Denise A. Grab, Cal. State Bar #268097
Richard L. Revesz, N.Y. State Bar #2044725 (*pro hac vice pending*)
Jason Schwartz, Va. State Bar #73398 (*pro hac vice pending*)
Institute for Policy Integrity
New York University Law School
139 MacDougal, 3rd floor
New York, NY 10012
T: (212) 992-8932
F: (212) 995-4592
E-mail: denise.grab@nyu.edu

Counsel for *Amicus Curiae* Institute for Policy Integrity

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB; CENTER FOR BIOLOGICAL DIVERSITY; DINE CITIZENS AGAINST RUINING OUR ENVIRONMENT; EARTHWORKS; FORT BERTHOLD PROTECTORS OF WATER AND EARTH RIGHTS; SOUTHERN UTAH WILDERNESS ALLIANCE; THE WILDERNESS SOCIETY; and WESTERN RESOURCE ADVOCATES,

Plaintiffs,

v.

DAVID BERNHARDT, Secretary of the Interior; UNITED STATES BUREAU OF LAND MANAGEMENT; and UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants.

Case No. 4:18-cv-00524-HSG

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

BRIEF OF THE INSTITUTE FOR POLICY INTEGRITY AT NEW YORK UNIVERSITY SCHOOL OF LAW AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

Hearing: December 5, 2019, 2:00 PM
Judge: Hon. Haywood S. Gilliam, Jr.

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

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The Institute for Policy Integrity at New York University School of Law ("Policy Integrity")[1] submits this *amicus curiae* brief in support of Plaintiffs' motions for summary judgment to vacate the Bureau of Land Management's ("BLM") repeal, 82 Fed. Reg. 61,924 (Dec. 29, 2017) ("Repeal") of the 2015 Hydraulic Fracturing Rule, 80 Fed. Reg. 16,128 (Mar. 26, 2015) ("2015 Rule").

INTEREST OF AMICUS CURIAE

Policy Integrity is a nonpartisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship on the topics of administrative law, economics, and environmental policy. In this case, Plaintiffs have challenged the Repeal as arbitrary and capricious for, among other reasons, improper consideration of costs and benefits.

Policy Integrity's team of economists and lawyers have significant expertise in these areas, having produced extensive scholarship on the balanced use of economic analysis in regulatory decisionmaking. *See* Mot. of the Institute for Policy Integrity to File Brief Amicus Curiae ("Policy Integrity Mot.") at 3 nn. 1-3 (citing multiple articles). Policy Integrity has employed its expertise to produce other amicus briefs addressing agency cost-benefit analyses in several repeals and rulemakings that present similar questions to the ones at issue here. *See* Policy Integrity Mot. at 3-4 (describing briefs). In several cases in which Policy Integrity filed briefs, courts have agreed that the agency's analysis was arbitrary. *E.g., California v. Interior*, No. 17-05948, 2019 U.S. Dist. LEXIS 66300 (N.D. Cal. Mar. 29, 2019) (holding that the repeal of the Valuation Rule was arbitrary); *California v. BLM.*, 277 F. Supp. 3d 1106 (N.D. Cal. 2017) (holding that BLM's failure to consider forgone climate benefits was arbitrary).

Policy Integrity has a substantial interest in this case, having filed comments on the proposed Repeal about how BLM's regulatory impact analysis failed the standards for rational decision-making. HFRR_015709-14. Harnessing its extensive expertise, its experience with this rule, and its

[1] This brief does not purport to represent the views of New York University School of Law, if any. No party's counsel authored this brief in whole or in part, and no person—other than amicus, its members, or its counsel—contributed money intended to fund the preparation or submission of this brief. Policy Integrity gratefully thanks Alexandra L. St. Romain and Theodore A. Gifford, students in NYU's Advanced Regulatory Policy Clinic, for their assistance in preparing this brief.

broader interest in ensuring that all agencies follow standard practices for considering regulatory costs and benefits, Policy Integrity submits this proposed *amicus* brief to share its unique perspective on regulatory impact analysis with the Court and so assist the Court in its evaluation of the Repeal.

SUMMARY OF ARGUMENT

BLM arbitrarily attempts to justify its Repeal of valuable regulatory protections by wrongly treating important effects as worthless simply because they cannot be fully quantified and by ignoring key indirect costs. By relying on irrational analytical choices to justify the Repeal, BLM not only has erased the 2015 Rule's significant net benefits, but BLM has also flouted longstanding guidance and standard practices for conducting regulatory impact analysis.

First, BLM wrongly disregards the 2015 Rule's environmental, health, and safety benefits simply because they were unquantified. In 2015, BLM strongly determined that the original fracking rule's benefits, though unquantified, were nevertheless significant. BLM now suggests instead that the Repeal's forgone benefits must be smaller than its cost savings, by arguing that unquantified effects are inherently less certain and less significant than quantified effects. Yet every respected guide on cost-benefit analysis—from White House manuals to the economic literature to BLM's own historical regulatory practices—confirm that unquantified effects demand due consideration and that a current inability to quantify an effect reveals nothing about that effect's certainty or magnitude.

