IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES ASSOCIATION OF REPTILE KEEPERS, INC.,	)	
Plaintiff,	)	
v.	)	Civil No. 1:13-cv-2007-EGS
S.M.R. JEWELL *et al*.,	)	
Defendants.	)	

MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Federal Defendants S.M.R. Jewell, in her official capacity as Secretary of the U.S. Department of the Interior, and the U.S. Fish and Wildlife Service ("FWS") respectfully submit the following Motion to Dismiss the First Amended Complaint of Plaintiff U.S. Association of Reptile Keepers, Inc., under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

INTRODUCTION

The Lacey Act prohibits, without permit, the importation and interstate transportation of species determined by the Secretary of the Interior to be injurious to the health and welfare of humans, the interests of agriculture, horticulture or forestry, or the welfare and survival of wildlife resources of the United States. 18 U.S.C. § 42(a)(1); 50 C.F.R. § 16.3. On January 23, 2012, the FWS issued a Final Rule adding four species of large, non-native constrictor snakes to the list of injurious wildlife under the Lacey Act. 77 Fed. Reg. 3,330. Plaintiff filed this lawsuit on December 18, 2013, alleging that the Final Rule violates the Lacey Act, the National Environmental Policy Act ("NEPA"), and the Administrative Procedure Act ("APA"). Of Plaintiff's four claims, the two arising under NEPA (Counts Two and Three) should be

dismissed for failure to state a claim. The Court lacks jurisdiction over one of the two Lacey Act claims (Count One) because the relevant statute of limitations has run.

STATUTORY AND REGULATORY BACKGROUND

I. The Lacey Act

The Lacey Act, enacted in 1900, is one of the oldest wildlife statutes in the United States. As relevant here, the statute authorizes the Secretary of the Interior, through the FWS, to regulate the importation and interstate transport of species, including offspring and eggs, determined to be injurious to the health and welfare of humans, the interests of agriculture, horticulture or forestry, or the welfare and survival of wildlife resources of the United States. 18 U.S.C. § 42(a)(1); 50 C.F.R. § 16.3. The types of organisms that can be added to the injurious wildlife list are limited to wild mammals, wild birds, fish, mollusks, crustaceans, amphibians, and reptiles. 18 U.S.C. § 42(a)(1).

Species listed as injurious may not be imported or transported between States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States by any means without a permit issued by the FWS. 18 U.S.C. §§ 42(a)(1), (3); 50 C.F.R. §§ 16.3, 16.22. Permits may be granted for the importation or interstate transportation of live specimens of injurious wildlife and their offspring or eggs for bona fide scientific, medical, educational, or zoological purposes. 18 U.S.C. § 42(a)(3); 50 C.F.R. §§ 16.11-16.15. Intrastate transport or possession within a State of species listed as injurious is not prohibited by the Lacey Act.

Because there is no private right of action under the Lacey Act, judicial review is available, if at all, only through the APA. *See, e.g.*, *Hill v. Norton*, 275 F.3d 98, 103 (D.C. Cir. 2001) (no private right of action under the Migratory Bird Treaty Act so challenge could only be

made under the APA) (superceded by statute on other grounds); *Strahan v. Coxe*, 127 F.3d 155, 160 (1st Cir. 1997) (no private right of action under the Marine Mammal Protection Act).

II. The National Environmental Policy Act

NEPA serves the dual purpose of informing agency decision makers of the environmental effects of proposed federal actions and ensuring that relevant information is made available to the public so that they may "play a role in both the decisionmaking process and the implementation of that decision." *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA's intent is to focus the attention of agencies and the public on a proposed action so that its consequences may be studied before implementation. 42 U.S.C. § 4321; 40 C.F.R. § 1501.1(c); *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989).

NEPA requires preparation of an Environmental Impact Statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment . . . ." 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.3. To determine whether an EIS is necessary, an agency may prepare an Environmental Assessment ("EA"). 40 C.F.R. §§ 1501.4(b)-(c), 1508.9; *see also Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 503-04 (D.C. Cir. 2010). If the agency concludes that the action will not significantly affect the quality of the human environment, rendering an EIS unnecessary, the agency must issue a Finding of No Significant Impact ("FONSI"). 40 C.F.R. § 1501.4(e).

