Nos. 20-16157 and 20-16158

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA; SIERRA CLUB, et al.,
Plaintiffs/Appellants,

v.

BUREAU OF LAND MANAGEMENT; DAVID BERNHARDT; et al.,
Defendants/Appellees,

and

AMERICAN PETROLEUM INSTITUTE; et al.,
Intervenor-Defendants/Appellees.

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

FEDERAL APPELLEES' ANSWERING BRIEF

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GLOSSARY

APA	Administrative Procedure Act
BLM	Bureau of Land Management
EA	Environmental Assessment
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FLPMA	Federal Land Policy and Management Act
FONSI	Finding of No Significant Impact
NEPA	National Environmental Policy Act
RMP	Resource Management Plan

INTRODUCTION

In 2015, the Bureau of Land Management (BLM) issued a regulation (2015 Rule) seeking to regulate hydraulic fracturing on federal and Indian lands. The 2015 Rule was not required by any statute or other legal obligation, and Plaintiffs here do not seriously contend otherwise. And the 2015 Rule in fact never went into effect. A district court in Wyoming issued a preliminary injunction on the grounds that BLM lacked statutory authority to issue the 2015 Rule, and that it was arbitrary and capricious in several respects. This included that there was little to no evidence that it was environmentally necessary or that preexisting requirements were inadequate. The district court later issued a final judgment setting aside the 2015 Rule on statutory authority grounds.

While the Government's appeal of the district court's decision was pending, a new Administration took office. BLM subsequently issued a rule (2017 Rule or Rule) rescinding the 2015 Rule. BLM determined that extensive preexisting federal, state, and tribal regulation, together with voluntary industry guidance covering the same subjects as the 2015 Rule, provided a better framework for mitigating the impacts of hydraulic fracturing. BLM pointed to the rarity of adverse environmental impacts attributable to hydraulic fracturing before the 2015 Rule—and the rarity of such impacts while the 2015 Rule was enjoined. BLM also observed that, unlike in 2015, all 32 states in which BLM manages oil and gas leases now have laws

regulating hydraulic fracturing. Given these and other considerations, including costs associated with the 2015 Rule's requirements, BLM rescinded it. The Tenth Circuit then dismissed the government's appeal as prudentially unripe.

California, as well as several environmental groups (collectively, Sierra Club), filed these two lawsuits challenging the 2017 Rule under the Administrative Procedure Act (APA) and the National Environmental Policy Act (NEPA). The district court granted summary judgment to BLM, concluding that Sierra Club lacked standing to pursue its APA claims and that, in any event, all of Plaintiffs' challenges to the Rule failed on the merits. The district court's judgment was correct. Neither Sierra Club nor California demonstrated any actual injury from the 2017 Rule. In any event, BLM's well-reasoned decision easily withstands review under the APA and NEPA. This Court should affirm the district court's decision.

STATEMENT OF JURISDICTION

(a) Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331 because Plaintiffs' claims arose under several federal statutes including the APA, 5 U.S.C. §§ 701-706; and NEPA, 42 U.S.C. §§ 4321 et seq. 4-ER-608–15. But as discussed in Part I of the Argument (pp. 22-27), the district court lacked jurisdiction because Plaintiffs failed to establish standing.

(b) This Court has jurisdiction under 28 U.S.C. § 1291 because the district court entered a final judgment. 1-ER-15.

(c) The district court entered final judgment on April 14, 2020. Plaintiffs in both cases filed their notices of appeal on June 12, 2020, or 59 days later. 1-ER-1–14. The appeals are timely under Federal Rule of Appellate Procedure 4(a)(1)(B).

STATEMENT OF THE ISSUES

1. Whether Plaintiffs lack standing to challenge the 2017 Rule.

2. Whether BLM adequately explained its decision to rescind the 2015 Rule and to eliminate the non-routine fracturing jobs approval requirement.

3. Whether Plaintiffs' contrary arguments lack merit, including:

   a. whether the APA required BLM to consider an alternative to the 2017 Rule that California raised for the first time in this litigation; and

   b. whether the Rule should be set aside based on the Federal Land Policy and Management Act, the Mineral Leasing Act, the Indian Mineral Leasing Act, or BLM's trustee obligations on Indian lands, where these authorities do not require BLM to promulgate regulations about hydraulic fracturing, and where not even Plaintiffs contend that these sources required BLM to maintain the 2015 Rule.

4. Whether the Rule is consistent with NEPA, including:

   a. whether the Rule is even subject to review under NEPA, where this Court has held that NEPA procedures do not apply to agency actions that merely maintain the environmental status quo, and where the provisions of the 2015 Rule provisions repealed by the 2017 Rule never went into effect;

b. whether, if NEPA applies, BLM reasonably issued a finding of no significant impact based on its environmental assessment in lieu of preparing an environmental impact statement; and

c. whether, if NEPA applies, BLM's environmental assessment took the requisite hard look at the 2017 Rule's environmental impacts.

5. Whether, if the 2017 Rule is deemed invalid, the Court should remand *without* vacating the 2017 Rule and *without* reinstating the 2015 Rule, where BLM could likely cure any identified deficiencies in the 2017 Rule on remand, and where the only court to have considered the merits of the 2015 Rule concluded that it was beyond BLM's statutory authority.

PERTINENT STATUTES AND REGULATIONS

All pertinent statutes and regulations are set forth in the Addendum following this brief.

STATEMENT OF THE CASE

A. Statutory and regulatory background

1. National Environmental Policy Act

NEPA serves the dual purpose of ensuring that federal agencies "consider every significant aspect of the environmental impact of a proposed action" and "inform the public" of their analysis. *Baltimore Gas & Electric Co. v. NRDC, Inc.*, 462 U.S. 87, 97 (1983); *see also DOT v. Public Citizen*, 541 U.S. 752, 768 (2004).

NEPA requires no particular results—only a process to ensure that federal decision-makers consider a proposed action's potential environmental consequences. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

NEPA requires an environmental impact statement (EIS) for any major federal action "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). If the significance of a given proposed action is not evident on its face, an agency may prepare an environmental assessment (EA) to determine if the proposal's effects would be significant. *See* 40 C.F.R. § 1501.4(b)-(d).[1] If in its EA the agency finds that the proposed action will not significantly affect the human environment, the agency may issue a "finding of no significant impact" (FONSI) in lieu of an EIS. *Id.* § 1501.4(e).

2. Oil and gas development on federal lands

BLM manages oil and gas development on federal lands pursuant to the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701 et seq., "under principles of multiple use and sustained yield," *id.* § 1732(a). "Multiple use management" is "a deceptively simple term that describes the enormously complicated task of striking a balance among the many competing uses to which land can be put." *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 58 (2004).

[1] NEPA's regulations have been updated effective September 14, 2020. Like Plaintiffs, we cite the version of the regulations that applied when BLM promulgated the 2017 Rule. *See* 40 C.F.R. § 1506.13 (2020).

The type of oil and gas development at issue in this litigation is hydraulic fracturing, often referred to as "fracking." Fracking is a well-stimulation technique that involves injecting fluid—which consists of water, proppants such as sand, and chemical additives—under high pressure to create or enlarge fractures in rocks. 5-ER-837. Oil and gas development on federal lands managed by BLM, including hydraulic fracturing operations, is a highly-regulated process that involves three general steps. First, BLM develops an area-wide resource management plan (RMP), which specifies public lands that are appropriate for oil and gas leasing, among other topics. 82 Fed. Reg. 61,924, 61,926 (Dec. 29, 2017) (4-ER-626); *see also Southern Utah Wilderness Alliance*, 542 U.S. at 59. The RMP identifies the terms and conditions—including stipulations that must be incorporated into oil and gas leases—under which BLM will allow oil and gas development while protecting other resource values. 4-ER-639.

Approval of an RMP is a multi-step process that involves several layers of public notice and comment, followed by a formal protest period. 43 C.F.R. §§ 1610.2, 1610.5-2. BLM prepares an EIS that analyzes, among other land issues, potential impacts from oil and gas development expected over the life of the RMP. 4-ER-638–39. The draft EIS is subject to public review and comment. 43 C.F.R. § 1610.2(f)(3). If any species listed under the Endangered Species Act (ESA) are present in the area, BLM must comply with the ESA in issuing the RMP. 4-ER-639.

At the second stage, interested parties must obtain a lease to conduct oil and gas activities. 4-ER-639. BLM may issue leases only within areas that are open to leasing under the RMP. *See* 43 U.S.C. § 1712(e). For such lands, the agency conducts a second round of NEPA review (typically an EA that is tiered to the EIS prepared for the RMP) addressing potential impacts from oil and gas development in the proposed lease areas. *Id.* If BLM determines that the proposed areas are eligible for leasing after that NEPA review, the areas are offered in a competitive lease auction. 4-ER-639–40. Again, BLM must ensure that leasing decisions made at this second step comply with the ESA and other applicable statutes. 4-ER-640.

At the third stage, operators must submit and obtain BLM approval of a site-specific Application for Permit to Drill (Application to Drill). 4-ER-640. The application must provide, among other information, the operator's drilling plan; surface use plan, including plans to protect groundwater and surface water; plans for casing, including size, grade, weight, and depth of casing strings; proposed drilling fluids; and specifications for blowout prevention equipment. 4-ER-642–48. Operators must further describe their plans for containing and disposing of drilling fluids and water produced from drilling. 4-ER-647.

BLM's approval of an application is also subject to NEPA review. 4-ER-642. For large projects, BLM may also provide a draft NEPA analysis for public comment before issuing a decision on the application. 4-ER-650. BLM may condition

approval on the lessee's adoption of "reasonable measures," delimited by the lease and the lessee's surface use rights, to mitigate the drilling's environmental impacts. 43 C.F.R. § 3101.1-2. The agency also conducts an onsite inspection with the operator and, in the case of split-estate lands, with the surface owner. 4-ER-649.

Even after an application to drill is approved, the operator must comply with Onshore Oil and Gas Orders 1, 2, and 7, which impose requirements for well permitting, construction, casing, and cementing, and disposal of produced water. 4-ER-651–54. Finally, BLM requires the operator to plug and abandon the well in a manner that prevents oil and gas leaks or contamination, a process that BLM supervises and inspects. 4-ER-655–56.

On Indian lands, the tribe or individual Indian mineral owners plan the uses of their own lands. They lease their own oil and gas resources with the consent of the Department of the Interior. 4-ER–640. When tribal oil and gas resources are leased under the Indian Mineral Leasing Act of 1938, Interior typically conducts a competitive lease sale that is similar to the process for federal lands; when resources are leased under the Indian Mineral Development Act of 1982, Indian mineral owners may negotiate agreements with potential operators directly. 4-ER-640–61. But under either scenario, oil and gas development on Indian lands is subject to full compliance with applicable federal statutes, including NEPA, and BLM applies the same operating regulations that apply on federal lands. 4-ER-641.

All of these requirements are in addition to those imposed by states and by Indian tribes. Hydraulic fracturing operators must comply with the requirements of the state in which the federally leased well is located or, on tribal lands, the requirements of the tribe with authority over the lands. 5-ER-744; *see also Wyoming v. Zinke*, 871 F.3d 1133, 1138 (10th Cir. 2017) (noting that "most fracking regulation occurs at the state level").