Second, BLM repeatedly attempts to justify its Repeal by insisting that any environmental, health, or safety benefits forgone by rescinding the 2015 Rule will be minimal—or indeed, have been outright "eliminated"—because state regulations and voluntary compliance will substitute for the repealed federal standards. Yet even if such substitutes existed, they would affect not just the Repeal's forgone benefits but the alleged compliance cost savings as well. Standard practices for cost-benefit analysis require assessing all effects against a common baseline. BLM instead inconsistently predicts that a change in the baseline rates of adherence to state regulations could erase all the Repeal's forgone environmental benefits while only slightly offsetting the Repeal's alleged compliance cost savings. BLM cannot have it both ways: either the Repeal will relieve operators of additional compliance obligations and so will forgo the environmental benefits of those

additional compliance activities, or else the operators would comply anyway due to preexisting regulations and voluntary practices and so neither forgone benefits nor cost savings would result.

Finally, BLM altogether ignores certain indirect but significant costs of the Repeal. Both case law and executive guidance forbid agencies from entirely neglecting important aspects of a regulatory problem simply because the effect is deemed to be indirect. Here, BLM completely disregards how the Repeal may increase air pollution and how the Repeal will likely forgo cost savings to industry. For example, the 2015 Rule was expected to deliver economic benefits to industry by reducing "frack hits" and so protecting any wells indirectly affected by such "inter-well communication" from damage or interruptions to production. These indirect benefits of the 2015 Rule became, upon rescission, the indirect costs of the Repeal. Yet BLM never considers how such indirect costs will offset the Repeal's alleged compliance cost savings.

BLM repeatedly flouted standard practices for regulatory analysis and relied on an irrational analysis to justify its Repeal. As such, the Repeal must be vacated as arbitrary and capricious.

ARGUMENT

I. BLM Arbitrarily Disregards the 2015 Rule's Benefits, in Violation of Standard Economic Practices

Regulatory impact analysis can reveal if an agency "entirely failed to consider an important aspect of the problem." *See California v. BLM,* 277 F. Supp. 3d 1106, 1122 (N.D. Cal. 2017) (quoting the Supreme Court's test for arbitrary agency action and reviewing the agency's cost-benefit analysis). For example, in a 2017 case, this district struck down a deregulatory action in part because BLM "entirely failed to consider" important aspects of the problem, namely the forgone environmental, financial, and social benefits caused by delaying implementation of a rule. *Id.* In this case, BLM has similarly relied on an arbitrary analysis, has disregarded the 2015 Rule's significant benefits, and so has irrationally ignored important aspects of the Repeal.

While BLM's regulatory impact analysis admits that the Repeal could forgo the 2015 Rule's environmental, social, and informational benefits, including reduced risks to surface and groundwater resources, BLM nevertheless insists that any forgone benefits actually are at most

"marginal" and "too small," or even have been "completely offset" and "eliminated." BLM, *Regulatory Impact Analysis for the Final Rule to Rescind the 2015 Hydraulic Fracturing Rule* 9, 54, 55 (2017) ("2017 RIA"); 82 Fed. Reg. at 61,939, 61,942. In so belittling and ignoring the Repeal's forgone benefits, BLM relies on two arbitrary analytical assumptions: first, BLM assumes that unquantified effects are inherently less significant and less certain than quantified effects; and second, BLM assumes that baseline rates of compliance with state regulations and voluntary standards would have affected the 2015 Rule's benefits differently than its costs. Both assumptions are irrational and violate longstanding practices for regulatory analysis.

a. BLM Arbitrarily Assumes that Forgone Benefits Are Insignificant or Nonexistent Simply Because They Could Not Be Quantified.

Key benefits of the 2015 Rule included reduced risks to surface and groundwater resources, reduced public health and environmental harms, reduced remediation costs, increased assurance of environmentally safe operations, air emission benefits, worker safety protections, increased public awareness and other informational benefits, reduced economic impacts, and various cost savings to industry. BLM, *Regulatory Impact Analysis for Hydraulic Fracturing Rule* 2, 77-80 (2015) ("2015 RIA"); 80 Fed. Reg. at 16,163, 16,203. In promulgating the 2015 Rule, BLM properly explained that while insufficient data prevented quantification of the rule's benefits, "*this does not mean that the rule is without benefits*." *Id.* at 16,188 (emphasis added). To the contrary, BLM concluded that the 2015 standards were "prudent," "necessary," and "common-sense," *id.* at 16,188-89, and that "potential benefits of the rule are *significant*," *id.* at 16,203 (emphasis added). Notably, in a preliminary analysis from 2012, BLM estimated that, for example, requiring the use of tanks or at least lined pits instead of open pits to store fluids could have provided monetized benefits of up to $41.3 million per year just by avoiding the costs of remediation of surface and subsurface contamination.[2] Though BLM ultimately concluded in 2015 that existing data was insufficient to