NEPA is a procedural statute: it does not dictate the substantive results of agency decision making, but rather prescribes the necessary process. *Robertson*, 490 U.S. at 350. While NEPA requires agencies to take a "hard look" at environmental effects, inherent in NEPA's procedural requirements is a "rule of reason" that relieves agencies of the obligation to consider every conceivable environmental effect. *See Dep't of Transp. v. Public Citizen*, 541 U.S. 752,

767-68 (2004); *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 736 (D.C. Cir. 2000).

NEPA provides no private right of action to enforce its requirements. *Town of Stratford v. FAA*, 285 F.3d 84, 88 (D.C. Cir. 2002). Thus, to bring suit to vindicate NEPA's requirements, a plaintiff must rely on the provisions of the APA that allow an aggrieved party within the zone of interests of the relevant substantive statute to bring suit. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990).

FACTUAL BACKGROUND

I. The Final Rule Adding Four Non-Native Constrictor Snakes to the List of "Injurious" Wildlife

On June 23, 2006, the South Florida Water Management District requested that the FWS consider listing the Burmese Python (*Python molurus bivittatus*) as injurious under the Lacey Act, 18 U.S.C. § 42. 77 Fed. Reg. 3,330 (Jan. 23, 2012). The District was concerned about the spread of Burmese Pythons throughout Florida, including in Everglades National Park. *Id*. The FWS published a Notice of Inquiry in the *Federal Register* on January 31, 2008, soliciting information on the *Python*, *Boa*, and *Eunectes* genera for possible addition to the list of injurious wildlife under the Lacey Act. *Id*. On March 12, 2010, the FWS published a proposed rule in the *Federal Register* that proposed adding nine species of large constrictor snakes that are not native to the United States to the Act's list of injurious wildlife: *Python molurus* (which includes both Burmese and Indian Pythons), *Broghammerus reticulatus* or *Python reticulatus* (Reticulated Pythons), *Python sebae* (Northern African Python), *Python natalensis* (Southern African Python), *Boa constrictor* (Boa Constrictor), *Eunectes notaeus* (Yellow Anaconda), *Eunectes deschauenseei* (DeSchauensee's Anaconda), *Eunectes murinus* (Green Anaconda), and *Eunectes beniensis* (Beni Anaconda). 75 Fed. Reg. 11,808 (Mar. 12, 2010); Am. Compl. ¶ 10 (ECF No.

21). The proposed rule announced the availability of the Draft Environmental Assessment and Draft Economic Analysis, and solicited comments on all of these documents. 75 Fed. Reg. at 11,811. Although the comment period initially closed on May 11, 2010, the FWS reopened it for an additional 30 days ending on August 2, 2010. 75 Fed. Reg. 38,069 (July 1, 2010).

In January 2012, the FWS issued a Final Environmental Assessment, Final Economic Analysis, Final Regulatory Flexibility Analysis, and a Finding of No Significant Impact. 77 Fed. Reg. at 3365. On January 23, 2012, the FWS issued the Final Rule at issue in this case, which amended its regulations under the Lacey Act to add four species of large constrictor snakes to the list of injurious wildlife: *Python molurus*, *Python sebae*, *Python natalensis*, and *Eunectes notaeus*. *Id*.; Am. Compl. ¶ 16; 50 C.F.R. § 16.15.

II. Plaintiff's Amended Complaint

On December 18, 2013, nearly two years after publication of the Final Rule, Plaintiff U.S. Association of Reptile Keepers ("USARK"), a non-profit organization representing "all segments of the reptile industry," filed a complaint challenging the Final Rule. ECF No. 1. The Complaint contained four counts alleging that the Final Rule's prohibition on the interstate transportation of listed snakes is *ultra vires* under the Lacey Act (Count One); that the FWS violated NEPA and the APA by failing to take a hard look at the environmental consequences of listing the snakes (Count Two) and by failing to prepare an environmental impact statement (Count Three); and that the FWS acted arbitrarily and capriciously in violation of the APA in deciding to list the four species of snakes (Count Four). Compl. ¶¶ 75-93.

