**No. 21-35121**

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**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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**CENTER FOR BIOLOGICAL DIVERSITY**,
*Plaintiff-Appellant*,

v.

**DEB HAALAND**, in her official capacity as Secretary of the United States Interior; **MARTHA WILLIAMS**, in her official capacity as Principal Deputy Director of U.S. Fish and Wildlife Service;
*Defendants-Appellees*.

and
**STATE OF WYOMING** et al.
*Intervenor Defendants-Appellees*.

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On Appeal from the United States District Court, District of Montana
No. 9:19-cv-00109-DLC
The Honorable Judge Dana L. Christensen

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# ANSWER BRIEF OF INTERVENOR APPELLEES WYOMING STOCK GROWERS' ASSOCIATION, WYOMING FARM BUREAU FEDERATION, AND UTAH FARM BUREAU FEDERATION

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William E. Trachman
MOUNTAIN STATES
LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, CO 80227
wtrachman@mslegal.org

Joseph A. Bingham*
MOUNTAIN STATES
LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, CO 80227
jbingham@mslegal.org
** Admission Pending*

*Attorneys for Intervenor Appellees Wyoming Stock Growers' Association, Wyoming Farm Bureau Federation, and Utah Farm Bureau Federation (Agricultural Associations)*

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Intervenor Appellees Agricultural Associations certify that none of them are public corporations, none issue stock, and none have parent corporations.

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## STATEMENT OF THE ISSUE

Has Appellant found a backdoor means to challenge recovery plans through 5 U.S.C. § 553(e), when courts have universally determined that recovery plans aren't rules subject to the usual requirements of the Administrative Procedure Act (APA)? *See Center for Biological Diversity v. Bernhardt*, 509 F. Supp. 3d 1256, 1268 (D. Mont. 2020) ("To permit a plaintiff to circumvent this rule by simply bringing a rulemaking petition prior to its lawsuit creates a backdoor challenge to the substance of every recovery plan and renders the APA's limited review virtually meaningless.").

## STATEMENT OF THE CASE

### A. CBD's Efforts to Petition to Modify a Recovery Plan

Appellant Center for Biological Diversity (CBD) correctly states that "at issue in this case is [CBD's] submission of a formal petition," in which it requested "the development of an updated and strengthened recovery plan for the grizzly bear."[1] CBD purported to submit their petition under 5 U.S.C. § 553(e), entitled "Rule Making," which broadly states: "Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."

[1] Adam Bowler, Ghost Bears: The Plight of the North Cascades Grizzly Bear, 6 SEATTLE J. ENVTL. L. 41, 49 (2016) ("[CBD's 2014] petition represents what would be a colossal shift in scope and breadth of grizzly bear recovery efforts.").

Whatever the outcome of this appeal, it should be consistent with case law establishing that the APA provides clear rules for public participation in the administrative process. *See, e.g., N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (plurality opinion) ("The rule-making provisions of that Act … were designed to assure fairness and mature consideration of rules of general application."); *Brown Exp., Inc. v. United States*, 607 F.2d 695, 701 (5th Cir. 1979) ("Congress ... prescribed these procedures to ensure that the broadest base of information would be provided to the agency by those most interested and perhaps best informed on the subject of the rulemaking at hand.").

CBD is also correct that Appellee, the U.S. Fish and Wildlife Service (the Service), denied its petition, and that the denial was based in large part on the position that "the APA does not authorize petitioning for recovery plans because they do not fall within the APA's broad definition of a 'rule.'" App. Br. at 1. Indeed, if recovery plans constituted "rules" under the APA, interested persons could submit innumerable petitions to amend such plans.

Appropriate recovery plans include 3 elements:

> The Secretary shall develop and implement plans (hereinafter in this subsection referred to as "recovery plans") for the conservation and survival of endangered species and threatened species listed pursuant to this section, unless he finds that such a plan will not promote the conservation of the species. The Secretary, in developing and implementing recovery plans, shall, to the maximum extent practicable--

> …
>
> (B) incorporate in each plan--
>
> (i) a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species;
>
> (ii) objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list; and
>
> (iii) estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal.

16 U.S.C. § 1533(f)(1)(b).

The language of these provisions themselves demonstrate how much flexibility goes into a recovery plan. First, the Secretary's duty to incorporate the three elements need only occur "to the maximum extent *practicable*." (emphasis added). Second, the site-specific management actions need only be described "as *may* be necessary" to achieve plan goals for conservation and survival. (emphasis added). Third, the plan need only contain "estimates" regarding the time and cost of the measures needed to reach the plan's goal. The idea that such a document—consisting primarily of discretionary predictions of possible future exercises of discretion and judgment calls—would constitute a rule that could be challenged is hardly intuitive. *See Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 547 (11th Cir. 1996) ("By providing general guidance as to what is required in a recovery plan, the ESA 'breathe[s] discretion at every pore.'"), *citing Strickland v. Morton*, 519 F.2d

467, 469 (9th Cir. 1975); *Strahan v. Linnon*, 967 F. Supp. 581, 597 (D. Mass. 1997) ("Case law instructs that the defendants are correct in their assertion that the content of recovery plans is discretionary."); *Grand Canyon Trust v. Norton*, No. 04–CV–636PHXFJM, 2006 WL 167560, *2 (D. Ariz., Jan. 18, 2006) ("[T]he substance of the plan is left to the discretion of the Secretary.").

Moreover, none of these elements has any sort of associated time limitation. *See, e.g.*, *Oregon Nat. Res. Council v. Turner*, 863 F. Supp. 1277, 1284 (D. Or. 1994) ("[T]he ESA itself omits any time limits for the preparation of a recovery plan. Had Congress felt that the development and implementation of a recovery plan was an immediate necessity, it could have set a time limit as it did for the designation of critical habitat."); Br. of Law Professors Daniel Rohlf, Pat Parenteau, Oliver Houck, and Robert Percival, as *Amici Curiae* in Support of Plaintiff-Appellant (Amici), at 15, ECF No. 22. ("Moreover, unlike other provisions of the ESA (e.g., the listing provisions), the recovery plan requirements do not impose any deadline on the agency for the issuance of either initial or revised recovery plans …")[2]; *Strahan*, 967 F. Supp. at 597 ("[D]efendants respond that the there are no time limits in § 4(f) within which the Secretary must develop, implement, or revise a recovery plan. I

[2] Additionally, Amici falsely state that "[a]ll parties have consented to the filing of this brief," with respect to their amicus. Amici, at 1. But Amici did not seek or receive consent from the Agricultural Associations to file their brief.

am persuaded by the defendants' argument."); *Conservation Nw. v. Kempthorne*, No. C04-1331-JCC, 2007 WL 1847143, *3 (W.D. Wash., June 25, 2007) ("[E]ven if the Secretary has a duty to implement all terms of a recovery plan in a timely manner, this duty is a discretionary one and is unreviewable by this Court via the ESA's citizen suit provision.")