[2] BLM, *Well Stimulation Proposed Rule: Economic Analysis and Initial Regulatory Flexibility Analysis*, 2, 41, tbl. 5 (2012) (HFRR_032094, 032133). This figure compares gross monetized benefits of proposed regulation requiring tanks or lined pits (up to $50.27 million per year in avoided remediation) with gross benefits of an alternative with no tank or lining requirement ($8.99 million).

produce a reliable quantitative estimate of benefits, BLM's expert judgment, based on the evidence before it, never wavered: the 2015 Rule's benefits were real and valuable. *Id.* at 16,188-89.

BLM now repeatedly assumes that forgone benefits from repealing the 2015 Rule must be small because they were unquantified, improperly equating quantification with significance. The Repeal, for example, concludes that "Any *marginal benefits* provided by the 2015 rule *do not outweigh* the rule's costs, even if those costs are a small percentage of the cost of a well. *In fact, benefits were largely unquantified* in the 2015 rule." 82 Fed. Reg. at 61,939 (emphasis added). The clear implication is that *because* the 2015 Rule's benefits were unquantified, *therefore* the Repeal's forgone benefits must be marginal and outweighed by the cost savings. The Repeal's regulatory analysis draws a similar false equivalency between quantification and significance by concluding that "Any incremental benefits that the 2015 rule provided in addition to existing federal, state, and tribal regulations and industry standards has heretofore been *undemonstrated and is likely to be marginal*." 2017 RIA at 5 (emphasis added). Finally, the Repeal implicitly gives more weight to costs simply because they have been quantified, noting again that "[t]here were *no monetary estimates of any incremental benefit* the 2015 rule provides," before concluding that "[s]uch incremental benefits, however, are *likely to be too small* . . . to justify compliance *costs that are both monetized and certain to exist*." 82 Fed. Reg. at 61,942 (emphasis added). BLM thus implies that forgone benefits are not "certain to exist" because they were not monetized, and so assumes that in no case could unmonetized benefits possibly be large enough to justify monetized costs.

To begin, BLM arbitrarily failed to explain its sudden and radical change in position that the 2015 Rule's effects, previously deemed to be "significant," 80 Fed. Reg. at 16,203, are instead now assumed to be small and perhaps non-existent simply because they could not be quantified. *See Air Alliance Houston v. EPA*, 906 F.3d 1049, 1067 (D.C. Cir. 2018) (faulting the agency for failing to "explain why the detailed factual findings regarding the harm that would be prevented upon implementation of the [original rule] are now only 'speculative'"). Moreover, ignoring an important aspect of the problem merely because it is unquantified is an arbitrary violation of standard practices for cost-benefit analysis, of BLM's own historical treatment of unquantified effects, and of standards

for rational rulemaking under the Administrative Procedure Act.

The executive orders and guidance governing regulatory analysis instruct agencies to give due consideration to all important unquantified costs and benefits. Executive Order 12,866 requires agencies to assess "qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider." Exec. Order No. 12,866 § 1(a), 58 Fed. Reg. 51,735 (Oct. 4, 1993); *see also* 2017 RIA at 5 (relying on Exec. Order 12,866 for guidance and so "recognizing that not all benefits and costs can be described in monetary or even in quantitative terms"). The Office of Management and Budget's *Circular A-4* guidance on regulatory analysis cautions agencies against ignoring the potential magnitude of unquantified benefits, because the most efficient rule may not have the "largest quantified and monetized . . . estimate." HFRR_034342.[3] It is widely recognized in the economic literature that cost-benefit analysis requires proper consideration of effects that "defy quantification but are thought to be important." Kenneth J. Arrow et al., *Benefit-Cost Analysis in Environmental, Health, and Safety Regulation: A Statement of Principles* 10 (1996).[4] The mere fact that a benefit cannot currently be quantified says little about its magnitude. In recent decades, some of the most important categories of regulatory benefits were once considered unquantifiable but were subsequently quantified. Richard L. Revesz, *Quantifying Environmental Benefits*, 102 Cal. L. Rev. 1423, 1436 (2014) (explaining, for example, how the key valuation of mortality risk reductions—known as the "value of statistical life"—had "initially evaded quantification").

Recognizing that unquantified benefits can be substantial had been a longstanding practice for BLM under administrations of both political parties. For example, in April 1982—just months after President Reagan signed Executive Order 12,291, which, like its successor Executive Order 12,866, required agencies to conduct regulatory impact analyses—BLM prepared its *Final Regulatory Impact Analysis for Regulations Governing Competitive Oil and Gas Leasing in the National*

[3] The Office of Management and Budget's *Circular A-4* was issued under President George W. Bush and continues to guide agencies on regulatory analysis. *See* 2017 RIA at 5 (relying on *Circular A-4*).