B. Factual background

1. The 2015 Rule

The 2015 Rule imposed a number of requirements specific to hydraulic fracturing, including:

- a requirement to submit detailed information concerning hydraulic fracturing operations with the drilling application or a notice;
- a requirement to design and implement a casing and cementing program that protects or isolates usable water, defined generally as waters less than 10,000 parts per million of total dissolved solids;
- a requirement to monitor cementing programs during well construction and to provide reports to BLM;
- new well construction and mechanical integrity testing requirements;
- a requirement that operators disclose chemicals used in hydraulic fracturing operations to BLM and the public (with limited exceptions); and
- a requirement that operators manage recovered fluids in above-ground tanks with limited capacity (as opposed to pits).

80 Fed. Reg. 16,128 (Mar. 26, 2015) (7-ER-1287–90).

In promulgating the 2015 Rule, BLM acknowledged that it already had "an extensive process in place to ensure that operators conduct oil and gas operations in an environmentally sound manner," and that "the 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." 7-ER-1293, 1297. BLM observed that "[m]any of the requirements generally are consistent with industry guidance, the voluntary practice of operators, and some are required by state regulations." 7-ER-1290. Nonetheless, BLM reasoned that the 2015 Rule would "establish a consistent standard across Federal and Indian lands and fulfill BLM's stewardship and trust responsibilities." 7-ER-1338. It issued the 2015 Rule 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." 7-ER-1288.

2. Litigation against the 2015 Rule

The 2015 Rule never went into effect. Two industry groups challenged it immediately in the District of Wyoming. The States of Wyoming and Colorado filed a separate lawsuit in the same court six days later. The district court consolidated the two cases and postponed the effective date of the 2015 Rule pending its resolution of preliminary injunction motions. *See Wyoming v. Zinke*, 871 F.3d at

1138-39. The district court subsequently granted a preliminary injunction against the 2015 Rule. *See Wyoming v. U.S. Department of Interior*, 136 F. Supp. 3d 1317 (D. Wyo. 2015). As to the issue of BLM's legal authority, the district court concluded that Congress had precluded BLM from regulating hydraulic fracturing not involving the use of diesel fuels. *Id.* at 1330.

As to whether the rule was arbitrary and capricious, the district court indicated that, even if BLM had authority to promulgate the 2015 Rule, the court was "troubled by the paucity of evidentiary support for the Rule." *Id.* at 1337. The court faulted BLM for purportedly failing to provide any "discussion of how any existing state regulations are inadequate to protect against the perceived risks to groundwater." *Id.* at 1339. The court identified a number of other perceived problems with the 2015 Rule, including that the mechanical integrity testing requirement lacked sufficient justification; BLM's usable water definition lacked a reasoned basis or factual support and represented an unacknowledged change from its existing practices; BLM failed to provide sufficient explanation for requiring oil and gas developers to disclose proprietary information; and BLM did not adequately consult with the Ute Indian Tribe in accordance with its policies and procedures. *Id.* at 1339-44.

In June 2016, the district court entered its final ruling on the merits. *See Wyoming v. U.S. Department of Interior*, No. 2:15-CV-043-SWS, 2016 WL 3509415 (D. Wyo. June 21, 2016). The court reiterated its conclusion that BLM

lacked authority to regulate hydraulic fracturing and thus that the 2015 Rule was unlawful. Because that was dispositive, the court did not revisit its prior conclusion that the 2015 Rule was also arbitrary and capricious. *Id.* at *12. When that final ruling was issued, the Tenth Circuit vacated the district court's order granting the injunction. *See Wyoming v. Sierra Club*, No. 15-8126, 2016 WL 3853806 (10th Cir. July 13, 2016).

BLM and the citizen groups who intervened in support of the 2015 Rule appealed the district court's merits decision. In the meantime, a new Administration took office. The Tenth Circuit then issued an order directing the federal appellants to indicate whether their position on the issues had changed. 6-ER-1059–61. BLM responded that it had begun reviewing the 2015 Rule, and that this "initial review has revealed that the [2015 Rule] does not reflect [the Administration's] policies and priorities." 6-ER-1052. The Tenth Circuit then dismissed the appeals as prudentially unripe and remanded the appeals with directions to vacate the district court's opinion. *See Wyoming v. Zinke*, 871 F.3d 1133.

3. The 2017 Rule

On March 28, 2017, President Trump issued an Executive Order declaring that it "is in the national interest to promote clean and safe development of our Nation's vast energy resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and

prevent job creation." Exec. Order No. 13,783, § 1(a) (5-ER-999). The Order directed the Secretary of the Interior to "review" the 2015 Rule (among other rules) and "if appropriate, . . . as soon as practicable, . . . publish for notice and comment proposed rules suspending, revising, or rescinding" the 2015 Rule. 5-ER-1002. The Secretary of the Interior subsequently issued Secretarial Order No. 3349, which directed BLM to "proceed expeditiously with proposing to rescind the" 2015 Rule. 5-ER-997. On July 25, 2017, BLM issued a proposed rule to rescind the 2015 Rule. 82 Fed. Reg. 34,464 (5-ER-973). Following notice and public comment, BLM issued the Rule on December 29, 2017. 82 Fed. Reg. 61,924 (4-ER-626).

BLM concluded that it is "better policy to rescind the 2015 rule to relieve operators of duplicative, unnecessary, costly and unproductive regulatory burdens, [while] also eliminat[ing] the need for further litigation about BLM's statutory authority." 4-ER-631. In support of its conclusion that the 2015 Rule imposed unnecessary and duplicative burdens, BLM relied on preexisting federal regulation, state and tribal requirements, and voluntary industry guidance from the American Petroleum Institute. *See infra* pp. 27-33 (discussing BLM's analysis in greater detail). BLM also relied on its experience during the time that the 2015 Rule was promulgated but not in effect (because of the injunction against it). BLM noted that it had "reviewed incident reports from Federal and Indian wells since December 2014," and that this "review indicated that resource damage is unlikely to increase

by rescinding the 2015 rule because of the rarity of adverse environmental impacts that occurred from hydraulic fracturing operations before the 2015 rule, and after its promulgation while the 2015 rule was not in effect." 4-ER-657.

BLM also pointed to legal and factual developments since the 2015 Rule. When the 2015 Rule was issued, only 20 of the 32 states where federal oil and gas leases were located had regulations addressing hydraulic fracturing; when the 2017 Rule was issued, all 32 such states had these regulations. 4-ER-634. "In addition, some tribes with oil and gas resources have also taken steps to regulate oil and gas operations, including hydraulic fracturing, on their lands." *Id.* BLM further concluded that disclosure of the chemical content of hydraulic fracturing fluids to state regulatory agencies and databases was more prevalent in 2017 than it was in 2015. *See infra* p. 30. And BLM noted that the American Petroleum Institute had since issued influential revised voluntary industry guidance covering the same subjects as the 2015 Rule (as well as additional subjects). 4-ER-709.

The Rule also eliminated a pre-2015 requirement that operators receive prior approval for "nonroutine fracturing jobs." 43 C.F.R. § 3162.3-2(a) (2014). BLM noted that this term was never defined, that previous regulations did not furnish any guidance as to what it meant, that various commenters had criticized the requirement as being vague and difficult to apply, and that actual requests under this provision had been rare to non-existent in recent years. 4-ER-678. Because the requirement

"does not seem to serve any purpose, and removing it from the regulations could reduce the potential for unproductive confusion or paperwork without adverse effects," BLM eliminated it. 4-ER-636.

As it did with the 2015 Rule, BLM prepared an EA to examine any environmental impacts from promulgating the 2017 Rule. 5-ER-819. The EA examined four alternatives in depth: not rescinding the 2015 Rule (no action); rescinding the 2015 Rule (proposed action); rescinding the 2015 Rule and removing the requirement for operators to obtain approval of "non-routine" hydraulic fracturing operations (preferred alternative); and rescinding the 2015 Rule except for the chemical disclosure requirements. 5-ER-823. BLM selected the preferred alternative. 5-ER-868. BLM issued a FONSI, concluding that the environmental impacts of promulgating the 2017 Rule were not significant, and accordingly that no EIS was required (just as the agency had determined that no EIS was required for the 2015 Rule). 5-ER-873.

BLM also conducted a thorough regulatory impact analysis, which found (among other things) that the Rule will reduce compliance costs by $13 to $30 million per year on federal lands from 2018 to 2027, and by $1.6 to $3.8 million per year on Indian lands. 5-ER-739, 794, 796. The agency also concluded that repealing the 2015 Rule would save time on the part of BLM and operators. 5-ER-785–86.

C. Proceedings below

In January 2018, California and Sierra Club filed separate lawsuits challenging the Rule in the Northern District of California. Sierra Club's operative complaint claimed that the Rule was arbitrary and capricious, violated NEPA, violated the ESA, and was contrary to three other statutes: FLPMA, the Mineral Leasing Act, and the Indian Mineral Leasing Act. 4-ER-609–11. California similarly alleged that BLM violated the APA by failing to provide a reasoned analysis for the Rule and violated NEPA on largely the same grounds urged by Sierra Club. 4-ER-614. The American Petroleum Institute, the Independent Petroleum Association of America, the Western Energy Alliance, and the State of Wyoming intervened in support of BLM. 1-ER-19–20.

The district court granted summary judgment to Defendants. 1-ER-17. The court initially concluded that Sierra Club lacked standing to bring its APA claims. 1-ER-24–26. The court observed that Sierra Club provided no evidence of current harms from hydraulic fracturing, but only limited past harms. 1-ER-24. Although Sierra Club provided declarations from members who enjoy recreational activities on or near BLM lands, the court observed that these declarations failed to explain how the repeal of the 2015 Rule—as opposed to oil and gas development generally—was the cause of their alleged harm. 1-ER-25. By contrast, the district court concluded that Sierra Club had standing to assert its ESA claim. 1-ER-27. The

district court also held that California had standing to assert its APA claim, crediting the State's contention that, as a result of the Rule, "responsibility for ensuring compliance with hydraulic fracturing regulations will fall entirely on California, placing additional burdens on State resources." 1-ER-22. The court likewise concluded that California had standing to pursue its NEPA claim. 1-ER-23.

The district court then rejected Plaintiffs' challenges on the merits. As to the APA claims, the court held that BLM complied with the requirements for making a policy change and had otherwise issued a reasoned decision. 1-ER-28–38. As to the NEPA claims, the court concluded that NEPA did not apply to the Rule: because the 2015 Rule never went into effect, the 2017 Rule did not alter the environmental status quo. 1-ER-41. Finally, the court granted BLM summary judgment on Sierra Club's ESA claim, 1-ER-42–43, which has been abandoned on appeal.

SUMMARY OF ARGUMENT

1. Plaintiffs lack standing to challenge the 2017 Rule.

a. The district court correctly concluded that Sierra Club lacks standing to challenge the Rule. Sierra Club does not allege, let alone demonstrate, any current or ongoing injury attributable to the Rule. And Sierra Club failed to prove any "substantial risk" of injury based on the Rule. Indeed, Sierra Club does not even appear to allege a single example of groundwater contamination that it contends the 2015 Rule supposedly would have prevented had it gone into effect.

b. The district court incorrectly held that California has standing to challenge the Rule. Settled law makes clear—and California does not dispute—that California can establish standing based only on injury to the State itself, as opposed to injury to its citizens. The district court credited California's contention that BLM's rescission of the 2015 Rule imposes regulatory burdens on the State. But that is not a valid basis for the State's standing. BLM continues to extensively regulate oil and gas operations under the same long-standing requirements, which also apply to hydraulic fracturing. And to the extent that California wishes to impose additional requirements as a matter of policy, it is free to do so, and BLM requires operators to comply with California's requirements on federal lands in the state.