That a recovery plan is not a rule becomes even clearer upon review of the APA's definition of a "rule":

> (4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing

5 U.S.C. § 551(4); *see also Clarry v. United States*, 85 F.3d 1041, 1048 (2d Cir. 1996) ("Under the APA, there are two distinct types of rules—legislative rules and interpretive rules. Legislative rules are those that 'create new law, rights, or duties, in what amounts to a legislative act.' … Interpretive rules, however, do not create rights, but instead 'clarify an existing statute or regulation.'"); *Circuit City Stores, Inc. v. E.E.O.C.*, 75 F. Supp. 2d 491, 506 (E.D. Va. 1999) (EEOC's National Enforcement Plan was not a rule because it simply announced its enforcement priorities for the future).

The truth is that no court has ever adopted CBD's position and found a recovery plan to be a rule. Because if developing a mere plan counts as a rule, there are other administrative actions that will soon become subject to petition under 5 U.S.C. § 553(e). *See Envtl Def. Fund, Inc. v. Costle*, 636 F.2d 1229, 1255 (D.C. Cir. 1980) (holding that "a modified settlement agreement [that] require[d] EPA to … initiate preliminary investigations as a first step toward determining whether or not to promulgate regulations" was not a rule); *see id.* ("[N]either the modifications themselves, nor the investigatory program they establish, require any action on the part of the public or the Companies. If and when EPA decides to promulgate regulations after completing its investigations, the Companies and the general public will have ample opportunity to participate in the rulemaking process. Any objections the Companies have to the Agency's investigatory program can be raised at that time.").

In short, a ruling in Appellant's favor would break new ground, into uncertain and unchartered territory.

### B. The Agricultural Associations Have Gone to Great Efforts to Prevent Grizzlies from Impairing Their Members' Well-Being

#### a. Wyoming Stock Growers' Association (WSGA)

WSGA was founded in 1872, and currently represents over 1,200 livestock producers in the State of Wyoming. WSGA advocates for and advances the livestock industry, Wyoming agriculture, rural community living, and the livestock-

related interests of its members. As part of its mission, WSGA informs and educates the public regarding the role of the livestock industry in the State. WSGA also promotes the role of the Wyoming livestock industry and its members in resource stewardship, animal care, and production of high-quality, safe, and nutritious meat. Further, WSGA engages in advocacy by commenting on issues affecting itself and its members, as well as participating in litigation.

One such issue is the management of grizzly bears within the portion of the Greater Yellowstone Ecosystem (GYE) located in Wyoming. WSGA's membership includes numerous permittees who graze livestock on National Forest lands in Wyoming, and others who are directly impacted by the grizzly bear population located within the GYE area. WSGA and its members have been actively involved in the monitoring and reporting of grizzly bear activity in the GYE area and have witnessed an increase in grizzly bear populations, and an expansion in occupied habitat.

Every year, WSGA members who graze livestock within the GYE area are severely impacted by grizzly bears. These impacts include but are not limited to: loss and injury to livestock, reduction in weight gains to livestock, decreased conception rates of needlessly stressed cattle and sheep, interruptions of grazing patterns, and significantly higher livestock management costs.

WSGA members have relinquished grazing permits within the GYE area due to the pressures of predation by grizzly bears. These members have experienced significant and increasing levels of grizzly bear depredation of livestock that are not economically sustainable. In nearly every instance, the relinquishment was driven by the inability to withstand the pressure of predation by bears and/or wolves, or regulatory constraints imposed by the federal land management agencies.

WSGA has provided comment on grizzly bear recovery plans, the Grizzly Bear Conservation Strategy, the Wyoming Game and Fish Department's Grizzly Bear Management Plan, and other grizzly bear conservation and management plans, in their various iterations, beginning with the earliest considerations for Endangered Species Act listing for the grizzly bear.

**b. Wyoming Farm Bureau Federation (WyFB)**

WyFB was founded in 1920 to represent agricultural producers throughout the State of Wyoming. It is a non-profit, membership, trade association and is also the umbrella organization for 23 county farm bureau associations throughout the State of Wyoming.

WyFB has more than 2,600 member families working in agricultural production in the State of Wyoming, and over 10,000 non-agricultural members in

all 23 counties in the State of Wyoming. WyFB agricultural members consist of both farmers and ranchers in the State of Wyoming.

WyFB's purpose is to protect, promote, and represent the economic, social, and educational interests of its members at the local, state, and national levels; as well as protect private property rights and help members achieve an equitable return on their investments.

WyFB furthers its members' interests by working with state and local entities to advocate for reduced regulatory burdens on farmers and ranchers, as well as to lobby for lower administrative costs of compliance. WyFB also informs and advocates for its members regarding legislative, regulatory, legal, conservation, and environmental issues.

The management of grizzly bears within the portion of the GYE located in Wyoming is part of WyFB's historic focus. WyFB membership includes agricultural producers who own private lands within the GYE, and operate on those and other private lands, as well as on state and federal lands within the GYE. Many of WyFB's members are actively engaged in food production or ranching activities within the GYE. These members are directly impacted by the grizzly bear population with the GYE area.

WyFB and its members have been actively involved in the monitoring and reporting of grizzly bear activity in the GYE and have witnessed an increase in

grizzly bear populations, and an expansion in occupied habitat. Additionally, many ranching members incur additional and unsustainable costs due to loss and injury to livestock, reduction in weight gains to livestock, decreased conception rates of livestock, interruptions of grazing patterns, and significantly higher livestock management costs.