[4] The Court may consider background material on technical subjects outside the administrative record to assess the sufficiency of the agency's assessments. *Council v. Johnson*, 674 F.2d 791, 794 (9th Cir. 1982); *Love v. Thomas*, 858 F.2 1347, 1356 (9th Cir. 1988).

Petroleum Reserve in Alaska.[5] BLM explained that, "[b]ecause of information gaps and scientific uncertainty," the "social costs" of allowing oil and gas drilling in sensitive Alaskan land "cannot be quantitatively predicted." *Id*. at 33. Nevertheless, BLM noted that drilling operations could entail the "risk of *significant* environmental harm," *id.* (emphasis added), and particularly insisted that sociocultural, nutritional, and economic effects to the subsistence activities of Native communities, while unquantifiable, were "real and very important." *Id.* at 32; *accord id.* at 31. Ultimately, in BLM's 1982 regulatory impact analysis, the agency concluded that "[t]hese costs *must, therefore, be analyzed* in terms of the potential risks (or cost) posed to environmental values in relation to the perceived benefits to accrue through oil and gas development." *Id.* at 33. In short, BLM has known since at least the Reagan administration that even if environmental effects are unquantified, they may be significant and require analysis. Similarly, under the Clinton administration, BLM developed new regulations for hardrock mining and determined that while the benefits "cannot be quantified" due to information gaps, the net economic benefits could be "substantial" and the "environmental benefits of protecting even a small number of unique resources over time could easily offset the costs." 65 Fed. Reg. 69,998, 70,102 (Nov. 21, 2000); *see also id.* (assessing costs "[o]n a per-capita basis" and concluding that "the magnitude of environmental benefits associated with the regulation could be quite small and still offset the estimated costs"). Even when BLM later repealed portions of those hardrock mining regulations during the George W. Bush administration, the agency noted that certain effects could be "substantial" even though uncertainty prevented quantification. 66 Fed. Reg. 54,834, 54,844 (Oct. 30, 2001).

Courts agree that "[t]he mere fact that the magnitude of [an effect] is uncertain is no justification for disregarding the effect entirely." *Public Citizen v. Fed. Motor Carrier Safety Admin*., 374 F.3d 1209, 1219 (D.C. Cir. 2004); *see also Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1052 (D.C. Cir.

[5] Complete text at https://books.google.com/books?id=5g4xAQAAMAAJ. Courts may look beyond the administrative record and take judicial notice of agencies' own records. *Dent v. Holder*, 627 F.3d 365, 371 (9th Cir. 2010). This Court may take notice of BLM's regulatory history to evaluate how BLM has broken with past practices. *Rose v. Stephens Inst.*, No. 09-cv-05966, 2016 WL 5076214 at *4 (N.D. Cal. Sept. 20, 2016) (taking notice of past agency reports to compare "historical practice").

1999) (rejecting the idea that EPA could ignore health effects that are "difficult, if not impossible, to quantify reliably"); *Air Alliance Houston,* 906 F.3d at 1067 (faulting the agency for, without analysis, dismissing unquantified forgone benefits as "speculative").

For BLM now to treat the 2015 Rule's benefits as trivial, and even to question their very existence, simply because those benefits could not be quantified, ignores an "important aspect of the problem," *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), and so is arbitrary and capricious, 5 U.S.C. § 706(2)(a).

b. BLM Trivializes and Erases the Repeal's Forgone Benefits by Inconsistently Applying an Arbitrary Baseline

BLM repeatedly attempts to justify its Repeal by insisting that any environmental, health, or safety benefits forgone by rescinding the 2015 Rule will be minimal—or indeed, have been outright "eliminated"—because state and tribal regulations, other federal regulations, and voluntary compliance with industry standards will substitute for the repealed federal standards. 2017 RIA at 9; *see also id.* at 43-53; 82 Fed. Reg. at 61,942 (calling the 2015 Rule "redundant" with other standards and practices and so concluding that the 2015 Rule's benefits could not justify its costs). In economic terms, BLM's argument is about the "baseline" for evaluating the 2015 Rule. As the Office of Management and Budget's *Circular A-4* guidelines on regulatory analysis instruct, agencies must always "measure the benefits and costs of a rule against a baseline," which should be "the best assessment of the way the world would look absent the [regulatory] action," including "the degree of compliance by regulated entities with other regulations." HFRR_034349. However, BLM's approach in the Repeal to defining the baseline is unsupported by evidence, is internally inconsistent, and violates standard practices for conducting regulatory impact analysis.