2. Even if Plaintiffs had standing, BLM provided a reasoned justification for rescinding the 2015 Rule that easily withstands review under the APA. BLM concluded that the 2015 Rule was a duplicative and unnecessary layer of regulation that imposed unjustified burdens in light of preexisting federal requirements, applicable state and tribal requirements, influential voluntary industry guidance, and the agency's own experience both before and after the 2015 Rule's promulgation. That conclusion was reasonable and, indeed, consistent with the District of Wyoming's previous conclusion that there was insufficient evidence supporting the need for the 2015 Rule.

3. Plaintiffs' various merits arguments fail.

a. Plaintiffs critique BLM's analysis of preexisting requirements as well as voluntary industry guidance but identify no errors in that analysis. Plaintiffs in no way undermine BLM's conclusion that these sources—together with BLM's experience since 2015—rendered the 2015 Rule unnecessary and unduly burdensome.

b. California's contention that BLM violated the APA by failing to consider an alternative that the State raised for the first time in this litigation fails. California did not preserve this argument, and it is meritless. NEPA itself specifies the requirements applicable to BLM's alternatives analysis, and the APA's general provisions do not require BLM to consider additional environmental alternatives. And the alternative that California proposes would not accomplish BLM's goal of eliminating unnecessary regulatory burdens in any event.

c. Sierra Club faults BLM for purportedly failing to explain whether the 2015 Rule was required to meet BLM's obligations under various federal statutes. But none of these sources even arguably required BLM to maintain the 2015 Rule, and Sierra Club does not contend otherwise. Although BLM was not required to specifically explain why the 2017 Rule was consistent with the sources invoked by Sierra Club, BLM did offer such an explanation here.

d. Plaintiffs argue that the Rule is not supported by Executive Order 13,783, but these arguments are irrelevant. Although BLM reviewed the 2015 Rule at the direction of Executive Order 13,783, BLM's subsequent reasons for rescinding

the 2015 Rule do not depend on the Order's applicability. Moreover, the Executive Order creates no judicially enforceable rights.

e. BLM adequately explained its change of position from 2015. BLM's justification was in part based on developments *subsequent* to 2015. And BLM otherwise adequately explained why it no longer believes the 2015 Rule is necessary or warranted in light of the costs that it would impose.

f. Plaintiffs' contention that BLM's cost-benefit analysis was arbitrary and capricious is meritless. Plaintiffs do not meaningfully dispute BLM's calculation of costs. Moreover, Plaintiffs' assertion of purported environmental benefits associated with the 2015 Rule simply repackages arguments that Plaintiffs make elsewhere and that BLM reasonably rejected.

4. The Rule was not subject to NEPA, but BLM satisfied NEPA anyway.

a. The district correctly concluded that NEPA does not apply to the 2017 Rule under this Court's decisions holding that NEPA analysis is not required for actions that do not change the environmental status quo. The 2015 Rule provisions rescinded by the 2017 Rule have never been in force, not even for a single day. Although Plaintiffs invoke this Court's decision in *California ex rel. Lockyer v. USDA*, 575 F.3d 999 (9th Cir. 2009), that decision relied on the fact that the rescinded regulation in that case had been in force for seven months in concluding that NEPA applied to its repeal.

b. Even if NEPA applies, no EIS was required. The rescinded 2015 Rule also was not accompanied by an EIS; the 2017 Rule does not itself authorize or prohibit any hydraulic fracturing operations; hydraulic fracturing activities are already extensively regulated; and BLM's experience both before and after the 2015 Rule demonstrated that the 2017 Rule would have minimal environmental effects.

c. BLM's EA was adequate. California does not challenge the EA at all, and Sierra Club criticizes the EA on only two issues, both of which BLM extensively analyzed.

5. In any event, the Court should not vacate the Rule. BLM could likely cure any deficiencies on remand, and there is no reason to believe maintaining the Rule would cause environmental harm. And vacating the 2017 Rule—and reinstating the 2015 Rule—would be inappropriate and create regulatory uncertainty, particularly since the only court to consider the merits of the 2015 Rule has concluded that it is unlawful.

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment de novo. *Native Ecosystems Council v. Marten*, 883 F.3d 783, 789 (9th Cir. 2018). Under the APA, courts uphold agency action that is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard is "highly deferential, presuming the agency action to be valid and

affirming the agency action if a reasonable basis exists for its decision." *Ranchers Cattlemen Action Legal Fund v. USDA*, 499 F.3d 1108, 1115 (9th Cir. 2007) (internal quotation marks omitted). Challenges to an agency's compliance with NEPA are also reviewed under the APA's deferential standard of review. *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014).

ARGUMENT

I. Plaintiffs failed to establish standing.

A. Sierra Club failed to establish standing.

An "essential and unchanging part of the case-or-controversy requirement" in the Constitution is that a plaintiff must establish Article III standing to sue. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "To establish standing under Article III of the Constitution, a plaintiff must demonstrate (1) that he or she suffered an injury in fact that is concrete, particularized, and actual or imminent, (2) that the injury was caused by the defendant, and (3) that the injury would likely be redressed by the requested judicial relief." *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1618 (2020). Where, as here, Plaintiffs are not themselves the "object of the government action or inaction [they] challenge[], standing is not precluded, but it is ordinarily substantially more difficult to establish." *Defenders of Wildlife*, 504 U.S. at 562. Applying these settled principles, the district court correctly concluded that Sierra Club lacked standing.

Initially, as the district court noted, Sierra Club has shown no *current or ongoing* environmental harm attributable to the 2017 Rule, which Sierra Club does not appear to dispute. *See* Sierra Club Brief at 12. Instead, Sierra Club's claimed harms are based entirely on hypothetical, future injuries. Although future harm can conceivably give rise to standing, the Supreme Court has "repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of *possible* future injury are not sufficient," *Clapper v. Amnesty International USA*, 568 U.S. 398, 409 (2013), and the Court has since suggested that a "substantial risk that the harm will occur" may also suffice, *Department of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019). Under either a "certainly impending" or "substantial risk" theory, Sierra Club failed to demonstrate standing.[2]

Sierra Club points to declarations that, in its words, "recount[] many examples of past damage that the 2015 Rule was designed to prevent, including spills, accidents from poorly constructed wells, and harms from waste pits." Sierra Club Brief at 21. But these declarations are patently deficient. Initially, some of the cited declarations describe alleged events that occurred years ago, even before the *2015*

[2] Sierra Club faults the district court for not distinguishing between *certainly impending* future injury and *substantial risk* of future injury. Sierra Club Brief at 29. But the Supreme Court has reserved the question whether there is any difference between the two standards. *See Clapper*, 568 U.S. at 414 n.5. In any event, here as in *Clapper*, Sierra Club falls short under either standard "in light of the attenuated chain of inferences necessary to find harm." *Id.*

Rule. *See, e.g.* 4-ER-532 (discussing "July 2014 Bear Den Bay Spill, and the January 2015 Blacktail Creek spill"). Even if these events are accurately described in the declarations, such incidents—occurring at a much earlier stage of state regulation, under different hydraulic fracturing technology, and prior to the voluntary industry guidance issued following the 2015 Rule—have little relevance to whether Sierra Club's members face a substantial risk *today*.

But more fundamentally, Sierra Club's declarations wholly fail to trace any injury to the 2017 Rule. For the most part, they consist of speculation, sometimes layered with multiple levels of hearsay. *See, e.g.*, 4-ER-562 (discussing declarant's attendance at a "November 2014 tribal council meeting" where previous spills were discussed). The declarations are replete with generic statements about environmental problems caused by oil and gas activities generally (and sometimes hydraulic fracturing), as opposed to the Rule. *See, e.g.*, 4-ER-499 ("Conventional oil and gas extraction in southern California has already damaged or permanently destroyed wildlife habitat for species that I care deeply about . . . ."); 2-ER-146 ("I have learned that pollution from hydraulic fracturing on public lands poses an immediate threat to the Colorado River Basin's endangered fish and critical habitat."). The declarations do not even allege, let alone show, injury that would be *redressed* by the 2015 Rule. Indeed, the very few declarations that even address this general topic underscore the wholly speculative nature of Plaintiffs' claims. *See, e.g.*, 4-ER-512 (discussing prior

spill and stating "I think that if the BLM Fracturing Rule had been in effect, *there is a chance* that this spill would not have happened" (emphasis added)).[3]

This fusillade of generalities and speculation does not come close to satisfying Sierra Club's burden of *proving* injury traceable to the 2017 Rule that would be redressed by a favorable judicial ruling. Indeed, Sierra Club's brief is most notable for what it does *not* include. Although it has now been nearly six years since BLM promulgated the 2015 Rule—and the 2015 Rule's protections Plaintiffs claim to be essential have never been in effect—Sierra Club's brief does not even appear to allege that there is any particular example of groundwater contamination or similar harm directly attributable to hydraulic fracturing, and not oil and gas in general, that would necessarily have been prevented by the 2015 Rule. The district court correctly concluded that Sierra Club lacked standing.

B. California failed to establish standing.

By contrast, the district court erred in concluding that California demonstrated its standing. *See* 1-ER-21–23. It is settled law that a "State does not have standing as parens patriae to bring an action against the Federal Government." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982); *accord*

[3] In support of even this claim, this declaration refers to the 2015 Rule's requirement that "produced water . . . be stored in closed tanks instead of open pits." 4-ER-512. But the incident report—cited in the declaration itself—states that there were "No Pits Found." *See* https://wwwapps.emnrd.state.nm.us/ocd/ocdpermitting/Data/WellDetails.aspx?api=30-043-21888.

Nevada v. Burford, 918 F.2d 854, 858 (9th Cir. 1990). Indeed, California disclaimed reliance on any such theory below. Accordingly, California can establish standing —if at all—only based on direct injury to the State itself.

California failed to make such a showing. The district court, crediting two of California's declarations, reasoned that "the repeal of the [2015] Rule eliminates an additional layer of regulatory protection on federal lands in California that supplements and bolsters state" regulation, and that "the burdens placed on California's resources to ensure state regulatory compliance on BLM lands increased due to the Repeal." 1-ER-22 (internal quotation marks omitted). But elimination of the 2015 Rule does not saddle California with sole responsibility for regulating hydraulic fracturing operations because BLM continues to regulate oil and gas operations under the 2017 Rule and other existing regulations.