WyFB has actively participated in the development of grizzly bear management plans and strategies dating back to 2004. In 2004, the Wyoming Farm Bureau, on behalf of itself and its members, submitted a petition to FWS to declare the GYE grizzly bear a distinct population segment (DPS), which was addressed in 2007 in FWS's Final Rule Designating the Greater Yellowstone Area Population of Grizzly Bears as a Distinct Population Segment; [and] Removing the Yellowstone Distinct Population Segment of Grizzly Bears From the Federal List of Endangered and Threatened Wildlife. *See* 72 Fed. Reg. 14,866 (Mar. 29, 2007).

In May 2016, WyFB timely submitted comments to FWS pursuant to 81 Fed. Reg. 13,173 (published Mar. 11, 2016). WyFB supported FWS's proposed rule identifying the GYE grizzly bear population as a DPS and removing the GYE grizzly bear population from the List of Endangered and Threatened Wildlife. WyFB

supported returning conservation and management of the delisted grizzly population in Wyoming to the Wyoming Game and Fish Department.

In June 2017, FWS published its final rule and final recovery plan ("2017 Final Rule") identifying the GYE grizzly bear as a DPS and removing the GYE grizzly bear from the List of Endangered and Threatened Wildlife. 82 Fed. Reg. 30,502 (June 30, 2017). In January 2018, WyFB timely submitted comments to FWS pursuant to 82 Fed. Reg. 57,698 (Dec. 7, 2017), which sought public comment on the potential impact, if any, of *Humane Soc'y of the U.S. v. Zinke*, 865 F.3d 585 (D.C. Cir. 2017), on the 2017 Final Rule delisting the GYE grizzly bear DPS.

**c. Utah Farm Bureau Federation (UFBF)**

The UFBF is a nonprofit corporation organized in 1916 under the laws of the State of Utah to protect, promote, and assert business, economic, social, and educational interests of its membership. UFBF is Utah's largest farm and ranch organization, made up of 28 county Farm Bureaus and more than 34,000 member families.

UFBF provides assistance to its members, as well as the ranching industry in general, by disseminating information to its members and the public, meeting with

legislators and agencies, drafting and commenting on legislation and agency rules, and, when necessary, participating in litigation in both state and federal courts.

Many of UFBF's members hold grazing permits and leases authorizing livestock grazing on state or federal lands located within Utah. The ability to graze livestock on federal lands in Utah is vitally important to the UFBF's members and the State's ranching industry, as well as industries and businesses that provide goods and services to ranchers. Utah contains approximately 52.7 million acres of land, of which the Bureau of Land Management controls approximately 22.9 million acres, and the United States Forest Service controls approximately 8.2 million acres.

Many of UFBF's ranching members own a relatively small amount of private land, with the remainder of their ranches consisting of a mixture of leased federal and state lands. Thus, access to federal lands is critical to these ranching operations. Indeed, UFBF's members use leased federal lands as an integral part of their ranching operations to provide forage for their livestock. This access to forage directly benefits their operations and, in turn, the customers they serve. Many of the areas in which CBD seeks to mandate that grizzly bears be reintroduced, or considered for reintroduction, would overlap with UFBF's members' ranching

operations, negatively impacting those members' abilities to use federal, state, and other lands.

The Wyoming Stock Growers' Association, the Wyoming Farm Bureau Federation, and the Utah Farm Bureau Federation (together, the Agricultural Associations), respectfully request that this Court affirm the District Court's judgment.

## SUMMARY OF THE ARGUMENT

Literally no Court has adopted CBD's position that recovery plans promulgated under the terms of the ESA are "rules" under sections 551 and 553 of the APA. Courts routinely find that recovery plans are merely guidance documents that do not amount to rules. Additionally, authorities outside of the ESA context are in strong tension with the idea that 5 U.S.C. § 553 could be used to challenge the mere plans of an agency.

## ARGUMENT

A rule is "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy[.]" 5 U.S.C. § 551(4). In order to constitute a rule, a recovery plan would have to (1) have future effect and (2) be designed—specifically—for implementing, interpreting, or prescribing law or policy.

### A. CBD is Wrong to State that a Recovery Plan "Implements" Law Merely Because its Creation Is Required by Law.

CBD contends that a recovery plan implements law because such plans "embody the Service's implementation of section 4(f) of the ESA, which imposes mandatory duties on the Service." App. Br. at 16. But merely because something is required by law does not transform that item into a rule. For instance, a law demanding that the Secretary of the Interior do 15 jumping jacks would not transform the jumping jacks themselves into an agency rule. *Cf. Coleman v. Black*, 632 F. Supp. 1005, 1015 (D. N.D. 1986) (notice letter from Farmers Home Administration stating that the agency was planning on foreclosing on certain loans was not a "rule" under the APA).

Nevertheless, CBD contends that recovery plans reflect the requirements of the Endangered Species Act, and are thus implementing that law. App. Br. at 16 ("The grizzly bear's formal recovery plan is the Service's implementation of section 4(f) of the ESA, just as with other recovery plans."). But this argument gets it exactly backwards. The recovery plan isn't "implementing law." *Other* laws are implementing the recovery plan. Suppose, for instance, the existence of a law requiring an agency to use No. 2 pencils, which undoubtedly places a duty on an agency; the actual physical use of those pencils to conduct work is not "implementing" the pencil law, such that the pencils (let alone all work done with those pencils) become a rule.

CBD also describes certain other statutes that refer to recovery plans. App. Br. at 19 n. 3. But these examples, too, fail to establish that recovery plans themselves implement law. Instead, it is the statutes that that are implementing law, and using the benchmark of a recovery plan as a condition precedent before action can proceed under another statute. But a condition precedent also does not itself implement anything. That is why courts have stated that recovery plans that are merely advisory, and only when they are affirmatively implemented into mandatory plans—and not before then—do they become mandatory. *WildEarth Guardians v. U.S. Fish and Wildlife Serv.*, 416 F. Supp. 3d 909, 926 (D. Ariz., 2019) ("*By incorporating* the 1995 Revised RP and the 1996 S & Gs into the Forest Plan, FWS made these documents mandatory.") (emphasis added).