First, as Plaintiffs detail, BLM's claims about the "increased prevalence" of such allegedly substitute standards, 2017 RIA at 4, have no basis in evidence. For example, BLM's own analysis shows that "the patchwork of existing state regulations do not provide the same protections" as the 2015 Rule, Citizen Pls. Mot. at 9 (Doc. 110), and new state regulations adopted since 2015 cover "less than 1% of BLM-approved oil and gas development," *id.* at 11; *see also* Cal. Mot. at 16-17

(Doc. 112) (detailing the "shortcomings in state and tribal rules" and arguing that BLM never explains how existing federal rules would provide sufficient substitute protections). Similarly, BLM admits that the 2015 Rule "exceed[ed] industry guidance" and that only "*some* operators" comply voluntarily. 2017 RIA at 54 (emphasis added); *see also* 2015 RIA at 2, 77 (explaining that while the 2015 Rule accounted for "standard industry practice" in its "baseline," key requirements exceeded standard industry practice, and BLM further believed that the 2015 Rule created a necessary regulatory backstop that would beneficially "increase the assurance" of compliance). BLM offers no new evidence to justify changing the prior conclusion that the 2015 Rules would exceed industry standards and provide beneficial assurances. *See* 2017 RIA at 27 ("Although the BLM believes that [industry] guidance documents are highly influential . . . we have no data to support an estimate of the percentage of operators that voluntarily comply."). BLM's approach in the Repeal to defining the baseline therefore "runs counter to the evidence," *State Farm*, 463 U.S. at 43, and falls far short of the Office of Management and Budget's instructions to make realistic and reasonable forecasts in defining the baseline, HFRR_034349.

Second, even if BLM were correct that new state, federal, or industry standards overlap with the 2015 Rule, BLM inconsistently and without explanation applies the baseline differently to forgone benefits as compared to the Repeal's alleged cost savings. The Office of Management and Budget instructs that "[i]n all cases, you must evaluate benefits and costs against the same baseline." *Id.* Treating costs and benefits with comparable methodologies is a basic element of rational regulatory analysis. *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1198 (9th Cir. 2008) (warning not to "put a thumb on the scale" by treating costs and benefits differently). Here, a change in baseline compliance rates should affect both costs and benefits. If, due to preexisting state regulations or voluntary actions, a given oil and gas operator would have complied with a particular practice even without any new federal regulation, then the new federal regulation does not impose any additional costs on that operator (beyond perhaps some paperwork costs to prove compliance with the new regulation), nor will any additional benefits come from applying the new regulation to that operator (beyond perhaps some informational benefits gained from the additional paperwork submissions).

Consequently, while repealing such a federal regulation may not forgo any meaningful benefits from any operators that will still comply anyway, neither will repealing that regulation generate any meaningful cost savings for such operators.

BLM at first seems to acknowledge that both forgone benefits and compliance cost savings must be measured as "incremental impacts" against a common baseline. 2017 RIA at 42. Just as the 2015 Rule counted neither benefits nor costs if a particular oil and gas operation would have already complied with the new federal regulatory standard due to, for example, preexisting state-level requirements, 2015 RIA at 57, the Repeal's regulatory impact analysis claims that it does "not consider" any "effect where the requirements being rescinded are consistent with existing state regulatory requirements in the jurisdiction within which the operation will occur or with what we understand to be voluntary compliance based on industry recommended practice." 2017 RIA at 42-43. In practice, however, BLM now applies the baseline very differently to its consideration of compliance cost savings as compared to its consideration (or lack thereof) of forgone benefits.

With respect to the Repeal's alleged compliance cost savings, BLM now estimates that rescinding the 2015 Rule will save industry $9,690 per well in compliance costs—a slight decrease from the 2015 Rule's estimates of $11,400 per well in compliance costs, in part because "the baseline conditions have changed since 2015, namely due to a reduction in oil and gas drilling activity and additional state regulation on hydraulic fracturing." 2017 RIA at 52-53. In other words, partly because certain operators would continue to meet at least some of the 2015 standards even after the rules are rescinded, in order to comply with state regulations or for other reasons, BLM estimates that the Repeal's compliance cost savings will be about 15% lower on a per-well basis as compared to the original estimates of the 2015 Rule's compliance costs. *Id.* at 53.[6]

On the other hand, with respect to forgone benefits, BLM baselessly asserts—without any explanation for why a changed baseline would affect forgone benefits more than compliance cost

[6] The difference between $11,400 and $9,690 is $1710, which is 15% of $11,400. On the basis of total annual costs, the reduction from an estimated $45.5 million in compliance costs to about $33.9 million in savings is about a 25.5% reduction. *See* 2017 RIA at 53.

savings—that "the potential incremental benefit of the 2015 rule *has been eliminated* by existing legal frameworks." *Id.* at 9 (emphasis added); *see also id.* at 55 ("Any potential increase in risk as a result of this final rule would be partially *or completely offset* by state and other Federal regulations that would still apply to the subject hydraulic fracturing operations.") (emphasis added). In other words, while BLM estimates that alleged changes in the baseline would offset compliance cost savings by only about 15%, BLM claims that the same changes in the baseline could completely offset 100% of forgone benefits. BLM offers no explanation for these inconsistent claims.