Federal Defendants moved to dismiss Plaintiff's Complaint on February 21, 2014, on the grounds that Plaintiff lacked prudential and constitutional standing to bring suit and failed to state a claim as to Counts One and Four (Lacey Act claims). ECF No. 14. Plaintiff's opposition,

filed on March 8, 2014, included six declarations by members of USARK. ECF Nos. 15 & 16. In their reply, Federal Defendants acknowledged that the declarations supported standing under the Lacey Act at the motion to dismiss stage but continued to argue that Plaintiff lacked prudential standing under NEPA and failed to state a claim as to its other counts. ECF No. 17.

On April 26, 2014, this Court denied Federal Defendants' motion to dismiss without prejudice and granted Plaintiff's motion for leave to amend its complaint, as contained in its opposition. Plaintiff filed its Amended Complaint on May 9, 2014. ECF No. 21. The Amended Complaint contains the same four counts contained in Plaintiff's original complaint, but clarifies that Count Four arises under the Lacey Act via the APA. *Id*. ¶¶ 95-97.

STANDARD OF REVIEW

I. Motion to Dismiss Under Rule 12(b)(1) for Lack of Subject Matter Jurisdiction

Jurisdiction is a threshold issue that must be addressed before considering the merits of a case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-96 (1998). Federal Rule of Civil Procedure 12(b)(1) provides for dismissal of a claim for lack of subject matter jurisdiction. The burden of proving subject matter jurisdiction rests with plaintiff, the "party asserting [the federal court's] jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Rempfer v. Sharfstein*, 583 F.3d 860, 868-869 (D.C. Cir. 2009). Federal courts are courts of "limited jurisdiction," and are presumed to lack jurisdiction unless a plaintiff establishes its existence. *Kokkonen*, 511 U.S. at 377.

Where, as here, a motion to dismiss makes a facial attack on the complaint, the reviewing court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Ord v. Dist. of Columbia*, 587 F.3d 1136, 1140 (D.C. Cir. 2009) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). "The court may look

beyond the allegations contained in the complaint to decide a facial challenge, 'as long as it still accepts the factual allegations in the complaint as true.'" *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 539 F. Supp. 2d 331, 337-38 (D.D.C. 2008) (quoting *Jerome Stevens Pharm., Inc. v. FDA*, 402 F.3d 1249, 1253-54 (D.C. Cir. 2005)).

II. Motion to Dismiss Under Rule 12(b)(6) for Failure to State a Claim

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of a complaint. *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). A court considering a Rule 12(b)(6) motion presumes the factual allegations of the complaint to be true. *See, e.g., United States v. Philip Morris, Inc.*, 116 F. Supp. 2d 131, 135 (D.D.C. 2000). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The court need not accept as true inferences unsupported by facts set out in the complaint or legal conclusions cast as factual allegations. *Warren v. Dist. of Columbia*, 353 F.3d 36, 39 (D.C. Cir. 2004); *Browning*, 292 F.3d at 242. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555).

ARGUMENT

I. The Court Lacks Jurisdiction to Review Count One.

The Court should dismiss Count One for lack of jurisdiction because it is time-barred under the applicable six-year statute of limitations in 28 U.S.C. § 2401(a). Courts in this Circuit have consistently held that § 2401(a) is jurisdictional, and that it imposes a subject matter bar to civil suits against the federal government. *Historic Eastern Pequots v. Salazar*, 934 F. Supp. 2d

272, 281 (D.D.C. 2013) ("the statute of limitations under Section 2401(a) is jurisdictional and cannot be tolled"); *Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 20 (D.D.C. 2013) ("The D.C. Circuit has held that § 2401(a) is jurisdictional.") (citing *P & V Enters. v. U.S. Army Corps of Eng'rs*, 516 F.3d 1021, 1026 (D.C. Cir. 2008) and *Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987)).