### B. CBD is Wrong to State That a Recovery Plan Implements Conservation Policy.

CBD contends that by identifying what measures are necessary for survival and recovery of certain species, recovery plans "give practical effect to and ensure of actual fulfillment by concrete measures." App. Br. at 21 (quoting Merriam Webster). CBD elaborates on this, explaining that drafting a recovery plan "is the first step in the Service's and other agencies' implementation of the ESA's policy of conservation." *Id.*

CBD's arguments go nowhere, however. Drafting the recovery plan may be a necessary a step before actual implementation of policy can occur, but there are

myriad other steps along the way, none of which constitute rules. *See, e.g.*, 16 U.S.C. § 1533(f)(2) (referring to the need to consider "the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat."). Or would CBD ask the court to determine that every step in the process of implementing the ESA "implements" the law?

Obviously, agency officials cannot simply unilaterally draft recovery plans, consistent with the ESA. Rather, such plans must thoroughly research site-specific management actions, must develop objective and measurable criteria for delisting of species, and must estimate time frames and costs for recovery. *See, e.g.*, App. Br. at 25 ("[T]he development of a recovery plan requires application of the expertise of scientists at the Service, with help from other recognized experts on the species."). All of these steps presumably take research, collaboration, and drafting. And all of these steps are presumably critical for an adequate recovery plan under the ESA. Yet none of them constitute rules under the APA. *See also Fund for Animals, Inc. v. Rice*, 83 F.3d 535, 547 (11th Cir. 1996) ("[T]he practical effect of the Plaintiffs' position would be to elevate the 1987 Recovery Plan into a document with the force of law.").

CBD compares recovery plans to actual provisions of the Code of Federal Regulations, which it says qualify as rules even though they do not, by themselves,

"create change." App. Br. at 23 (*citing* 50 C.F.R. Part 424). But these provisions constitute rules because they are locked into federal regulations and force compliance. *Compare Envtl. Def. Fund, Inc. v. Costle*, 636 F.2d 1229, 1255 (D.C. Cir. 1980) ("The guidelines [in *Pickus*] had an immediate and direct effect on applicants for parole inasmuch as they determined whether or not the requests would be granted.").[3] Recovery plans, on the other hand, do no such thing. *See Defs. of Wildlife v. Lujan*, 792 F. Supp. 834, 835 (D.D.C. 1992) ("The Recovery Plan itself has never been an action document. … It left open different approaches and contemplated that when an agency or group made specific proposals for achieving a particular objective of the plan, there would be a need for further study.").

[3] By contrast, *see* Jason M. Patlis, Recovery, Conservation, and Survival Under the Endangered Species Act: Recovering Species, Conserving Resources, and Saving the Law, 17 PUB. LAND & RES. L. REV. 55, 87 (1996) ("[N]o one argues that recovery plans are regulations..."); *see id.* ("Given that a recovery plan is purely advisory, and can only be implemented through subsequent, specific actions, there is a strong argument that a plaintiff does not have standing to bring a suit challenging a recovery plan: the plaintiff will not suffer an injury in fact until the subsequent action is either taken or not taken; the plaintiff's injury would not be fairly traceable to the recovery plan itself—which does not mandate any particular course of action—but only to the independent action by the implementing third party; the plaintiff's injury would not be redressable by a favorable judgment, because federal agencies could still apply their own discretion to fulfill their conservation duty, regardless of the content of a recovery plan.").

### C. CBD is Wrong to State that a Recovery Plan Prescribes Policy Based on Its Statements Regarding How to Conserve Species.

CBD engages in an *ipse dixit* argument that because a recovery plan serves as an "authoritative statement on what is needed to recover a species," it counts as prescribing policy. App. Br. at 24. CBD contends that recovery plans constitute rules by stringing together the most favorable definitions of "prescribe" and "policy." From there, it states that a recovery plan "establishes authoritatively a general plan of action for recovering endangered and threatened species." *Id.* at 25. Even on CBD's own terms, however, its argument fails.

Recovery plans aren't "authoritative," because merely advisory documents can't be authoritative. *See WildEarth Guardians v. U.S. Fish and Wildlife Serv.*, 416 F. Supp. 3d 909, 926 (D. Ariz., 2019) ("Recovery Plans by themselves are merely advisory."). In plenty of other contexts, courts have rejected the idea that they are authoritative at all. *See Fund for Animals v. Rice*, 85 F.3d 535, 548 (11th Cir. 1996) ("[T]the Recovery Plan is not a document with the force of law divesting all discretion and judgment from the F.W.S."); *Oregon Nat. Res. Council v. Turner*, 863 F. Supp. 1277, 1284 (D. Or. 1994) ("[T]he development and publication of a recovery plan in and of itself would not have afforded the endangered species any additional protection. The recovery plan presents a guideline for future goals but does not mandate any actions, at any particular time, to obtain those goals.").

Indeed, recovery plans often outline future variables to be addressed. And recovery plans themselves cannot proceed without significant cooperation by other actors, including non-federal actors. *See Fund for Animals v. Babbitt*, 903 F.Supp. 96, 107 (D.D.C. 1995), as amended by 967 F.Supp. 6 (D.D.C. 1997) ("[T]he Plan's recommendations are implemented through FWS programs, cooperation and consultation with states, and the obligation of federal agencies to consult with the FWS or to implement conservation programs."); *Leatherback Sea Turtle v. Nat'l Marine Fisheries Serv.*, No. 99-00152-DAE, 1999 WL 33594329, at *12 (D. Haw. Oct. 18, 1999) (unpublished) ("The recovery plan is a discretionary document by which scientists determine the methods needed to promote recovery of the species …").

CBD asks this Court to announce a *per se* holding that "the definition of 'rule' encompasses formal recovery plans." App. Br. at 13. But CBD's arguments could just as well entail that depending on the level of specificity in a given recovery plan, some might constitute rules while others would not. *See, e.g., Fund for Animals v. Babbitt*, 903 F. Supp. 96, 107–08 (D.D.C. 1995), as amended by 967 F. Supp. 6 (D.D.C. 1997) ("It is not necessary for a recovery plan to be an exhaustively detailed document."); *Defenders of Wildlife v. Lujan*, 792 F. Supp. 834, 835 (D.D.C. 1992) ("The Recovery Plan itself has never been an action document. … It left open different approaches and contemplated that when an agency or group made specific

proposals for achieving a particular objective of the plan, there would be a need for further study."); *Friends of Blackwater v. Salazar*, 691 F.3d 428, 438 (D.C. Cir. 2012) ("[I]f the Secretary foresees that adopting certain criteria would unduly restrict his delisting analysis, then he may decide it is practicable only to adopt criteria that guide but do not constrain that analysis."). Would this court need to pour over every recovery plan, in order to determine whether it contained enough specificity to "authoritatively" establish how a species could be conserved?[4]

### 1. CBD Is Wrong to State that Using Scientific Expertise and Going Through Public Comment Indicate that Recovery Plans are Rules.