The dramatic and unexplained inconsistency in BLM's treatment of costs versus benefits is patently arbitrary. *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1198 (9th Cir. 2008) (ruling that it is arbitrary to "put a thumb on the scale" by treating costs and benefits differently). Either the Repeal will relieve operators of additional compliance obligations and so will forgo the environmental benefits of those additional compliance activities, or else the operator would comply anyway due to preexisting regulations and voluntary practices and so the Repeal would produce no cost savings—but "BLM cannot have it both ways" by claiming vast compliance cost savings while trivializing or ignoring the forgone benefits. *California v. BLM*, 286 F. Supp. 3d 1054, 1069 (N.D. Cal. 2018); *accord Air Alliance Houston v. EPA*, 906 F.3d 1049, 1068 (D.C. Cir. 2018).

II. BLM Fails to Address Important Indirect Costs of the Repeal

Executive guidance and case law require federal agencies to consider not only direct effects, but also important indirect benefits (sometimes called "ancillary benefits" or "co-benefits") as well as indirect costs (sometimes called "countervailing risks") in regulatory impact analyses. The 2015 Rule promised to deliver important indirect benefits, including air quality improvements and cost savings to industry by, for example, reducing the risk that frack hits will damage other wells. Upon rescission of the 2015 Rule, those important indirect benefits became the Repeal's indirect costs. But, in its Repeal and associated regulatory impact analysis, BLM fails to consider the important indirect costs of forgone air quality improvements and forgone cost savings to industry. Failing to consider these indirect costs creates an "unexplained inconsistency" between the 2015 Rule and the Repeal, which is "a reason for holding an interpretation to be an arbitrary and capricious change."

Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005).

a. Executive Guidance and Judicial Precedent Require Agencies to Consider Indirect Costs

It is well-established that when promulgating or rescinding a rule, an agency must consider indirect costs, and failing to do so is arbitrary and capricious under the Administrative Procedure Act. Executive Order 12,866 instructs agencies to "assess *all* costs and benefits," including those "that are difficult to quantify." Exec. Order No. 12,866 § 1(a), 58 Fed. Reg. at 51,735 (emphasis added). Additionally, *Circular A-4* instructs agencies to consider "any important . . . countervailing risk," defined as "an adverse economic, health, safety, or environmental consequence that . . . is not already accounted for in the direct cost of the rule." HFRR_034355. *Circular A-4* stresses that "[t]he same standards of information and analysis quality that apply to direct benefits and costs should be applied to ancillary benefits and countervailing risks." *Id.*

Furthermore, courts have repeatedly required agencies to take indirect costs into account when making regulatory decisions. In *Michigan v. EPA*, the Supreme Court recognized the wisdom of accounting for indirect effects when determining whether regulation is appropriate. 135 S. Ct. 2699, 2707 (2015) (defining rational rulemaking to "require paying attention to the advantages *and* the disadvantages of agency decisions," and observing that "cost" includes not just compliance expenses but also, for example, any indirect "harms that regulation might do to human health or the environment"). In *American Trucking Ass'ns v. EPA*, the U.S. Court of Appeals for the D.C. Circuit required EPA to consider indirect costs when setting ambient standards for ozone under the Clean Air Act, expressing that failing to do so would mean the agency is only considering "half of the . . . health effects." 175 F.3d 1027, 1051–52, *rev'd on other grounds sub nom. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001). The D.C. Circuit also struck down a National Highway Traffic Safety Administration rule on fuel economy standards for failing to consider indirect costs in the form of safety risks associated with the smaller size of more fuel-efficient cars. *See Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.*, 956 F.2d 321, 326–27 (D.C. Cir. 1992) ("When the government regulates in a way that prices many of its citizens out of access to large-car safety, it owes them reasonable candor."). The U.S. Court of Appeals for the Ninth Circuit has similarly found

that proper assessment of indirect effects, whether quantitatively or qualitatively, is part of rational agency decisionmaking. *See Alaska Oil and Gas Ass'n v. Jewell*, 815 F.3d 544, 565 (9th Cir. 2016) ("The Final Economic Analysis thus provided a quantitative assessment of the likely direct costs of the designation, as well a qualitative assessment of the more uncertain and speculative potential indirect costs. . . . [The] economic impact assessment, therefore, was not arbitrary and capricious.").