In Count One, Plaintiff alleges that the Final Rule purports to apply the prohibition on "any shipment between the continental United States, the District of Columbia, Hawaii, the Commonwealth of Puerto Rico, or any possession of the United States" in Lacey Act Section 42(a)(1) "not merely between continental states and other enumerated jurisdictions, as the law clearly states, but also among and between the continental states themselves." Am. Compl. ¶ 82. However, it is the FWS's Lacey Act regulations, promulgated in 1965, that interpreted the Lacey Act to prohibit the interstate transportation of injurious species, not the Final Rule. *See* 50 C.F.R. § 16.3 ("[I]mportation into or the transportation of live wildlife or eggs thereof between the continental United States . . . by any means whatsoever, is prohibited except for certain purposes and under certain conditions as hereinafter provided in this part."); 30 Fed. Reg. 9,640 (Aug. 3, 1965). The preamble to the Final Rule explained that the effect of adding the four constrictor snakes to the list of injurious species was that the interstate transport of these species was now prohibited, consistent with FWS's longstanding regulatory interpretation of the Lacey Act. However, the Final Rule itself did not prohibit interstate transport of listed species.

Count One is brought pursuant to the Lacey Act and the APA, but the Lacey Act does not contain a waiver of sovereign immunity and so any waiver would have to come from the APA. *See Am. Rd. & Transp. Builders Ass'n v. E.P.A.*, 865 F. Supp. 2d 72, 81 (D.D.C. 2012) (If "another statute provides an 'adequate remedy in a court,' then the APA neither provides a cause

of action nor waives sovereign immunity." (internal citation omitted)). Any action pursuant to the APA is subject to the limitations period established in 28 U.S.C. § 2401(a), which provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." *P & V Enters.*, 516 F.3d at 1026-27; *Historic Eastern Pequots*, 934 F. Supp. 2d at 278 ("[The APA's] waiver of sovereign immunity is limited, however, by the applicable statute of limitations."). "The right of action first accrues on the date of the final agency action." *Harris v. FAA*, 353 F.3d 1006, 1010 (D.C. Cir. 2004). Here, the right to challenge the 1965 rule expired in 1971, six years after the FWS took final action and long before this case was filed. Accordingly, any attempt to challenge the 1965 regulation is precluded by the statute of limitations.

In addition, while the D.C. Circuit has recognized two narrow circumstances in which the substance of a rule can be reviewed after the statute of limitations or other defined period for judicial review has expired, Plaintiff has not alleged and cannot allege that either of those circumstances is present here. The first circumstance where review is permissible after the limitations period has expired is where the agency "reopens" the issue challenged in an older rule. *P & V Enters.*, 516 F.3d at 1023-24. However, Plaintiff does not (and could not) claim that the FWS has reopened the 1965 rule through a subsequent rulemaking. "[A] party against whom a rule is applied" also can bring a challenge that otherwise would be time-barred. *Indep. Cmty. Bankers of Am. v. Bd. of Governors of Fed. Reserve Sys.*, 195 F.3d 28, 34 (D.C. Cir. 1999). The D.C. Circuit has explained that such a challenge can be brought "for example, by way of defense in an enforcement proceeding." *Nat'l Labor Relations Bd. Union v. Fed. Labor Relations Auth.*, 834 F.2d 191, 195 (D.C. Cir. 1987). However, Plaintiff is not asserting its challenge to the ban on interstate transportation by way of defense in an enforcement proceeding. As-applied

challenges are also permitted after expiration of the statute of limitations to challenge an agency's denial of a petition for amendment or rescission of a regulation. *Id.* at 196. Plaintiff does not and cannot assert that it has petitioned the FWS for amendment or rescission of any regulation, much less the 1965 regulation. Because Plaintiff is barred from challenging the FWS's regulatory interpretation of Lacey Act Section 42(a)(1), Count One should be dismissed for lack of jurisdiction.