CBD groups two arguments regarding the underlying processes required before a recovery plan can be established. But the arguments are non-sequiturs, and neither establishes that recovery plans are rules.

First, CBD asserts that because a recovery plan "requires application of the expertise of scientists of the Service, with help from other recognized experts on the species," the recovery plan is therefore authoritative. App. Br. at 25. CBD fails, however, to connect these dots. That scientific expertise is used before a recovery

[4] In the same vein, CBD contends in a footnote that recovery plans obviously have "future effect," and that many courts even skip over this step because it is "largely self-evident." App. Br. at 40, n. 10. But in fact, whether a specific recovery plan has "future effect" may depend on the content of that actual plan, such that a sweeping judicial rule that all recovery plans have "future effect" would be improper.

plan is established does not make it any more binding on the agency, on future events, or outside parties necessary to meet the goals of the recovery plan. Moreover, CBD's argument potentially expands the right to petition under 5 U.S.C. § 553(e) to the consultation methodology itself, consistent with its claim that consultation with scientists is part of implementing the ESA's policies.

Second, the fact that a public notice process occurs surrounding a document does not convert the document into an agency rule. *See, e.g.*, Revised Sexual Harassment Guidance: Harassment of Students By School Employees, Other Students, Or Third Parties, at ii (January 19, 2001) ("On November 2, 2000, we published in the Federal Register a notice requesting comments on the proposed revised guidance (62 FR 66092). … A notice regarding the availability of this final document appeared in the Federal Register on January 19, 2001.").[5] The idea that an agency might make its statements *more* vulnerable under 5 U.S.C. § 553(e) by requesting public comment on them would certainly disincentivize such conduct, and discourage agencies from asking for valuable feedback on proposed guidance documents.

[5] The 2001 Sexual Harassment Guidance is available at this URL: https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf. It was withdrawn—without the need for notice and comment, or any petition—by the Department of Education's Office for Civil Rights on August 26, 2020, but remains available online for historical purposes. *See Office for Civil Rights Rescinds Outdated Documents*, at 1-2 (August 26, 2020), https://www2.ed.gov/policy/gen/guid/fr-200826-letter.pdf

CBD cites *Animal Legal Defense Fund v. Veneman*, 469 F.3d 826, 840 (9th Cir. 2006), for the proposition that inclusion of a statement in the Federal Register is a factor that the court can consider when determining whether something is a rule. App. Br. at 26.[6] CBD's reliance on that case, however, is misplaced. First, the *Veneman* court was considering whether a Draft Policy was "reviewable as an interpretative rule from which legal consequence followed." *Id.* And its analysis related specifically to whether "these procedural attributes would have strengthened the Draft Policy's claim to binding authority had it been adopted." *Id.* Here, the question is not whether a recovery plan is "binding authority." In truth, there can be no such argument. But CBD has lifted a quote from *Veneman* unrelated to whether an agency policy can be construed as a rule, despite being non-binding. *Veneman* is completely inapposite for that proposition.

In any event, because the ESA requires notice and comment before the establishment of a recovery plan, courts have considered this argument in this exact context and rejected it. *Friends of Blackwater v. Salazar*, 691 F.3d 428, 433-34

[6] CBD's citation to this case is questionable, as it has been vacated and "shall not be cited as precedent by or to this court or any district court of the Ninth Circuit …". *Animal Legal Defense Fund v. Veneman*, 482 F.3d 1156, 1156 (9th Cir. 2007). *See also Animal Legal Defense Fund v. Veneman*, 490 F.3d 725, 732 (9th Cir. 2007) (Thomas, J., concurring in part and dissenting in part) ("The motion to dismiss at this stage, coupled with ALDF's stated willingness to vacate the panel opinion, leaves one with the impression that it was willing to trade off what it thought was 'good' precedent to avoid the risk of a 'bad' decision from the *en banc* panel.").

(D.C. Cir. 2012) ("If the Secretary wants to change the plan, then he first must let the public comment. *Id.* § 1533(f)(4). It does not follow, however, that with each criterion he includes in a recovery plan the Secretary places a further obligation upon the Service."). In *Friends of Blackwater*, the D.C. Circuit appropriately analogized a recovery plan to a mere map:

> The Service fairly analogizes a recovery plan to a map or a set of directions that provides objective and measurable steps to guide a traveler to his destination. *Cf. Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 547 (11th Cir. 1996) (holding "recovery plans are for guidance purposes only"). Although a map may help a traveler chart his course, it is the sign at the end of the road, here the five statutory factors indicating recovery, and not a mark on the map that tells him his journey is over. Moreover, as with a map, it is possible to reach one's destination—recovery of the species—by a pathway neither contemplated by the traveler setting out nor indicated on the map.

*Friends of Blackwater v. Salazar*, 691 F.3d 428, 434 (D.C. Cir. 2012); *National Wildlife Fed'n v. National Park Serv.*, 669 F. Supp. 384, 389 (D. Wyo. 1987) ("This Court will not attempt to second guess the Secretary's motives for not following the recovery plan.").