As noted above, moreover, there is no evidence of any particular injury resulting from hydraulic fracturing that would be redressed by the 2015 Rule—as the district court recognized when it held that Sierra Club lacked standing to pursue its APA claims. That absence of evidence distinguishes this case from *California v. Azar*, 911 F.3d 558 (9th Cir. 2018), on which the district court relied. *See id.* at 571 (states had standing based on allegations that federal rules would lead to women losing employer-sponsored contraceptive coverage, "which [would] then result in economic harm to the states"). California is free to impose on federal lands within

California the requirements that the 2015 Rule would have mandated, and BLM requires operators to follow state law on such lands. 5-ER-744; *see also* 5-ER-782 (summarizing California's requirements). The 2017 Rule neither affects California's ability to make that choice, nor reduces the resources devoted by BLM to ensuring compliance with federal and applicable state and tribal requirements.

Finally, the district court erred in concluding that California (as well as Sierra Club) had standing to bring NEPA claims. It is true that NEPA is a procedural statute, and "a plaintiff pursuing violations of procedural rights need not establish the likelihood that the agency would render a different decision after going through the proper procedural steps." *Center for Biological Diversity v. Export-Import Bank*, 894 F.3d 1005, 1012 (9th Cir. 2018). But a plaintiff must establish an actual injury even where procedural rights are asserted. *Summers v. Earth Island Institute*, 555 U.S. 488, 493-98 (2009). Here, because Plaintiffs failed to prove such an injury, they lack standing to pursue their NEPA claims as well as their APA claims.

II. BLM adequately explained its decision to rescind the 2015 Rule and eliminate the non-routine fracturing jobs approval requirement.

Under the APA, courts may "not substitute [their] judgment for that of the agency." *Northern Plains Resource Council, Inc. v. STB*, 668 F.3d 1067, 1074 (9th Cir. 2011) (internal quotation marks omitted). Instead, courts ask only whether "the evidence in the administrative record permitted the agency to make the decision it

did." *Occidental Engineering Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985). BLM plainly satisfied this standard here.

Specifically, BLM concluded that the 2015 Rule was a duplicative and unnecessary layer of regulation that imposed unjustified burdens in light of its minimal to nonexistent benefits. Multiple considerations supported that conclusion:

- extensive preexisting federal requirements that mitigate risks from hydraulic fracturing operations;
- state regulations governing hydraulic fracturing activities (many of which post-dated the 2015 Rule);
- tribal regulations governing these activities;
- influential voluntary guidance from the American Petroleum Institute (significant elements of which post-dated the 2015 Rule);
- a desire to eliminate further litigation about BLM's statutory authority;
- the costs associated with the 2015 Rule; and
- evidence that the 2015 Rule was unnecessary and conferred little to no benefits.

We briefly discuss each component of BLM's reasoning.

Preexisting federal requirements: BLM initially explained that the agency already has an extensive process in place to ensure that operators conduct oil and gas operations in a safe, environmentally sound, and resource-protective manner. This process includes the public RMP process and the EIS that accompanies it, the NEPA analysis that occurs at the leasing stage, BLM's regulation of oil and gas operations on tribal lands, the further evaluation and public inspection that occurs at

the application to drill stage, as well as preexisting requirements set forth in Onshore Oil and Gas Orders 1, 2, and 7. 4-ER-638-56; *see also supra* pp. 5-8. BLM also explained that, in promulgating the 2015 Rule, the agency had acknowledged that it already had "an extensive process in place to ensure that operators conduct oil and gas operations in an environmentally sound manner," and that "the 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." 4-ER-685 (quoting 7-ER-1293, 1297). BLM concluded that its preexisting requirements "ensure that operators conduct oil and gas operations in an environmentally sound manner and also reduce the risks associated with hydraulic fracturing by providing specific requirements for well permitting; construction, casing, and cementing; and disposal of produced water." 4-ER-635. Furthermore, "BLM also possesses discretionary authority allowing it to impose site-specific protective measures reducing the risks associated with hydraulic fracturing." *Id.*

State regulations: BLM pointed to the prevalence of state and tribal regulation in this area, some of which post-date the 2015 Rule. In 2015, only 20 of the 32 states with federal oil and gas leases had regulations addressing hydraulic fracturing; when the 2017 Rule was issued, all 32 states had such regulations. 4-ER-634. BLM also pointed out that some states that had hydraulic fracturing regulations in 2015 had since strengthened them. *See* 5-ER-781 (observing that North Dakota had updated

its flowback management provisions to require closed rigid tanks, and New Mexico had required chemical disclosure to FracFocus).

BLM also concluded that disclosure of the chemical content of hydraulic fracturing fluids to state regulatory agencies and databases was more prevalent in 2017 than in 2015. On this point, BLM noted that most states with existing oil and gas operations, including the nine states accounting for approximately 99 percent of well completions on federal and tribal lands, "have regulations that require operators to disclose the chemical content of hydraulic fracturing fluids to either a publicly accessible forum, such as FracFocus, state regulatory agencies, or both." 4-ER-669. BLM accordingly concluded that such disclosures were "more prevalent than it was in 2015 and that there is no need for a duplicate Federal chemical disclosure requirement, since companies are already making those disclosures on most of the operations, either to comply with state law or voluntarily." 4-ER-670.

Tribal regulations: BLM noted that "some tribes with oil and gas resources have also taken steps to regulate oil and gas operations, including hydraulic fracturing, on their lands." 4-ER-634. BLM explained that the Rule would not prevent other tribes who had not yet promulgated hydraulic fracturing regulations from doing so. The agency concluded that, in any event, preexisting federal requirements along with other enforcement mechanisms available to it would ensure environmentally responsible oil and gas development on tribal lands. 4-ER-692.

Voluntary guidance: BLM explained that the American Petroleum Institute provides uniform voluntary standards for conducting hydraulic fracturing operations. 4-ER-709. Specifically, the Institute published two updated guidance documents after BLM issued the 2015 Rule. 5-ER-853-54. Those documents addressed many of the same topics—such as cement monitoring, pressure testing well casing, and isolating producing zones—that the 2015 Rule addressed. *Id.*

Eliminating questions about statutory authority: Several commenters argued —echoing the District of Wyoming's conclusion—that BLM lacked statutory authority to issue the 2015 Rule. 4-ER-675. BLM stated that rescinding the 2015 Rule "alleviates these concerns," but the agency did not express a view on whether the 2015 Rule was statutorily authorized. 4-ER-676. "The more immediate point," BLM noted, "is that the BLM has authority to rescind the 2015 rule, and to restore the regulations existing prior to the 2015 rule." *Id.* BLM concluded "that it is not only better policy to rescind the 2015 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." 4-ER-631.

Reduced costs: BLM concluded the Rule would reduce compliance costs by $14 to $34 million per year on federal and Indian lands. 5-ER-794. BLM also concluded that repealing the 2015 Rule would save time, specifically (1) eight hours of industry time to submit, and four hours of BLM time to process, per application

to conduct fracturing operations; and (2) nine hours of industry time to submit, and four-and-a-half hours of BLM time to process, per notice that fracturing operations were complete. 5-ER-785–86.

Absence of adverse environmental consequences: Most fundamentally, BLM concluded that experience demonstrated that the environmental effects of rescinding the 2015 Rule would be minimal. BLM reviewed incident reports from federal and Indian wells since December 2014. This "review indicated that resource damage is unlikely to increase by rescinding the 2015 rule because of the rarity of adverse environmental impacts that occurred from hydraulic fracturing operations before the 2015 rule, and after its promulgation while the 2015 rule was not in effect." 4-ER-657; *see also* 4-ER-661–62 (referring to multiple comments stating that "there has been no proven case of groundwater contamination from hydraulic fracturing in the United States to date," and "generally agree[ing]" with commenter who stated "that there is no protective advantage to the environment from the 2015 rule").[4]

[4] California attempts to diminish this finding, citing BLM's response to comments in 2015. California Brief at 41-42 (citing 7-ER-1340). But the cited excerpt did not purport to identify specific contamination incidents attributable to hydraulic fracturing and, in any event, does not undermine BLM's subsequent conclusion about the rarity of adverse impacts *since* the 2015 Rule's promulgation. California also cites its own district court briefing that refers in turn to BLM's list of "major undesirable events" from October 2011 to September 2016. 3-ER-241–42. The numbers on this list are inflated because each incident can have multiple entries. *See, e.g.*, 6-ER-1153. Moreover, most of the events on that list are incidents at production facilities or pipelines or drilling incidents—not hydraulic fracturing operations—and the 2015 Rule would not have even arguably prevented them. 6-ER-1142–68.

In short, BLM concluded that—particularly in light of its experience while the 2015 Rule was not in effect—the 2015 Rule was a solution in search of a problem. That was reasonable. Indeed, the District of Wyoming reached a similar conclusion in preliminarily enjoining the 2015 Rule. *See Wyoming*, 136 F. Supp. 3d at 1338-39 (concluding that the "record reflects that both experts and government regulators have repeatedly acknowledged a lack of evidence linking the hydraulic fracturing process to groundwater contamination," and that "BLM fails to reference a single confirmed case of the hydraulic fracturing process contaminating groundwater"). The validity of the 2015 Rule is not before this Court, and BLM takes no position on that issue. But BLM did not act arbitrarily and capriciously in evaluating the evidence (and especially the post-2015 evidence) in much the same way the District of Wyoming did.

III. Plaintiffs' contrary arguments are insufficient.

Against all of the above, Plaintiffs' various attempts to undermine BLM's justification for repealing the 2015 Rule fall well short. They certainly do not demonstrate that the 2017 Rule was arbitrary and capricious.

A. BLM's analysis of preexisting regulation and voluntary industry guidance was not arbitrary and capricious.

Plaintiffs primarily contend that BLM's reliance on the above-discussed sources—preexisting state, tribal, and federal requirements, as well as voluntary industry guidance—was unreasonable. These attacks lack merit.

Initially, the most basic problem with Plaintiffs' arguments on these sources is that Plaintiffs examine them each in isolation. Essentially, Plaintiffs analyze each source individually, declare it inadequate because it does not mandate all of the same requirements as the 2015 Rule, and claim BLM's reliance on it was unreasonable. *See, e.g.*, California Brief at 24-35. But as the above discussion makes clear, BLM's conclusion that the 2015 Rule was unnecessary and provided minimal to nonexistent environmental benefits was based on a holistic analysis of all of these factors. These included the preexisting federal requirements, state and tribal requirements, voluntary industry guidance, as well as the "rarity of adverse environmental impacts that occurred from hydraulic fracturing operations" since the 2015 Rule was enjoined. *See supra* pp. 32-33. As the district court observed, "BLM's focus is not *solely* on preexisting BLM regulations," and "BLM relies on the *combination* of preexisting BLM regulations and additional state and tribal regulations." 1-ER-32–33 (emphases added). Plaintiffs' siloed arguments cannot rebut BLM's conclusion —from its holistic assessment of the record—that the 2015 Rule was unnecessary. But even analyzed individually, Plaintiffs' critiques of BLM are insufficient.

As to state requirements, Plaintiffs emphasize differences between them and the 2015 Rule and suggest that these differences undermine BLM's analysis. *See* California Brief at 29-32; Sierra Club Brief at 38-39. Plaintiffs attack a strawman. BLM acknowledged that the 2015 Rule was not *identical* to state requirements:

> [T]he fact that state rules differ from each other and are not identical to the 2015 rule do not render state programs ineffective, or the 2015 rule essential. . . . Based on the rarity of adverse environmental impacts that have occurred from hydraulic fracturing operations before the 2015 rule, and the lack of compelling evidence that state regulatory programs are inadequate, the 2015 rule is a duplicative layer of Federal regulation that should be rescinded.