Thus, judicial precedents, as well as executive guidance, make clear that a rulemaking is irrational when the agency fails to consider all relevant indirect costs. BLM has failed to do so here, rendering the Repeal arbitrary and capricious.

b. BLM Fails to Consider Indirect Air Quality Effects

In the 2015 Rule, BLM determined that improvements in air quality would be an ancillary benefit. For example, in discussing its new requirement of above-ground tanks rather than pits for storage of recovered fluids from fracking, BLM noted "above-ground tanks, when compared to pits, are less prone to leaking, are safer for wildlife, *and will have less air emissions*." 80 Fed. Reg. at 16,162 (emphasis added). Furthermore, BLM predicted that the above-ground tanks, which are covered rather than open to the air, would provide "some benefit of limiting air emissions" because "an enclosed tank may lessen evaporation." 2015 RIA at 78 (explaining that the 2015 Rule would "provide enhanced protection to on-site workers" due to the limitation of air emissions from the chemicals used in fracking). In the Repeal, however, BLM fails to consider these air quality improvements, which would have occurred if the 2015 Rule had been implemented. In response to comments about air quality impacts as a result of the rescission, BLM stated that "[h]ealth effects from air emissions . . . are outside the scope of this rule." 82 Fed. Reg. at 61,932; *see also id.* at 61,933 (similarly stating that public comments expressing concerns about inadequate air quality protections "are outside the scope of the present rulemaking").

BLM's response to air quality concerns is arbitrary for two reasons. First, BLM fails to articulate any changed circumstances that warrant dismissing the 2015 Rule's predicted air quality improvements. Whereas in 2015 BLM considered these potential improvements in air quality, in the 2017 Repeal the agency insists that this indirect cost is "outside the scope" of the rule without

providing a reasoned justification for what changed during the intervening two years. This is the exact type of "unexplained inconsistency" that should render the Repeal arbitrary and capricious. *Nat'l Cable & Telecomms. Ass'n*, 545 U.S. at 981.

Second, by categorizing air quality concerns as "outside the scope of the rule," BLM fails to fully consider the costs of the Repeal. Merely because the 2015 Rule was not created with the direct intention of improving air quality does not mean that the resulting air quality impact can be ignored. As *Circular A-4* explains, regulatory analysis is about prompting decisionmakers to organize all "evidence on the key effects—good or bad," in order to "inform the public . . . as well as the agency," and to "learn" and "discover" whether the agency's initial instincts are "well-conceived" or else "misguided." HFRR_034341-42. Precisely because they are not the direct focus of an agency's regulatory mission, indirect effects are often liable to be ignored unless some analysis is required, and so "the mere consideration of these secondary effects may help in the generation of a superior regulatory alternative." *Circular A*-4 at 26 (HFRR_034355). In short, it would be irrational for an agency to adopt a rule without even thinking about the important indirect costs it might cause. *See Michigan v. EPA*, 135 S. Ct. at 2707 (noting that it would be irrational for an agency to adopt a rule if indirect health and environmental costs outweighed the benefits). By dismissing key indirect costs as "outside the scope," BLM undermines the very purpose of regulatory impact analysis, and the Repeal arbitrarily ignores an "important aspect of the problem." *State Farm*, 463 U.S. at 43.

c. BLM Fails to Consider Forgone Cost Savings to Industry

In the 2015 Rule, BLM detailed how the rule would create cost savings for industry. For example, BLM predicted that the use of tanks instead of pits "allows for quicker site preparation, reduces reclamation requirements . . . and increases safety." 80 Fed. Reg. at 16,163. Additionally, using tanks would not require the same "long-term monitoring and mitigation," such as "periodic upkeep, monitoring, and fences" as is required for pits. *Id.* Furthermore, BLM observed that tanks help operators "to manage costs and timing of operations, and to control impacts to the environment and any resulting liability." *Id.* BLM also expected that tanks would reduce the costs of recycling fluids, by better isolating fluids from sediment contamination. *Id.* at 16,203.

Industry would have also saved money because the 2015 Rule was designed in part to help identify and reduce the potential for "frack hits." *Id.* at 16,148-49, 16,154, 16,167. By regulating such "unplanned surges of pressurized fluid . . . into other wells," the 2015 Rule not only prevented environmental contamination but also helped industry "protect other wells" from damage that would interrupt operations. *Id.* at 16,189. In the 2015 regulatory impact analysis, BLM explained that frack hits involved "several economic impacts, including the shutting-in of the impacted wells for a period of time, wellbore damage to the second wells, and unrecovered resources. In other scenarios, entire fracturing stages may be lost or forgone" due to frack hits. 2015 RIA at 79-80.

In its 2015 regulatory impact analysis, BLM recognized that its cost estimate ($74,400 per well) was likely to be an overestimate due to such cost savings and industry benefits generated by use of storage tanks, such as reduced remediation costs, worker safety benefits, reduced long-term monitoring costs, reduced liability from environmental impacts, and reduced cost for recycling fluid. 2015 RIA at 75; *see also* Comments from Policy Integrity, HFRR_015713-14 (explaining that in the 2015 RIA, BLM did not adjust its monetized cost estimates to reflect important potential cost savings but did recognize that the costs were "likely . . . overestimate[d]").

