockyer* also rejected the argument that the Roadless Rule was procedural in nature, because the repeal "specifically removed the [rule] from the Code of Federal Regulations." *Id.* at 1013; *see also id.* at 1015 (noting that the agency "plainly intended to free itself from any future restraints imposed by the Roadless Rule" because it revised the subpart of the Code of Federal Regulations containing the rule "in its entirety."). Further, the Court specifically noted the huge departure from precedent that exempting the repeal would set, noting that the other rules promulgated under the same categorical exclusion[6] never involved "the revocation of any major substantive environmental regulations," but only "routine matters." *Id.* at 1017. Thus, *Lockyer* does not center on the fact that the Roadless Rule was in effect as Appellees urge: rather, *Lockyer* turns on its findings that the

[6] 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 1013-15. As a result, this Court's analysis is directly relevant to this case.

removal of the Roadless Rule, as a regulatory change, represented a drastic departure from the agency's prior policies toward environmental land management. Similarly, here, the Repeal represents an equal departure that cannot be exempted from NEPA.

Appellees also argue that because the Fracking Rule was undergoing litigation up until the Repeal was enacted, the Repeal did not have the effect of preventing the Rule from going into effect. BLM Br. at 55. However, *Lockyer* specifically addressed and rejected this argument. In *Lockyer*, as 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. *Lockyer*, 575 F.3d at 1007. The court specifically noted that the fact that the repeal had the effect of mooting the pending appeal to the Roadless Rule, and eliminated the possibility of the rule going back into effect, was a change in policy that warranted NEPA review. *Id.* at 1013 (agreeing with the district court's contention that the agency cannot "take deliberate action that moots a pending appeal, triggering vacatur, yet rely on the vacated decision to avoid compliance with procedures mandated by environmental laws."); *see also id.* at 1015 (noting that the Forest Service took "deliberate action to prevent appellate review of the Wyoming injunction").

Thus, Appellees' arguments that NEPA does not apply to the Repeal lack merit.

B. There are Substantial Questions About Whether the Repeal Will Have Significant Impacts on the Environment.

NEPA sets a "low standard" for when an EIS is required. *Klamath Siskiyou Wildlands Center v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006). To compel preparation of an EIS, a "'plaintiff need not show that significant effects *will in fact occur;*' raising 'substantial questions whether a project may have a significant effect is sufficient.'" *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998) (quoting *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992)). Moreover, an agency cannot avoid preparation of an EIS simply "by making conclusory assertions that an activity will only have an insignificant effect on the environment." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 864 (9th Cir. 2005). If an agency decides not to prepare an EIS, "it must put forth a "'convincing statement of reasons' that explain why the project will impact the environment no more than insignificantly." *Id*.

Appellees cannot demonstrate that repealing the substantive requirements of the Fracking Rule will not create significant impacts on the environment. In defense of its decision not to prepare an EIS, BLM argues yet again, that existing federal, state, and tribal requirements will somehow make up for the removal of the Fracking Rule's requirements. BLM Br. at 58. However, BLM fails to

acknowledge the extensive evidence in the record that these other rules fall significantly short of the protections that the Rule would have provided. *See supra* Part II.A. BLM also argues that environmental impacts will be insignificant because adverse incidents from hydraulic fracturing operations are rare. BLM Br. at 58. But, as discussed *supra* Part II.B, BLM fails to explain its contradictory findings from 2015, including that it would not be able to verify whether an adverse incident occurred at a fracking operation without the Rule's information disclosure requirements. ER 1241.

Nor do Appellees address the impermissible way that the EA dismisses the foreseeable significant impacts resulting from the regulatory gap created by the Repeal. The EA claims that any impacts caused by the Repeal are "an appropriate tradeoff" for the reductions in compliance costs that purportedly result from the elimination of the Rule's requirements. ER 856. However, an agency cannot avoid conducting an EIS due to alleged savings in compliance costs where the statutory requirements for conducting such an analysis have been triggered. *See* 42 U.S.C. § 4332(2)(C).

Appellees' other attempts to defend the environmental analysis for the Repeal lack merit. BLM argues that the Repeal cannot cause a significant impact because future oil and gas development projects on federal lands will be required to undergo NEPA review as a part of their approval process. BLM Br. at 57-58.