4-ER-686. In its regulatory impact analysis, BLM provided a comprehensive state-by-state analysis of state regulation, including whether and to what extent each state imposed requirements covering each of the subjects addressed by the 2015 Rule. 5-ER-779–83, 792. Plaintiffs do not purport to find fault with this analysis. Indeed, Sierra Club cites it favorably. *See* Sierra Club Brief at 38.

Plaintiffs also wrongly dismiss the state-law developments since the 2015 Rule. Unlike the situation in 2015—when nearly 40 percent of states with federal oil and gas leases lacked regulations addressing hydraulic fracturing—*all* such states had such regulations when the 2017 Rule was issued. 4-ER-634. Plaintiffs note that the 12 states that adopted hydraulic fracturing regulations during this period cover a small percentage of BLM-approved oil and gas development. California Brief at 29. But putting aside that these percentages are not necessarily static and can change, it is not unreasonable for BLM to find it relevant that (unlike in 2015) repealing the 2015 Rule did not even arguably leave hydraulic fracturing unregulated in any state.

Plaintiffs' critique of BLM's tribal regulation analysis is no more persuasive. Sierra Club contends that BLM "never reconciled its explanation for the Repeal with

the regulatory void it was creating on tribal lands." Sierra Club Brief at 38. But BLM in fact "acknowledge[d] that not all oil and gas producing tribes have exercised their sovereignty to regulate hydraulic fracturing activities," and it observed that rescission would "not affect those tribes' options for promulgating and implementing programs in exercise of their self-governance and sovereignty." 4-ER-692. In any event, BLM concluded that preexisting federal requirements "along with the enforcement mechanisms that are available to the BLM on tribal lands, provide reasonable assurance that oil and gas development on tribal lands will occur in an environmentally responsible manner, even when tribal regulations . . . are not fully developed." *Id.* That conclusion was not arbitrary and capricious, particularly given BLM's well-supported conclusion that its experience both before and after 2015 Rule underscored that it was unnecessary.

BLM also appropriately concluded that its preexisting regulations, including those located in 43 C.F.R. Subpart 3162 and in Onshore Oil and Gas Orders 1, 2, and 7, adequately ensured that operators conduct oil and gas operations in an environmentally sound manner. *See* 4-ER-635. California contends that "BLM makes no effort to explain how the agency's preexisting regulations and Onshore Orders now provide sufficient protection from the risks the [2015] Rule was designed to address." California Brief at 24-26. Again, this is false. BLM acknowledged that the agency in 2015 had predicted various benefits from the 2015

Rule. 5-ER-797. But BLM noted "that the 2015 rule made no attempt to quantify or otherwise estimate the extent to which the aforementioned risks were reduced by the new requirements." *Id.* As discussed previously, the 2017 Rule explained that, in part as a result of BLM's review of incident reports since December 2014 showing that adverse environmental impacts resulting from hydraulic fracturing operations were rare, the agency now "believes that the appropriate framework for mitigating these impacts is through the state regulations, through tribal exercise of sovereignty, and through BLM's own pre-existing regulations and authorities." 4-ER-636–37.

Finally, California's criticism of BLM's discussion of voluntary industry guidance is also misplaced. California notes that BLM acknowledged the existence of such guidance in 2015 but issued the 2015 Rule anyway. *See* California Brief at 33-35. But the two updated guidance documents were published *after* BLM issued the 2015 Rule. *See supra* p. 31. Indeed, BLM observed that the first post-2015 Rule guidance document "is comprehensive and covers *more* topic areas than the BLM's 2015 final rule." 5-ER-853 (emphasis added). Although BLM acknowledged that it could not estimate how many hydraulic fracturing operators would voluntarily comply with this guidance, the agency "believe[d] that [the] guidance documents are highly influential in the oil and gas industry." 5-ER-769. It was not arbitrary and capricious for BLM to note this guidance, together with other factors, in determining that the 2015 Rule was not necessary.

B. BLM adequately considered alternatives to the Rule.

California also contends that BLM violated the APA by failing to consider repealing some portions of the 2015 Rule but not others—"such as cement casing requirements, measures to prevent frack hits, and storage tank requirements"—that allegedly "are largely unregulated by the states, and therefore would not result in duplication." California Brief at 50. This argument is without merit.

First, California did not raise this alternative in comments on the proposed Rule. It is settled that "a party's failure to make an argument before the administrative agency in comments on a proposed rule bar[s] it from raising that argument on judicial review." *Universal Health Services, Inc. v. Thompson*, 363 F.3d 1013, 1019 (9th Cir. 2004). In the district court, California contended that it could nonetheless raise this argument now because *other* commenters supposedly did. But the only purported example provided by California was a comment stating that "BLM should carefully examine whether to retain the current rule, amend the current rule to retain protective measures while minimizing burdens, or to repeal the existing rule while simultaneously initiating a new rulemaking to provide strong protections with reasonable costs." *See* ECF 127 at 18 (internal quotation marks omitted). This general suggestion is insufficient to preserve the specific alternative that California now implausibly characterizes as "obvious." *See Koretoff v. Vilsack*, 707 F.3d 394, 398 (D.C. Cir. 2013) (per curiam) (proponent must raise a "specific

argument," as opposed to a "general legal issue" to preserve a legal argument for review). BLM can hardly be faulted for failing to address a specific alternative that no commenter asked it to address—particularly given that BLM addressed other alternatives that commenters did raise. *See* 4-ER-697.

Second, lack of preservation aside, BLM *did* consider alternatives. BLM considered four alternatives in depth in its EA and also considered—but decided not to conduct a detailed analysis of—several others. 5-ER-823, 832-33. BLM further discussed that analysis in issuing the Final Rule. 4-ER-696. As the district court correctly concluded, this consideration was adequate.

Indeed, it is striking that the concerns California identifies in suggesting this alternative are environmental in nature. *See* California Brief at 50 (referring to the "important environmental benefits" purportedly conferred by these features of the 2015 Rule). But California does not argue that BLM violated NEPA—even though NEPA expressly requires consideration of alternatives, *see* 42 U.S.C. § 4332(2)(E), *and the APA does not*. Although agencies must consider at least one alternative, this Court has repeatedly made clear that an agency faces a lesser burden in considering alternatives under an EA than under an EIS. *See, e.g.*, *Western Watersheds Project v. Abbey*, 719 F.3d 1035, 1050 (9th Cir. 2013); *North Idaho Community Action Network v. DOT*, 545 F.3d 1147, 1153 (9th Cir. 2008). And "the range of alternatives that [an] agency must consider [in an EA] decreases as the proposed action's

environmental impact becomes less and less substantial." *Earth Island Institute v. U.S. Forest Service*, 697 F.3d 1010, 1023 (9th Cir. 2012). Here, BLM determined that the 2017 Rule would have minimal environmental effects. *See* 4-ER-696. It thus had no obligation under NEPA to consider the alternative California now proposes.

California's failure to even argue that BLM's consideration of alternatives violated NEPA forecloses California's argument that this same consideration of alternatives somehow violated the APA. Unlike NEPA, the APA's far more general dictates are not specific to environmental concerns. The APA does not mandate that BLM consider any particular alternatives to a proposed action. It "is a commonplace of statutory construction that the specific governs the general." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). The APA contains no freestanding requirement that an agency consider particular alternatives; in any event, the APA certainly does not require BLM to consider a *greater* set of environmental alternatives than does NEPA.

Third, forfeiture *and* NEPA aside, BLM had no obligation to address the specific partial repeal now proposed by California. Even assuming the particular provisions identified by California are "largely" not replicated by current state laws, BLM acknowledged in the 2017 Rule that state (and tribal) laws were not identical to the 2015 Rule in every respect. Moreover, as documented above (pp. 27-33), the agency relied on a number of other considerations as well—including preexisting

federal requirements, national voluntary standards, and tribal requirements. More fundamentally, BLM concluded that experience before and since the never-in-effect 2015 Rule was promulgated—in particular, the rarity of adverse environmental impacts that resulted from hydraulic fracturing operations—warranted rescinding the 2015 Rule. That consideration, and BLM's desire to avoid regulation that it believed was unnecessary, applies fully to the 2015 Rule provisions identified by California. Accordingly, this argument (even if California had preserved it) has no merit.

C. BLM adequately explained why maintaining the 2015 Rule was not legally required.

Sierra Club also contends that BLM "arbitrarily reversed itself" on whether the 2015 Rule was required to meet BLM's obligations under the Mineral Leasing Act and FLPMA and as a trustee on Indian lands. Sierra Club Brief at 43. Notably, Sierra Club does not allege that the 2017 Rule *actually violated* these statutes. Rather, Sierra Club asserts that BLM concluded that these statutes and BLM's trusteeship responsibilities required the 2015 Rule, but BLM "reached the opposite conclusion" in 2017 "without acknowledging its change in position." Sierra Club Brief at 43. This argument has no merit.

We begin with the point that not even Sierra Club is really willing to dispute: nothing in FLPMA, the Mineral Leasing Act, any other statute, or any aspect of BLM's trusteeship responsibilities even arguably required BLM to promulgate the 2015 Rule or to leave it in place in 2017. FLPMA provides that BLM "shall . . .

regulate, through easements, permits, leases, licenses, published rules, or other instruments as the [agency] deems appropriate, the use, occupancy, and development of the public lands." 43 U.S.C. § 1732(b). This "broad wording . . . does not mandate that the BLM adopt restrictions" or regulations regarding hydraulic fracturing or on any other particular subject, *Gardner v. BLM*, 638 F.3d 1217, 1222 (9th Cir. 2011)—especially where BLM has determined that such regulations are unnecessary.

Similarly, the Mineral Leasing Act authorizes BLM to "prescribe necessary and proper rules and regulations," as well as "to do any and all things necessary to carry out and accomplish the purposes" of the Act. 30 U.S.C. § 189. Nothing in this language compels the 2015 Rule either. Indeed, the statute contemplates both that state laws will play a role in regulation of federal lands, *see id.* §§ 187, 189, and that lease provisions will contain requirements that BLM deems necessary to protect public welfare, *id.* § 187. Nor did BLM's trust obligations require the agency to maintain a regulation that it concluded imposed unnecessary costs and duplicative requirements on Indian (and federal) lands.[5]

Nor is there any merit to Sierra Club's suggestion that rescinding the 2017 Rule unlawfully "leave[s] regulation to states and tribes," in violation of FLPMA

[5] It is not clear whether Sierra Club wishes to renew its arguments that the 2017 Rule violated BLM's responsibilities under the Indian Mineral Leasing Act and Indian Mineral Development Act. *See* Sierra Club Brief at 43. Neither of these two statutes, which generally subject oil and gas operations to rules promulgated by BLM, *see* 25 U.S.C. §§ 396, 396d, 2107, required BLM to promulgate or maintain the 2015 Rule.

and unspecified "other laws." Sierra Club Brief at 45. BLM's rescission of the 2015 Rule does not leave regulation to states and tribes: BLM develops RMPs, issues leases, and approves applications to drill; at each of these three stages, it conducts NEPA analysis, provides an opportunity for public input or inspection, and imposes whatever additional requirements it deems appropriate and necessary. *See supra* pp. 5-8. BLM maintains and enforces oil and gas regulations to prevent or mitigate risks from hydraulic fracturing operations. *See supra* p. 36. It is obviously not unlawful for BLM to decline to occupy a discretionary regulatory space, even if that choice is based in part on the adequacy of existing state and tribal requirements.[6]

Indeed, as discussed previously, the only court to pass on the validity of the 2015 Rule concluded that the rule was beyond BLM's statutory authority. *See supra* pp. 10-12. BLM does not necessarily endorse that decision. And as it did in issuing the 2017 Rule, BLM does not address the legality of the 2015 Rule here. But for present purposes, it is sufficient to observe that the 2015 Rule certainly was not statutorily *required*.