### 2. CBD is Wrong to State that Recovery Plans "Direct" Conservation Actions.

A recovery plan does not "prescribe" policy because it does not necessarily direct an agency's subsequent actions. It is non-binding. Recovery plans are flexible, and designed to be so, as circumstances may change. *See Friends of the Wild Swan v. U.S. Fish & Wildlife Serv.*, 745 F. App'x 718, 721 (9th Cir. 2018)

("The recovery plan does not create any legal rights or obligations for the Service or any third parties."); *Cascadia Wildlands v. Bureau of Indian Affairs*, 801 F.3d 1105, 1114 n.8 (9th Cir. 2015) ("[The] ESA does not mandate compliance with recovery plans."); *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 547 (11th Cir. 1996) ("[R]ecovery plans are for guidance purposes only."); *Friends of the Wild Swan v. Thorson*, 260 F. Supp. 3d 1338, 1344 (D. Or. 2017), aff'd, 745 F. App'x 718 (9th Cir. 2018) (highlighting the fact that that although plans have "real world consequences" they are "non-binding in nature"); *Nat'l Wildlife Fed'n v. Nat'l Park Serv.*, 669 F. Supp. 384, 389 (D. Wyo. 1993) (refusing to "second guess the Secretary's motives for not following the recovery plan"); *Nat'l Audubon Soc'y v. Hester*, 801 F.2d 405, 408 (D.C. Cir. 1986) (upholding FWS's decision to remove endangered condors from the wild despite the recovery plan's commitment to extensive tracking and study of wild birds); *Defenders of Wildlife v. Jewell*, No. CV-14-02472-TUC-JGZ, 2015 WL 11182029, *6 (D. Ariz., Sept. 30, 2015) ("In spite of the requirements of Section 4(f), the recommendations contained within a recovery plan are not binding upon the agency, and the Secretary retains discretion over the methods to use in species conservation.").

CBD contends that because recovery plans contain certain benchmarks, they qualify as rules. App. Br. 25-27. The fact that a planning document contains benchmarks, however, does not convert it into a rule. Identifying future events, that,

if they occurred, would lead to delisting a species is not the equivalent of implementing law or policy. If anything, those benchmarks merely clarify that future events could trigger other future events. *See Cascadia Wildlands v. Bureau of Indian Affairs*, 801 F.3d 1105, 1114 n.8 (9th Cir. 2015) ("It is undisputed that, generally, FWS recovery plans are not mandatory. The Endangered Species Act does not mandate compliance with recovery plans for endangered species."); *Friends of the Wild Swan, Inc. v. U.S. Fish & Wildlife*, 745 Fed. Appx. 718, 721 (9th Cir. 2018) ("[R]ecovery plans are not agency actions by which rights or obligations have been determined, or from which legal consequences will flow.") (internal quotation marks omitted).[7] Some courts have gone so far as to note that a strict reading of the ESA does not require the Secretary to even consult the benchmarks

[7] Academic articles have conceded this point, but countered by stating that ESA's citizen-suit provisions provide the appropriate remedy. *See* 38 C.J.S. Game § 23 (2021) ("The conclusion that the way in which ESA requirements are incorporated into a recovery plan for a threatened or endangered species is not reviewable does not foreclose a citizen's ability to bring suit for the Secretary of Interior's violation of public participation requirements."); *see also* Sandra B. Zellmer, Samuel J. Panarella, and Oliver Finn Wood, *Species Conservation & Recovery Through Adequate Regulatory Mechanisms*, 44 HARV. ENVTL. L. REV. 367, 385-86 (2020) ("Although a 'predictive' recovery plan may not be directly enforceable in and of itself, the failure to observe its provisions when engaging in consultation or issuing incidental take permits under the ESA may render the outcome arbitrary and capricious, unless the FWS explains why it diverged from the plan. By the same token, a failure to consider the plan's provisions, and to explain a deviation from them, could cause the extinction of the listed species. Thus, recovery plans are highly relevant to the conservation objective, even if they are not always enforceable in court.").

before making a decision regarding delisting. *See Friends of Blackwater v. Salazar*, 691 F.3d 428, 433 (D.C. Cir. 2012) ("[T]he Act does not similarly say the Secretary 'shall' consult those criteria in making a delisting decision.").

CBD cites *Friends of Blackwater* for the proposition that a recovery plan binds the Secretary to implement it. App. Br. at 28; 691 F.3d 428, 437. But the court in that matter was careful to speak vaguely about the Secretary's duty to "work toward the goals" in the recovery plan. *Id.* at 437 (Appendix). Immediately after the sentence that CBD cites, the court stated unequivocally: "None of this, however, implies the objective, measurable criteria in the plan limit the agency when it is deciding whether to delist a species." Indeed, the same court implied that a Secretary is free to artfully craft a recovery plan that gives themselves or a future Secretary maximum discretion going forward. *Id.* at 438 ("[I]f the Secretary foresees that adopting certain criteria would unduly restrict his delisting analysis, then he may decide it is practicable only to adopt criteria that guide but do not constrain that analysis.").

CBD places great emphasis on the idea that recovery plans are relevant for how other provisions of the ESA are implemented, and even how other statutes might be implemented. But it fails to connect these arguments to the proposition that recovery plans themselves "prescribe" policy, much less law. The fact that an agency may rely on a recovery plan in formulating other policies does not convert

every memorandum, study, or methodology into an independent rule that may be challenged by an interested person under 5 U.S.C. § 553(e). To hold otherwise would sweep in a host of agency conduct that would be subject to both petitions under the APA, and judicial review subsequently.

### 3. CBD Fails to Establish That a Recovery Plan Prescribes Policy, Despite Being Nonbinding.

Impliedly conceding what every court has held—that recovery plans are not binding—CBD contends that they can nevertheless be agency statements of policy. App. Br. at 35. Besides making an analytical argument from scattered dictionary terms that mere guidance can be a rule, CBD cites *Veneman* once more for the proposition that a nonbinding policy statement can qualify as a rule. *Id.* at 37 ("holding that '[the] Draft Policy on Environmental Enhancement for Nonhuman Primates' would be a 'rule' *if finalized*") (emphasis added).

But *Veneman* actually cuts against CBD in this context. That court held that the Draft Policy would only become a rule "if finalized." But why was finalization important, when the Draft Policy "merely … 'clarif[ied]' existing obligations"? *Id.* at 839. Adopting CBD's logic would in fact entail that the Draft Policy was a "rule" long before finalization, when the USDA published a document that simply "listed a number of specific features that a regulated entity could usefully include in an environmental enhancement plan." *Id.* at 831. Indeed, it is not clear why the draft policy guidance was not exactly the kind of rule that CBD envisions would be

subject to petition under 5 U.S.C. § 553(e), or why, if CBD is correct now, the Ninth Circuit would have concluded that "[t]he Draft Policy, if adopted, would '*alter the legal regime* to which' regulated entities' action is subject." *Id.* at 835 (emphasis added).