However, this fails to address the NEPA review BLM conducted for the *Repeal*. The fact that future leases will have to undergo project-level NEPA review does not absolve BLM from addressing and fully analyzing the widespread, nationwide, impacts that will foreseeably result from the Repeal of the Fracking Rule itself. *See, e.g., Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1516 (9th Cir. 1992) (holding that "if the agency action only could be challenged at the site-specific development stage, the underlying programmatic authorization would forever escape review"). Similarly, BLM argues that the Repeal does not "authorize or prohibit any hydraulic fracturing operations." BLM Br. at 57. But this is irrelevant with regard to BLM's obligations under NEPA for the Repeal. As discussed above, the Repeal will eliminate important requirements that numerous future oil and gas operations on federal lands will no longer be required to comply with. BLM's failure to address these foreseeable impacts and evaluate them in an EIS is a violation of NEPA.

Appellees also argue that BLM was not required to produce an EIS because the agency did not prepare an EIS for the Fracking Rule. BLM Br. at 56-57; API Br. at 26-27. As an initial matter, BLM never raised this argument in its EA for the Repeal, and therefore it cannot serve as a post-hoc justification for its inadequate analysis now. *See Humane Soc'y*, 626 F.3d at 1049-50. Second, Appellees' assumption that there were no significant beneficial impacts when the

Rule was enacted is erroneous. Although the Ninth Circuit has not ruled on this issue, other courts have concluded that agencies do not need to prepare an EIS to evaluate solely beneficial significant impacts. *See, e.g.*, *Friends of the Fiery Gizzard v. Farmers Home Admin.*, 61 F.3d 501, 504-505 (6th Cir. 1995) ("If the agency reasonably concludes, on the basis of an environmental assessment, that the project will have no significant adverse consequences, an EIS is not required.") (citations omitted). Moreover, even if BLM did not find any significant impacts when it enacted the Fracking Rule, it does not automatically follow that there will be no significant adverse impacts upon Repeal. *See Humane Soc'y*, 626 F.3d at 1056 (noting that just because the agency found that sea lions are having a significant negative impact on salmon populations does not mean that the removing the sea lions will have a significant positive impact on those same populations).

In sum, the record raises significant questions as to whether the Repeal will have significant impacts on the environment. Appellees' arguments that NEPA is inapplicable, and that an EIS was not required, must fail.

V. THE REPEAL SHOULD BE VACATED.

Should this Court find that BLM violated the APA or NEPA based on any one of the violations discussed in this brief, the Repeal should be vacated. *See Regents*, 140 S. Ct. at 1913. Courts decline to vacate an unlawful agency action

"only in limited circumstances," none of which are applicable to the Repeal. *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015). First, vacating the Repeal would not "result in possible environmental harm." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995). To the contrary, reinstating the requirements of the Fracking Rule, which were designed to reduce environmental risks associated with hydraulic fracturing operations, would benefit the environment.

Second, weighing the seriousness of the agency's errors against the disruptive consequences that would result from vacatur turns decidedly in favor of vacating the Repeal. *See Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012). Courts generally limit remand without vacatur to technical or procedural errors that can be easily cured. *Id.* at 993 (finding procedural error harmless, and noting that it could be corrected on remand). In contrast, BLM failed to explain inconsistencies with its very basis for repealing the Fracking Rule, *see supra* Part II, and also failed to seriously consider the environmental risks posed by the project in an EIS. *See supra*, Part IV. BLM committed substantive, serious errors under both the APA and NEPA that cannot be easily cured.

On the other hand, reinstating the Fracking Rule would not lead to the sort of "disruptive consequences" that would cause a court to forgo vacatur. In practice, courts have forgone or only partially vacated a rule in situations where vacatur

would create serious adverse consequences for the environment or the economy. *See Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d at 1406 (not vacating a rule where it would seriously harm an entire species of snail); *California Communities Against Toxics*, 688 F.3d at 994 (denying vacatur where consequences would be "economically disastrous."). Here, industry would not be disrupted simply because it would be required to comply with the Fracking Rule. *See California v. DOI*, 381 F. Supp. 3d at 1179 (rejecting federal defendants' position that vacatur would be "unduly disruptive" because lessees and agency would need time to adjust to new rules). Indeed, as BLM notes, industry has had considerable time since the Rule's original promulgation to prepare for compliance. BLM Br. at 62.

Finally, this Court should reject BLM's argument that the Fracking Rule should not be reinstated because the Rule was found to be unlawful by the Wyoming district court. BLM Br. at 62. As BLM admits, it does not concede that the Rule was unlawful, and that decision was in the process of being appealed to the Tenth Circuit when the Repeal rendered it moot. *Id.* Nor was the legality of the Rule ever a justification for this Repeal. *See Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1091 (9th Cir. 2007) ("[O]ur review of an administrative agency's decision begins and ends with the reasoning that the agency relied on in making that decision."). Should the Fracking Rule be reinstated, industry can always

renew its challenge to the Rule in Wyoming. The bases for that challenge do not impact the remedy here.

Thus, vacatur is the proper remedy.

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.

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