Sierra Club also misunderstands the role that these statutes played in BLM's 2015 Rule. That rule contains only abbreviated and scattered discussions of these

[6] Sierra Club argued below that the 2017 Rule constituted an unlawful "delegation" of BLM's rulemaking duties. But an agency does not "delegate" its regulatory responsibilities when it declines to issue discretionary regulations or when it repeals regulations that it had no obligation to promulgate in the first place.

statutes. It did not purport to set forth a specific interpretation of what they do and do not require. *Cf. National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 985 (2005) (concluding that even a *judicial* construction of a statute "override[s] an agency's interpretation only if the relevant court decision held the statute unambiguous"). BLM certainly never concluded the 2015 Rule was the *only* mechanism for complying with these statutes. Thus, BLM could change such interpretations even if it had so concluded.

More fundamentally, the agency's conclusion that FLPMA and the Mineral Leasing Act supported the 2015 Rule was based on the agency's record-based conclusions that the rule was necessary and that preexisting federal, state, and tribal requirements were inadequate. *See* 7-ER-1350 (noting that statutes require BLM to regulate "in a manner that protects Federal and Indian lands"). BLM explained at length its changed conclusions in the 2017 Rule when it concluded that the 2015 Rule imposed unnecessary and duplicative requirements. *See Brand X*, 545 U.S. at 981 ("[I]f the agency adequately explains the reasons for a reversal of policy, change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." (internal quotation marks omitted)). Having addressed the premises underlying the agency's 2015 discussion of these statutes, BLM was not required to assert expressly that the 2017 Rule complies with FLPMA, the Mineral Leasing Act, and BLM's trust

responsibilities. *See Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461, 497 (2004) ("Even when an agency explains its decision with less than ideal clarity, a reviewing court will not upset the decision on that account if the agency's path may reasonably be discerned." (internal quotation marks omitted)).

But even assuming that BLM in 2015 suggested that FLPMA and other statutes required the 2015 Rule (it did not), and even if BLM in 2017 was obligated to specifically address the 2017 Rule's compliance with these statutes (it was not), BLM did that here. It acknowledged commenters' assertions that the proposed rule is inconsistent with FLPMA, the Mineral Leasing Act, and the Indian Mineral Leasing Act. 4-ER-673. BLM then explained its rejection of those assertions. After setting forth the requirements of those statutes, the agency observed that "no statute requires the BLM to regulate hydraulic fracturing operations," and that lease conditions and state laws applicable to oil and gas operations have always varied. 4-ER-674. BLM concluded that "[p]articularly where, as here, there is no compelling indication that modern state regulations are allowing unnecessary or undue degradation to the public lands, the [agency is within [its] discretion to decide that rescinding the 2015 rule would reduce the burdens both on operators and the BLM, with little reduction in the protection of those lands." *Id.* This explanation satisfied the APA.

D. Plaintiffs' discussion of Executive Order 13,783 is irrelevant.

California also argues that Executive Order 13,783 is not a basis for the 2017 Rule. *See* California Brief at 43-48. Sierra Club similarly faults BLM for citing Secretarial directives to promote "Energy Independence" and eliminate regulations that "encumber energy production, constrain economic growth, and prevent job creation." Sierra Club Brief at 34-36 (internal quotation marks omitted). Whether the language of Executive Order 13,783 applies to the 2015 Rule is irrelevant. BLM reviewed the 2015 Rule *at the direction* of the Executive Order (and of Secretarial Order No. 3349). But it based its decision to rescind the 2015 Rule "[a]s a result of this review," not based on a bare legal conclusion that the Executive Order applied. 4-ER-632. More fundamentally, although agencies are not free to ignore applicable executive orders, this Executive Order (like others) expressly "does not . . . create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person." 5-ER-1003.

E. BLM adequately explained its change in position from 2015.

Plaintiffs also repeatedly contend that BLM changed its position from 2015 without appropriate justification. *See, e.g.*, California Brief at 26, 27, 28, 34, 36, 38, 41; Sierra Club Brief at 43-46. The district court correctly rejected this contention.

"Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). Indeed, the APA standard of review is no more stringent when an agency changes its position than in any other context. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009). A "policy change complies with the APA if the agency (1) displays 'awareness that it is changing position,' (2) shows that 'the new policy is permissible under the statute,' (3) 'believes' the new policy is better, and (4) provides 'good reasons' for the new policy, which, if the 'new policy rests upon factual findings that contradict those which underlay its prior policy,' must include 'a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy.'" *Organized Village of Kake v. USDA*, 795 F.3d 956, 966 (9th Cir. 2015) (quoting *Fox*, 556 U.S. at 515-16).

BLM complied with these requirements. It displayed awareness that it was changing its position, acknowledging that it was rescinding the 2015 Rule. The new policy is legally permissible, as explained above (pp. 41-45). And BLM believed the 2017 Rule was "better" than the 2015 Rule "because it decided to adopt it." *Village of Kake*, 795 F.3d 956, 967 (9th Cir. 2015); *see also* 4-ER-631 (it is "*better policy* to rescind the 2015 rule" (emphasis added)). Finally, BLM provided good reasons for rescinding the 2015 Rule, as discussed above.

Urging otherwise, Plaintiffs repeatedly accuse BLM of contradicting the factual findings from the 2015 Rule without explanation. California Brief at 2, 18-19, 27, 34; Sierra Club Brief at 43-46. But for much the same reasons as previously discussed, these accusations fall flat. California points out that BLM had previously concluded that the 2015 Rule was necessary despite preexisting state, federal, and tribal requirements as well as guidance. *See* California Brief at 24-35. But the situation had changed in several respects by 2017: new state and tribal regulations, new industry guidance, and additional agency experience. *See supra* pp. 29-33.

In any event, the 2015 Rule's findings that that rule would have significant environmental benefits were speculative and almost entirely conclusory. *See* California Brief at 37 (acknowledging that potential benefits of the 2015 Rule were never quantified); *id.* at 36 (characterizing 2015 Rule as presenting "a qualitative discussion" of benefits); 5-ER-797; *Wyoming*, 136 F. Supp. 3d at 1337-44. BLM acknowledged those previous findings, *see* 4-ER-633, and explained in detail why it now believes the 2015 Rule was unnecessary and duplicative.

Plaintiffs' remaining change-of-position arguments likewise fail. Sierra Club faults BLM for not explaining its supposed reversal on whether the 2015 Rule was required to meet the agency's legal duties. *See* Sierra Club Brief at 43-46. But as previously explained, BLM was not required to furnish such an explanation but did so anyway. *See supra* pp. 44-45. California accuses BLM of failing to consider that

"states do not need to comply with the stewardship standards and trust responsibilities applicable to federal and Indian lands," or "why the variance process in the [2015] Rule is insufficient to address any concerns about duplication." California Brief at 32-33. But these are neither separate factual findings requiring additional discussion nor a basis for requiring BLM to maintain a rule that it concluded was unnecessary. California also contends that BLM failed to "address that the [2015] Rule provided 'a consistent, predictable, regulatory framework' that would 'establish a consistent baseline.'" California Brief at 32 (quoting 7-ER-1290) (second use of "consistent" supplied by California). But BLM explained that the appropriate framework for mitigating the impacts of hydraulic fracturing was "through state regulations, through tribal exercise of sovereignty, and through BLM's own pre-existing regulations and authorities." 4-ER-636–37. In any event, this too is just a truism, not a "factual finding" that an agency must specifically address in a rulemaking: BLM's preexisting requirements applicable to oil and gas operations also provide a "consistent baseline" that states and tribes may strengthen and supplement as they deem appropriate.

F. BLM's analysis of costs and benefits was not arbitrary or capricious.

Finally, California asserts that BLM arbitrarily weighed the costs and benefits of repealing the 2015 Rule, California Brief at 35-42, and Sierra Club makes a similar argument, Sierra Club Brief at 40-42. But Plaintiffs do not dispute BLM's

estimate of the 2015 Rule's compliance costs. Indeed, Plaintiffs cite those estimates favorably. *See* California Brief at 37-38. Instead, Plaintiffs assert that BLM unreasonably minimized what they see as the environmental and public health benefits of the 2015 Rule. But although California's argument on this point is lengthy, the State's discussion is simply a rehash of its assertions that BLM wrongly concluded that the 2015 Rule was unnecessary and conferred minimal environmental benefits. California Brief at 38-42. For all the reasons previously discussed, BLM reasonably determined otherwise.[7]

The amicus curiae supporting Plaintiffs faults BLM for observing that the 2015 Rule's supposed benefits were never quantified. *See* Brief of Institute for Policy Integrity at 7-12. But it was surely reasonable for BLM to observe that the rule that it was repealing had never attempted to quantify or estimate the supposed benefits associated with it. In any event, amicus's argument is built on a strawman. BLM based its conclusion that the 2017 Rule would have minimal effects on its analysis of preexisting requirements and experience since the 2015 Rule, *see supra*

[7] California characterizes BLM as stating 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." California Brief at 38-39. But the full quote reads: "*While the extent of the benefits that the additional assurances might provide are questionable*, it follows that the rescission of the 2015 rule could potentially reduce any such assurances." 4-ER-633 (emphasis added). As discussed previously, BLM explained in the Rule and accompanying EA that it believed the environmental effects of the Rule would be minimal.

pp. 27-33—not on any global conclusion "that unquantified benefits are inherently 'small' or 'less certain to exist.' " Brief of Institute for Policy Integrity at 7 (conceding that this characterization is a mere "implication" derived from BLM's analysis).

* * * * *

Even if Plaintiffs had standing, their APA claims fail on the merits. This Court should affirm the district court's grant of summary judgment on those claims.

IV. The Rule is not subject to, but in any event satisfies, NEPA.

The district court also correctly rejected Plaintiffs' NEPA challenges. The Rule was not subject to NEPA, but even if it was, BLM complied with NEPA.

A. The Rule was not subject to NEPA.

"NEPA procedures do not apply to federal actions that maintain the environmental status quo." *Kootenai Tribe v. Veneman*, 313 F.3d 1094, 1114 (9th Cir. 2002) (collecting cases), *abrogated on other grounds by Wilderness Society v. U.S. Forest Service*, 630 F.3d 1173 (9th Cir. 2011); *accord National Wildlife Federation v. Espy*, 45 F.3d 1337, 1343-44 (9th Cir. 1995). On its face, that principle applies here. Plaintiffs do not dispute that the 2015 Rule has *never* been in effect. As the district court observed, "both before and after the Repeal, the environmental impact of hydraulic fracturing has remained consistent, and has been regulated only by BLM's preexisting regulations, as well as by state and tribal regulations." 1-ER-41. In dismissing appeals related to the 2015 Rule, the Tenth Circuit similarly

observed that the "only 'harm' the Citizen Group Intervenors will suffer is the continued operation of oil and gas development on federal lands, which represents no departure from the status quo since 2015." *Wyoming v. Zinke*, 871 F.3d at 1143.