CBD points to other guidance documents that courts have construed as rules in some cases, but expanding judicial review to petitions regarding modifications of recovery plans would certainly break new ground. *See Friends of the Wild Swan, Inc. v. Thorson*, 260 F.Supp.3d 1338, 1342 (D. Or. 2017) ("[I]t is clear from the statutory language [of the ESA] that Congress intended some acts of the Secretary to remain outside the purview of judicial review."); *Conservation Congress v. Finley*, 774 F.3d 611, 620 (9th Cir. 2014) ("[D]eclining to adopt particular recommendations in a recovery plan or a study—neither of which is binding on an agency—does not constitute failing to consider them under 50 C.F.R. § 402.16."); *Save Bull Trout v. Williams*, — F.Supp.3d —, No. CV-19-184-M-KLD, 2021 WL 2551412, *4 (D. Mont., June 22, 2021) (Magistrate Opinion) ("Although limited case law exists considering challenges to recovery plans, courts within the Ninth Circuit have consistently found the substance of recovery plans to be within the agency's discretion and therefore unreviewable.").[8] It would be discordant to permit

[8] Similarly, some courts have treated an agency's decisions surrounding adoption of a methodology to be a "rule" when they were part of a "critical factor in an otherwise

rulemaking petitions for revision of recovery plans that are not themselves constitute agency action subject to typical APA requirements.

CBD's theory is also inconsistent with other cases outside of the ESA context. In *Midwater Trawlers Co-op. v. Mosbacher*, 727 F. Supp. 12, 16 (D.D.C. 1990), for instance, the District Court for the District of Columbia recognized that fishery management plans under the Magnuson Act are subject to petition, "if the appropriate Council fails to develop and submit to the Secretary, after a reasonable period of time, a fishery management plan for such fishery, or any necessary amendment to such a plan, if such fishery requires conservation and management." 16 U.S.C. § 1854(c)(1). What purpose would the language in that provision regarding "the failure of the appropriate Council" serve, however, if 5 U.S.C. § 553(e) simply authorized all petitions by interested parties, at any time?

To the same effect, the District Court for the Eastern District of New York noted in *United States v. M. Genzale Plating, Inc.*, 723 F. Supp. 877 (E.D.N.Y. 1989), that in challenging a placement on the National Priorities List, "[o]nce the site has been formally included on the NPL, a party with standing may challenge the

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inflexible statutory formula." *Batterton v. Marshall*, 648 F.2d 694, 704-05 (D.C. Cir. 1980). While *Batterton* is not binding authority in this Court, no party contends, in any event, that recovery plans contain components of an inflexible statutory formula. *See also City of Alexandria v. Helms*, 728 F.2d 643, 647 (4th Cir. 1984) (90-day FAA study of flight traffic patterns was a rule, although exempt from notice and comment requirements, as part of specific plan to "distribute aircraft noise as equitably as possible").

listing." (citing 5 U.S.C. § 553(e)). But if Appellant's theory is correct, there is no need to wait until the "the site has been formally included on the NPL." Why wouldn't the mere proposal be sufficient? *See* App. Br. at 15 (citing *Veneman*, which has been vacated, for the proposition that "virtually every statement an agency may make" is a rule).

Additionally, in *State of Vermont v. Thomas*, 850 F.2d 99 (2d Cir. 1988), the Second Circuit stated that it was "sympathetic" to the arguments that the EPA had not done enough to combat "regional haze." *See id.* at 104 ("EPA's assurances of future action on regional haze are little comfort to Vermont and visitors to Lye Brook."). The Second Circuit noted that the State of Vermont could pursue, however, an alternate remedy under 5 U.S.C. § 553(e). *Id.* ("Vermont can pursue an alternative remedy, namely, the filing with EPA of a petition for rulemaking under the Administrative Procedure Act."). The Second Circuit suggested that petitioning for rule*making* was an option; it did not, however, suggest that the petition under Section 553(e) would in fact merely request an *amendment* to the EPA's prior "assurances of future action."

Last, the court in *Circuit City Stores, Inc. v. E.E.O.C.*, 75 F. Supp. 2d 491, 508 (E.D. Va. 1999), analyzed whether several agency actions as part of a broader EEOC enforcement effort against mandatory arbitration agreements constituted "rules." It concluded that a number of acts did not constitute rules, despite the fact

that they were related to EEOC's efforts to crack down on mandatory arbitration agreements:

> (1) the decision of the General Counsel to select an appropriate corporate target for litigation over a mandatory arbitration plan; (2) the identification of Circuit City as the target and the decision of the General Counsel (pursuant to the delegation of authority in the NEP) to sue Circuit City over its AIRP; (3) selection of a venue; (4) investigating and finding putative claimants to support an action in the chosen venue; (5) structuring the litigation for consolidation with a putative private action against Circuit City; and (6) the General Counsel's approval of litigation by approval of the Presentation Memorandum on the Commissioner's Charge.

*Id.* at 508 ("None of those acts can qualify as a rule."). The fact that none of these actions—designed to implement the EEOC's views regarding mandatory arbitration agreements—was considered a rule is in stark tension with CBD's position that "virtually every statement an agency may make" is a rule. *See* App. Br. at 15 (citing *Veneman*).

### D. CBD's Arguments that Petition Rights Promote Public Participation Are Unavailing.

CBD contends that the effectiveness of the APA "is stymied by the district court's narrow construction of the definition of 'rule' to exclude agency statements, like recovery plans that are the result of formal notice-and-comment processes …." App. Br. at 41. Of course, CBD acknowledges that there is already public participation in the process, as part of any recovery plan being initially established. Additionally, the Agricultural Associations have already explained how punishing

agencies for engaging in notice and comment processes will reduce public participation. *See*, supra page 21.

Additionally, it is just as likely that, rather than healthy public participation, agencies will be unable to handle tens of thousands of petitions for not just all regulations, but every policy statement or guidance document, and the subsequent litigation when they are denied. Construing recovery plans to constitute rules would potentially open the floodgates. Amici, for instance, make clear that they hope that their position prevails in this forum because they feel that it "is vital to ensure that agency 'rules' reflect important current scientific, and other relevant information." Amici at 13. *Compare Conservation Congress v. U.S. Forest Serv.*, 377 F. Supp. 3d 1039, 1054 (E.D. Cal. 2019) ("The Ninth Circuit has held that although an agency should consider recovery plans, adopting recommendations in those plans is not mandatory, and agencies can use discretion in determining what constitutes the best available science.").