The 2017 regulatory impact analysis for the Repeal, on the other hand, did not include any meaningful discussion of forgone cost savings to industry. For example, in its scant discussion of the Repeal's forgone benefits,[7] BLM never mentions forgone cost savings. 2017 RIA at 49 (discussing only three forgone benefits: "A reduction in the risks associated with hydraulic fracturing operations on Federal and Indian lands;" "A reduction in the risks to surface and groundwater resources;" and "Increased public awareness and understanding of hydraulic fracturing operations.").

Furthermore, the 2017 analysis calculates the alleged cost savings per operator for removing the tank requirement by using the same $74,400 per well figure from the 2015 Rule, 2017 RIA at 43, 69, but BLM now fails to acknowledge the likelihood that this figure is an overestimate due to the indirect cost of forgone savings to industry associated with the Repeal. Instead, BLM claims that it need not consider forgone cost savings to industry in the rescission, because:

[7] As discussed earlier, a forgone benefit of the 2015 Rule is the same as a cost of the 2017 Repeal.

> [I]t is not clear that requiring operators to use storage tanks . . . would generate any cost savings. Operators that instead use central reservoirs may have decided to do so precisely because it is the most cost-effective option available to them, and requiring them to do otherwise may have the unintended consequence of increasing costs for them.

82 Fed. Reg. at 61,942. There are two fundamental flaws associated with this rationale.

First, BLM's explanation for not considering these forgone cost savings—that if there were true cost savings to industry, more operators would already use storage tanks—fundamentally misunderstands how regulations may generate and be justified by both private and social benefits. Imagine that for a particular operator, switching from reservoirs to tanks would entail $200 in construction and operational expenses (private costs), would save $100 in long-term monitoring and reclamation costs (private benefits), and would generate $300 in environmental and public health benefits (public benefits). That operator may indeed decide to stick with reservoirs because, from the perspective of their private costs and benefits, "it is the most cost-effective option available"—that is, the $100 in private cost savings from switching to tanks does not alone justify the $200 in private costs to install and maintain tanks. Yet the point of government regulation is to look beyond private costs and benefits and consider the social perspective. In this scenario, a regulatory requirement to install tanks is justified because the total public benefits outweigh the costs. Moreover, when counting the costs, the agency must consider both the $200 in compliance costs and the $100 in cost savings. Just because the cost savings alone were not enough to motivate voluntary private action does not mean those cost savings can be erased from the regulatory analysis. *See Circular A-4* at 11 (HFRR_034347) ("With regard to measuring costs, you should be sure to include all the relevant costs to society—whether public or private. Rulemakings may also yield cost savings.")

The second flaw is BLM's inadequate justification for changing its position from the 2015 Rule. BLM's flawed explanation for not considering forgone cost savings, as quoted above, was offered only "[i]n response to [public] comment." 82 Fed. Reg. at 61,942. The Repeal never grapples with the 2015 Rule's evidence and conclusions that industry cost savings were likely and that the calculations of per-well compliance costs were therefore overestimated. BLM never explains in the Repeal why its per-well figure is not also an overestimate, why it ignored cost savings, or why the

Repeal would still be justified had it considered cost savings. This failure represents blatant disregard of the "facts and circumstances that underlay . . . the prior policy," thus making the Repeal arbitrary and capricious. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

The flaws in BLM's explanation are made further apparent when viewed in light of other comparable rulemakings, in which the agency has assessed similar forgone cost savings as an indirect cost. For example, in 2018, BLM rescinded a rule designed to prevent natural gas leaks, which both causes pollution and wastes a valuable resource that otherwise could be captured and sold for profit by oil and gas operators. 83 Fed. Reg. 49,184 (Sept. 28, 2018). Though that rescission's economic analysis was arbitrary and the rescission was unjustified for a variety of reasons, in the 2018 rulemaking BLM did properly account for indirect costs to industry, in the form of lost profits from the marketable gas that would have been captured by the original leak-prevention rule. *Id.* at 49,204 (calculating the "forgone" "cost savings that would have come from product recovery"). The lost revenue to industry that BLM calculated would result from rescinding that leak-prevention rule is comparable to the lost savings to industry here from repealing the 2015 fracking rule. And yet, BLM offers no reason for selectively failing to consider the lost cost savings in this case. The inconsistent approach to important indirect costs is irrational, and BLM has arbitrarily failed to consider an important aspect of the Repeal.

CONCLUSION

This Court should grant Plaintiffs' motions for summary judgment.

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Respectfully submitted,
/s/ Richard L. Revesz

Denise A. Grab, Cal. State Bar #268097
Richard L. Revesz, N.Y. State Bar #2044725 (*pro hac vice pending*)
Jason Schwartz, Va. State Bar #73398 (*pro hac vice pending*)
Institute for Policy Integrity
New York University Law School
139 MacDougal, 3rd floor
New York, NY 10012
T: (212) 992-8932
F: (212) 995-4592
E-mail: denise.grab@nyu.edu

Counsel for *Amicus Curiae* Institute for Policy Integrity