Nor does it matter that, even though it was not required, BLM prepared an EA in support of the Rule. *See* California Brief at 55; Sierra Club Brief at 48-49. This Court has concluded that federal agency action was not subject to NEPA even when, as here, the agency in fact prepared an EA. *See Idaho Conservation League v. Bonneville Power Administration*, 826 F.3d 1173, 1178 (9th Cir. 2016); *see also WildEarth Guardians v. U.S. Fish & Wildlife Service*, 342 F. Supp. 3d 1047, 1059 (D. Mont. 2018) (NEPA claims failed because "despite the preparation of an EA, there [wa]s no identifiable agency action that alter[ed] the status quo"). For good reason: it would be strange to punish BLM for *doing more* than it was required.

It is also irrelevant that BLM did not invoke NEPA's inapplicability during the rulemaking process. *See* California Brief at 55; Sierra Club Brief at 49. Whether NEPA applies in this context—repeal of a regulation that never went into effect—is a purely legal question, not the sort of factual or record-based issue the agency must address to permit meaningful court review. *See National Electric Manufacturers Ass'n v. U.S. DOE*, 654 F.3d 496, 515 (4th Cir. 2011) (The APA requires agencies to "provid[e] reasons for its actions sufficient to permit assessment by a reviewing court," but "this responsibility does not oblige the agency to provide exhaustive,

contemporaneous legal arguments to preemptively defend its action."); *see also id.* ("Similarly, when (and if) its action is challenged, the [government] is not hamstrung to limit its legal arguments to the four corners of the administrative record.").

Sierra Club also suggests that BLM stated in its EA that the 2015 Rule would go into effect absent the 2017 Rule. Sierra Club Brief at 49. But even if relevant, that suggestion is also false. The portion of the EA cited by Sierra Club merely "*assume*[*d*] that the 2015 final rule is in effect and fully implemented in order to provide a baseline for comparing with the potential effects of the action alternatives." 5-ER-823 (emphasis added).

Accordingly, NEPA did not apply to the 2017 Rule: in issuing the Rule, BLM "was doing what it had always done." *Idaho Conservation League*, 826 F.3d at 1176.

Urging otherwise, Plaintiffs rely heavily on this Court's decision in *California ex rel. Lockyer v. USDA*, 575 F.3d 999 (9th Cir. 2009). As the district court explained, however, the regulation at issue in *Lockyer* was *in effect* for seven months before that regulation was enjoined. *Id.* at 1014. California dismisses *Lockyer*'s discussion of this point as merely "a short paragraph" that "is only one part of the opinion's larger consideration" of whether NEPA applies. California Brief at 58-59. That is not correct. Under any fair reading of *Lockyer*, the fact that the regulation at issue had once been in effect was central to this Court's conclusion that NEPA applied to the agency's attempted repeal:

> [W]e reject the USDA's arguments that the Roadless Rule was never "meaningfully" in force and that it could not have altered the status quo. *The Roadless Rule was legally valid for the seven months after the opinion in Kootenai Tribe. From the time our mandate issued to when the United States District Court for the District of Wyoming issued its injunction, the Roadless Rule governed the roadless area management of the national forests.* . . . That the Roadless Rule did not interfere with forest planning measures does not mean that the months of limited human intervention it facilitated were without beneficial effect on roadless areas and their complex ecosystems.

575 F.3d at 1014 (footnote omitted and emphasis added).

Similarly, *Lockyer* in a footnote expressed concern that "an incoming administration might conclude that many of the outgoing administration's regulations were not in place *long enough* to 'make any meaningful difference' and simply set them aside." *Id.* at 1014 n.9 (emphasis added). But *Lockyer* could hardly have been clearer that a regulation must be in force *at some point* before repealing it could constitute a change in the status quo for NEPA purposes. This makes sense: as the district court observed, conducting NEPA analysis here "would have been difficult where data about the environmental impacts of the 2015 Rule would be as hypothetical as data about the Repeal." 1-ER-40.

Plaintiffs also contend that the 2015 Rule would have gone into effect if the agency had not acted to rescind it. California Brief at 59-60; Sierra Club Brief at 48. But there are multiple problems with this argument. Sierra Club emphasizes that when "BLM finalized the Repeal in December 2017, the Tenth Circuit had vacated the lower court ruling setting aside the 2015 Rule, and that regulation would have

taken effect upon issuance of the Tenth Circuit's mandate." Sierra Club Brief at 49. This is disingenuous. The Tenth Circuit vacated the District of Wyoming's decision *only because* BLM had made clear its intent to rescind the 2015 Rule. *Wyoming v. Zinke*, 871 F.3d at 1142. In any event, it is simply not true that the 2015 Rule would have necessarily gone into effect if BLM had not issued the 2017 Rule. If BLM had not rescinded the 2015 Rule, the plaintiffs in the District of Wyoming would have been free to return to court and obtain a permanent injunction against the 2015 Rule on the same grounds on which they had already received a preliminary injunction (as well as a final judgment). In addition, the District of Wyoming had *also* enjoined the 2015 Rule on the grounds that the 2015 Rule was arbitrary and capricious in several respects. That would have required further litigation even if the Tenth Circuit had reversed the district court's holding on statutory authority.

In short, Plaintiffs' argument would require accepting that BLM changed the status quo for NEPA purposes by repealing a Rule that never went into effect, that a district court had indicated (by granting a preliminary injunction) that it was likely to hold invalid, and that could never go into effect except upon the occurrence of several speculative and contingent events. That argument has no basis in law, and NEPA does not require a reviewing court to engage in such speculation. Rescinding a rule that never went into effect did not change the environmental status quo, and the district court thus correctly held that NEPA did not apply to the 2017 Rule.

B. BLM was not required to prepare an EIS.

Even if NEPA applies to the 2017 Rule, BLM did not need to prepare an EIS. In determining that an EIS was not required, BLM conducted a thorough review of the criteria that guide agencies in determining whether an action's impact will be significant. *See* 40 C.F.R. § 1508.27. BLM concluded that the 2017 Rule would not have such an impact (just as it previously concluded the 2015 Rule would not). 5-ER-869–73. That conclusion was correct and, in any event, certainly reasonable.

Sierra Club contends that an EIS was required because "the Repeal is a nationally applicable regulation that affects thousands of new oil and gas wells drilled each year on federal and Indian lands." Sierra Club Brief at 60. But even accepting this characterization, it does not show that the 2017 Rule was an action "significantly affecting the quality of the human environment," thereby requiring an EIS. 42 U.S.C. § 4332(2)(C). The regulation cited by Sierra Club for a contrary position, *see* Sierra Club Brief at 60, lends no support for its position. *See* 40 C.F.R. § 1502.4(b) (2019) (EISs "*may* be prepared, and are *sometimes* required, for broad Federal actions such as the adoption of new agency" regulation" (emphasis added)).

The same characterization, moreover, is no less true of the 2015 Rule, which *also* was preceded by an EA and FONSI, not an EIS. 6-ER-1204. Rescinding a rule with insignificant environmental effects is, by definition, also environmentally insignificant. Below, Plaintiffs contended that *beneficial* environmental impacts

(which they attribute to the 2015 Rule) do not require an EIS but that *adverse* environmental effects (which they attribute to the 2017 Rule) do require an EIS. There is no basis for such a one-way ratchet. NEPA provides that a federal agency must prepare an EIS for any "major Federal actions significantly affecting the quality of the human environment," and it makes no distinction between beneficial and adverse effects. 42 U.S.C. § 4332(2)(C). The NEPA regulations likewise draw no such distinction; in fact, they mandate that a "significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial." 40 C.F.R. § 1508.27(b)(1). Although this Court has not decided the issue, this Court has suggested that the view that NEPA supports no such distinction "is consistent with the weight of circuit authority and has the virtue of reflecting the plain language of the statute." *Humane Society v. Locke*, 626 F.3d 1040, 1056 n.9 (9th Cir. 2010). Accordingly, BLM was not required to prepare an EIS to rescind a regulation that itself was not accompanied by an EIS.

Even putting aside this history, there is no basis for Plaintiffs' contention that the 2017 Rule required an EIS. As BLM explained, the 2017 Rule does not authorize or prohibit any hydraulic fracturing operations. 5-ER-824. Nor does it affect the number of hydraulic fracturing operations, 4-ER-696–97, a point that Plaintiffs emphasize, *see* Sierra Club Brief at 35. Oil and gas development on federal lands, moreover, involves a three-stage process—issuance of an RMP, a lease sale, and the

drill application approval process—all parts of which involve NEPA review and an opportunity for public participation or inspection. *See supra* pp. 5-8. Hydraulic fracturing activities are already extensively regulated by federal requirements, state laws in all 32 states in which BLM currently manages oil and gas leases, as well as by some tribal requirements. *See supra* pp. 28-30. And critically, a review of incident reports revealed a "rarity of adverse environmental impacts that occurred from hydraulic fracturing operations since promulgation of the 2015 rule." 4-ER-636. There was substantial evidence for BLM to reasonably conclude that repealing the 2015 Rule would not have a significant effect on the quality of the human environment.

C. Plaintiffs' remaining challenges to the EA and FONSI lack merit.

Finally, BLM's EA satisfied NEPA's requirements. California does not address the adequacy of the EA. Sierra Club challenges the EA in only two respects. Neither undermines BLM's analysis.

First, Sierra Club faults BLM for purportedly failing to separately analyze impacts to tribal lands in its EA. Sierra Club Brief at 55-57. Yet nothing in NEPA or the APA requires BLM to address tribal impacts separately—let alone requires an agency to do so in an EA specifically. The source cited by Sierra Club for this argument, *see* Sierra Club Brief at 55, is a 1997 guidance document. By its own terms, that document does not create any enforceable rights against the United States

and its agencies. *See* Council on Environmental Quality, *Environmental Justice: Guidance Under the National Environmental Policy Act* 21 (1997).[8]

Regardless, BLM's EA is replete with discussion of tribal impacts. *See, e.g.*, 5-ER-830 (noting prior review indicating "given the BLM's pre-existing authorities and regulations . . . *and the ability of tribes to exercise their sovereignty and participate in the regulation of oil and gas development on their lands*, [the 2015 Rule's requirements] are not justified by" the potential benefits of the 2015 Rule (emphasis added)); 5-ER-831 (noting "a review of incident reports from Federal *and Indian wells*, which indicated that adverse environmental impacts from hydraulic fracturing were a rare occurrence prior to the 2015 final rule, and subsequent to its promulgation" (emphasis added)); 5-ER-838–39 (2016 EPA report "does not show that BLM regulation on Federal *and Indian lands* is necessary in addition to state *or tribal* regulation" (emphasis added)).