In Amici's world, every study that is released; every new scientific advancement; every new tidbit of information regarding a species; will lead to a petition to amend a recovery plan that forces an agency response. *Id.* at 16 ("It is vital that the recovery plan be as scientifically current as possible."). As the D.C. Circuit stated in a case regarding Presidential budget proposals: "It is impossible to believe that the APA opened this process to judicial scrutiny as a reviewable 'agency

action.'" *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 20 (D.C. Cir. 2006).

**E. Amici are Wrong that Recovery Plans "Interpret" Law or Policy.**

Even CBD does not advance this argument in its appellate brief, nor did it dispute the Service's position that a recovery plan does not approach the standard for an interpretative rule. Undaunted by the fact that even CBD does not advance this position, Amici claim that a recovery plan "interprets" by "explaining" what is necessary to recover a species. But "recovering a species" is not a law or a policy by itself. It is a goal that has been encompassed in law. And the recovery plan does not explain or elaborate as to what the definitions of the words in the ESA mean. Indeed, Amici's argument amounts to a suggestion that any statement or document referring to a statute or federal regulation constitutes a rule. This is belied by caselaw. *See Atchison, Topeka and Santa Fe Ry. Co. v. Pena*, 44 F.3d 437, 442 (7th Cir. 1994) (en banc) ("[I]nterpretive rules are treated differently by the APA. They are exempt from the notice-and-comment requirements of rule-making. … In addition, interested parties do not have the right to petition the agency for review of its interpretive rulings as they do with respect to agency rules.").[9]

[9] It is unclear whether CBD and Amici would argue that even agencies who do not possess rulemaking authority, may nevertheless create "rules" through policy guidance that can be the subject of valid APA petitions. *See WWHT, Inc. v. F.C.C.*, 656 F.2d 807, 813 (D.C. Cir. 1981) ("In the legislative history accompanying [5

### F. If Recovery Plans Are Rules, Agency Guidance is Next.

If recovery plans are rules under the APA, such that parties can petition for their amendment, agency guidance documents are next. Such documents are generally not subject to challenges under the arbitrary and capricious standard. *See SurvJustice Inc. v. DeVos*, No. 18-cv-00535-JSC, 2019 WL 5684522, *10 (N.D. Cal., Nov. 1, 2019) ("Mr. Trachman's declaration is also supported by OMB and DOJ documents indicating that guidance documents like the 2017 Guidance 'do not create binding legal obligations or serve as a basis for a noncompliance finding and federal funding termination.'") (internal brackets omitted). But why not simply change tactics, if CBD's arguments are adopted: advocacy groups will submit petitions to change such documents, and then challenge the denial of those petition as arbitrary and capricious?

Academics have already noted this potential outcome, while wondering why, inexplicably, more cases have not already evidenced this obvious conclusion:

> In light of the clear language and the nondefinitive judicial treatment of the applicability of the right to petition for modification to guidance documents, the dearth of cases in which stakeholders attempted to petition for modification of such a document seems to reflect an assessment that such a strategy is unlikely to succeed in getting courts to hold the agency accountable for the guidance document, rather than a belief that the strategy was precluded by the APA.

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U.S.C. § 553(e)], it was stated that this section 'requires agencies to receive and consider requests' for rulemaking.").

Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331, 372 (December 2011).

However, rather than cast doubt on the willingness of the judiciary to hold agencies accountable—something courts have been more than willing to do, where appropriate—the real reason for the lack of case law in this area is that CBD's theory is too cute by half. Agencies themselves are quick to announce that guidance documents that do not have the force or effect of law. *See, e.g.*, Questions and Answers for K-12 Public Schools In the Current COVID-19 Environment, at 1 (Sept. 28, 2020) ("Other than statutory and regulatory requirements included in the document, the contents of this guidance do not have the force and effect of law and are not meant to bind the public. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.").[10]

But there can be no doubt that agency guidance is commonly referred to as "policy." *See, e.g.*, Department of Education Office for Civil Rights, Reading Room (Policy Guidance Portal); *see also* Executive Order 13891, Promoting the Rule of Law Through Improved Agency Guidance Documents (October 15, 2019), *withdrawn* by Executive Order 13992 (January 25, 2021) ("'Guidance document' means an agency statement of general applicability, intended to have future effect on the behavior of regulated parties, that sets forth a policy on a statutory, regulatory,

[10] www2.ed.gov/about/offices/list/ocr/docs/qa-covid-20200928.pdf

or technical issue, or an interpretation of a statute or regulation.").[11] To the extent that all statements of policy would constitute rules under the APA, however, all of these documents would become newly more vulnerable under 5 U.S.C. § 553(e). In short, adopting CBD's theory for recovery plans potentially implicates tens of thousands of guidance documents that could be subject to just as many petitions.

## CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the District Court.

DATED this the 22nd day of October 2021.

Respectfully submitted,

*/s/ William E. Trachman*

William E. Trachman
Joseph A. Bingham
MOUNTAIN STATES
LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, CO 80227
(303) 292-2021
wtrachman@mslegal.org

*Attorneys for Agricultural Associations*

[11] www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/index.html

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,720 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Word, Times New Roman 14-point font.

October 22, 2021.

*/s/ William E. Trachman*

William E. Trachman
Joseph A. Bingham*
MOUNTAIN STATES
LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, CO 80227
(303) 292-2021
*Admission pending

*Attorneys for Agricultural Associations*

## CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2021, I electronically filed the foregoing *Answer Brief of Intervenor Appellees Wyoming Stock Growers' Association, Wyoming Farm Bureau Association, and Utah Farm Bureau Association*, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit via the appellate CM/ECF system, which will serve all registered CM/ECF users.

*/s/ William E. Trachman*
William E. Trachman
MOUNTAIN STATES
LEGAL FOUNDATION

## ADDENDUM

All applicable statutes are contained in addendum of the Center for Biological Diversity.