As reflected in these examples, BLM's reasons for extending the Rule to tribal lands are straightforward and reasonable: given preexisting federal regulation, the regulations of some tribes, new industry guidance, and the rarity of adverse environmental impacts that have occurred before and after promulgation of the 2015

[8] In any event, BLM acted consistently with the guidance's suggestion to address "whether there may be disproportionately high and adverse human health or environmental effects on" Native Americans, when the agency concluded that the 2015 Rule was not necessary on Indian lands. 4-ER-692.

Rule, "BLM believes that the appropriate framework for mitigating the potential impacts of hydraulic fracturing exists through state and tribal regulations and through its own pre-existing regulations and authorities." 4-ER-636–37. Of course, tribes are free to impose additional requirements. *See* 5-ER-830 (encouraging further tribal involvement).

Second, Sierra Club argues that BLM failed to take a hard look at the impacts from eliminating the 2015 Rule's requirement that operators store fluids in tanks rather than above-ground pits. Sierra Club Brief at 57. But again, BLM extensively analyzed this rescission (which, of course, never went into effect at all). Initially, BLM explained that the impact of the rescinded requirement was unlikely to be significant. Five of the nine states that have the most hydraulic fracturing on federal and Indian lands (including California) require operators to use tanks. 5-ER-790. BLM also estimated that, even where tanks are not required, operators would use tanks voluntarily when tanks cost the same or less than pits. The comparative costs of the two methods depend largely on the volume of recovered fluids. 5-ER-811. And overall, BLM estimated that 90 to 94 percent of hydraulic fracturing operations on federal and Indian lands *used tanks* even without the 2015 Rule. 5-ER-849. Sierra Club does not challenge this estimate. *See* Sierra Club Brief at 58. Although BLM acknowledged that using tanks would reduce the amount of air emissions, it explained that this reduction from the 2015 Rule would have been minor because

the 2015 Rule did not require tanks to have vapor recovery systems. 5-ER-849. After examining this issue, BLM chose to prioritize the cost savings of eliminating the never-in-effect tank requirement (which would save operators an average of $74,000, 5-ER-790). That is all NEPA requires. *See Laguna Greenbelt, Inc. v. DOT*, 42 F.3d 517, 523 (9th Cir. 1994) (NEPA "does not mandate particular substantive results, but instead imposes only procedural requirements").

* * * * *

In sum, if the 2017 Rule was even subject to NEPA, BLM complied with the statute in promulgating the Rule.

V. In any event, this Court should not vacate the 2017 Rule.

For all the reasons previously discussed, this Court should affirm the district court's judgment. But even if the Court concludes that the 2017 Rule is unlawful, it should not vacate the Rule. It is "well established" that agency action need not be vacated whenever there is a legal violation or procedural flaw. *United States v. Afshari*, 426 F.3d 1150, 1156 (9th Cir. 2005). In deciding whether to vacate a flawed agency action, this Court considers the seriousness of the agency's errors and the disruptive consequences that would result from vacatur. *California Communities Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012). These factors do not support any vacatur here.

As to the first factor, Plaintiffs' arguments against the 2017 Rule in this Court are entirely procedural: Plaintiffs assert that BLM failed to adequately explain certain aspects of its reasoning, particularly where the agency's thinking diverged from the 2015 Rule. Plaintiffs' arguments lack merit. Regardless, even if this Court were to accept them in whole or in part, BLM would almost certainly be able to correct any identified deficiencies on remand. *See, e.g.*, *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015) (courts may choose not to vacate when an agency "would likely be able to offer better reasoning or whether by complying with procedural rules, it could adopt the same rule on remand"); *California Communities*, 688 F.3d at 993. Moreover, there is no good reason to think that any procedural errors underlying the 2017 Rule have led to environmental harm, or that vacatur of the Rule is needed to prevent future environmental harm. The 2015 Rule rescinded by the 2017 Rule was promulgated nearly six years ago and has never been in effect. In 2015, the Wyoming district court criticized the potential risks and impacts that BLM identified in the 2015 Rule as unsupported by evidence, and BLM has since noted the rarity of adverse environmental impacts that have occurred since the 2015 Rule's promulgation. *See supra* pp. 11, 32-33.

Moreover, vacating the 2017 Rule would create disruption and uncertainty for both BLM and the regulated community. Though Plaintiffs do not expressly address the issue in their opening briefs in this Court, California argued below that vacating

the 2017 Rule would result in reinstatement of the 2015 Rule. But the 2015 Rule is now nearly six years old. It has never been in force. And much of the data supporting it (including its analysis of state and tribal laws) is out of date.

More fundamentally, although in general the "effect of invalidating an agency rule is to reinstate the rule previously in force," *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005), this principle does not apply when the rule previously in force was *also invalid*. *Id.* The only court to have considered the legality of the 2015 Rule has concluded that the 2015 Rule was unlawful, and the Tenth Circuit merely vacated (not reversed) the District of Wyoming's decision when it dismissed the appeals as prudentially unripe. BLM again does not concede that the 2015 Rule was unlawful. But if this Court were to order the 2015 Rule reinstated, the plaintiffs in that litigation will presumably just return to the District of Wyoming, which has already concluded that the 2015 Rule is beyond BLM's statutory authority as well as arbitrary and capricious. There is no reason to create such regulatory uncertainty and unnecessary litigation. This is particularly true because, as discussed above, it is highly likely that BLM could cure any deficiencies this Court might identify on remand.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Dated: December 21, 2020.

Respectfully submitted,

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Date December 21, 2020

ADDENDUM

Administrative Procedure Act

5 U.S.C. § 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. . . .

5 U.S.C. § 706. Scope of review

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

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

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

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

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

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

(D) without observance of procedure required by law;

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

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

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

Federal Land Policy and Management Act of 1976

43 U.S.C. § 1712. Land use plans

(a) Development, maintenance, and revision by Secretary

The Secretary shall, with public involvement and consistent with the terms and conditions of this Act, develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands. Land use plans shall be developed for the public lands regardless of whether such lands previously have been classified, withdrawn, set aside, or otherwise designated for one or more uses.

. . . .

(f) Procedures applicable to formulation of plans and programs for public land management

The Secretary shall allow an opportunity for public involvement and by regulation shall establish procedures, including public hearings where appropriate, to give Federal, State, and local governments and the public, adequate notice and opportunity to comment upon and participate in the formulation of plans and programs relating to the management of the public lands.

. . . .

43 U.S.C. § 1732. Management of use, occupancy, and development of public lands

(a) Multiple use and sustained yield requirements applicable; exception

The Secretary shall manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed by him under section 1712 of this title when they are available, except that where a tract of such public land has been dedicated to specific uses according to any other provisions of law it shall be managed in accordance with such law.

. . . .

Indian Mineral Development Act

25 U.S.C. § 2107. Regulations; consultation with Indian organizations; pending agreements

Within one hundred and eighty days of December 22, 1982, the Secretary of the Interior shall promulgate rules and regulations to facilitate implementation of this chapter. The Secretary shall, to the extent practicable, consult with national and regional Indian organizations and tribes with expertise in mineral development both in the initial formulation of rules and regulations and any future revision or amendment of such rules and regulations. Where there is pending before the Secretary for his approval a Minerals Agreement of the type authorized by section 2102 of this title which was submitted prior to December 22, 1982, the Secretary shall evaluate and approve or disapprove such agreement based upon section 2103 of this title, but shall not withhold or delay such approval or disapproval on the grounds that the rules and regulations implementing this chapter have not been promulgated.

Indian Mineral Leasing Act

25 U.S.C. § 396. Leases of allotted lands for mining purposes

All lands allotted to Indians in severalty, except allotments made to members of the Five Civilized Tribes and Osage Indians in Oklahoma, may by said allottee be leased for mining purposes for any term of years as may be deemed advisable by the Secretary of the Interior; and the Secretary of the Interior is authorized to perform any and all acts and make such rules and regulations as may be necessary for the purpose of carrying the provisions of this section into full force and effect: Provided, That if the said allottee is deceased and the heirs to or devisees of any interest in the allotment have not been determined, or, if determined, some or all of them cannot be located, the Secretary of the Interior may offer for sale leases for mining purposes to the highest responsible qualified bidder, at public auction, or on sealed bids, after notice and advertisement, upon such terms and conditions as the Secretary of the Interior may prescribe. The Secretary of the Interior shall have the right to reject all bids whenever in his judgment the interests of the Indians will be served by so doing, and to readvertise such lease for sale.

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

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

Mineral Leasing Act

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

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

30 U.S.C. § 189. Rules and regulations; boundary lines; State rights unaffected; taxation

The Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this chapter, also to fix and determine the boundary lines of any structure, or oil or gas field, for the purposes of this chapter. Nothing in this chapter shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States.

National Environmental Policy Act

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

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

. . . .

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

(i) the environmental impact of the proposed action,

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

(iii) alternatives to the proposed action,

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

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

Federal Land Policy and Management Act Regulations

43 C.F.R. § 1610.2. Public participation.

(a) The public shall be provided opportunities to meaningfully participate in and comment on the preparation of plans, amendments and related guidance and be given early notice of planning activities. Public involvement in the resource management planning process shall conform to the requirements of the National Environmental Policy Act and associated implementing regulations.

. . . .

(f) Public notice and opportunity for participation in resource management plan preparation shall be appropriate to the areas and people involved and shall be provided at the following specific points in the planning process:

(1) General notice at the outset of the process inviting participation in the identification of issues (See §§ 1610.2(c) and 1610.4-1);

(2) Review of the proposed planning criteria (§§ 1610.4-2);

(3) Publication of the draft resource management plan and draft environmental impact statement (See § 1610.4-7);

(4) Publication of the proposed resource management plan and final environmental impact statement which triggers the opportunity for protest (See §§ 1610.4-8 and 1610.5-1(b)); and

(5) Public notice and comment on any significant change made to the plan as a result of action on a protest (See § 1610.5-1(b)).

. . . .

43 C.F.R. § 1610.5-2. Protest procedures.

(a) Any person who participated in the planning process and has an interest which is or may be adversely affected by the approval or amendment of a resource management plan may protest such approval or amendment. A protest may raise only those issues which were submitted for the record during the planning process.

(1) The protest shall be in writing and shall be filed with the Director. The protest shall be filed within 30 days of the date the Environmental Protection Agency published the notice of receipt of the final environmental impact statement containing the plan or amendment in the Federal Register. For an amendment not requiring the preparation of an environmental impact statement, the protest shall be filed within 30 days of the publication of the notice of its effective date.

. . . .

National Environmental Policy Act Regulations

40 C.F.R. § 1501.4. Whether to prepare an environmental impact statement.

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in § 1507.3) whether the proposal is one which:

(1) Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§ 1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by § 1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

(d) Commence the scoping process (§ 1501.7), if the agency will prepare an environmental impact statement.

(e) Prepare a finding of no significant impact (§ 1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.

(1) The agency shall make the finding of no significant impact available to the affected public as specified in § 1506.6.

(2) In certain limited circumstances, which the agency may cover in its procedures under § 1507.3, the agency shall make the finding of no significant impact available for public review (including State and areawide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:

(i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to § 1507.3, or

(ii) The nature of the proposed action is one without precedent.

40 C.F.R. § 1502.4. Major Federal actions requiring the preparation of environmental impact statements.

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

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

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

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

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

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

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

40 C.F.R. § 1508.27. Significantly.

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

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

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

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

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

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

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

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

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

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

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

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

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