II. Counts Two and Three Fail to State a Claim Because Plaintiff Is Not Within the Zone of Interests of NEPA.

"[A] statutory cause of action extends only to plaintiffs whose interests 'fall within the zone of interests protected by the law invoked.'"[1] *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014); *see also Bennett v. Spear*, 520 U.S. 154, 162 (1997). The zone of interests test is intended to exclude those plaintiffs "whose interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1287 (D.C. Cir. 2005).

Where, as here, a plaintiff asserts causes of action under the APA, the plaintiff's interests must be "within the 'zone of interests' of the relevant substantive statute." *Ass'n of Battery Recyclers*, 716 F.3d at 676 (Silberman, concurring); *see also Lujan v. Nat'l Wildlife Fed'n*, 497

[1] Although Federal Defendants framed the zone of interests issue as a question of prudential standing in their motion to dismiss Plaintiff's original complaint, the Supreme Court has since held that "prudential standing is a misnomer." *Lexmark*, 134 S. Ct. 1387 (quoting *Ass'n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 675–676 (2013) (concurring opinion)). Rather, "[w]hether a plaintiff comes within the zone of interests is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Id.* (internal quotation marks omitted). Because "the absence of a valid . . . cause of action does not implicate subject-matter jurisdiction," *id.* at 1387 n.4, Federal Defendants now move to dismiss Plaintiff's claims under NEPA for failure to state a claim under Fed. R. Civ. P. 12(b)(6) rather than lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1).

U.S. 871, 883 (1990) ("[A] plaintiff must establish that the injury he complains of . . . falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint."). Because Plaintiff's asserted interests are not within the zone of interests of NEPA, Counts Two and Three should be dismissed.

The D.C. Circuit has held that, because NEPA "is a statute aimed at the protection of the environment," a plaintiff must assert an environmental interest to fall within the zone of interests protected by NEPA. *ANR Pipeline Co. v. FERC*, 205 F.3d 403, 408 (D.C. Cir. 2000); *Town of Stratford*, 285 F.3d at 88 ("[A] NEPA claim may not be raised by a party with no claimed or apparent environmental interest."). Purely economic interests are not within NEPA's zone of interests and are therefore insufficient to support a claim under NEPA unless accompanied by valid environmental interests. *ANR Pipeline*, 205 F.3d at 408; *Town of Stratford*, 285 F.3d at 88. The asserted environmental interest need not be a plaintiff's primary interest—"[p]arties motivated by purely commercial interests routinely satisfy [NEPA's] zone of interests test"—but a plaintiff cannot proceed without at least some valid environmental interest. *Nat'l Ass'n of Home Builders*, 417 F.3d at 1287 (quoting *Amgen, Inc. v. Smith*, 357 F.3d 103, 109 (D.C. Cir. 2004)).

The Supreme Court has cautioned against reading the term "environmental" in NEPA too broadly for fear that if "give[n] the broadest possible definition, the words 'adverse environmental effects' might embrace virtually any consequence of a governmental action that someone thought 'adverse.'" *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772 (1983). Thus, the Court has limited NEPA's zone of interests to "the 'physical environment—the world around us so to speak.'" *Cal. Forestry Ass'n v. Thomas*, 936 F. Supp. 13, 21 (D.D.C. 1996) (quoting *Metro. Edison Co.*, 460 U.S. at 772). NEPA's regulations echo

this limited definition, defining "human environment" to include "the natural and physical environment. . . . This means that economic or social effects are not intended by themselves to require preparation of an [EIS]." 40 C.F.R. § 1508.14.

Despite its attempts to bolster its alleged "conservation" interests in its Amended Complaint, Plaintiff has failed to remedy the fundamental flaw in its original complaint—Plaintiff once again does not assert any valid environmental interests that could support a cause of action under NEPA. Plaintiff's primary concern remains economic: it alleges that, by prohibiting interstate transport of the listed snakes, the Final Rule has and will continue to cause the market in these snakes to contract. Am. Compl. ¶ 14; *see also id*. ¶ 4-8 (describing the economics of the pet reptile trade). Plaintiff claims that potential buyers will refrain from purchasing snakes because they cannot take them across state lines. *Id*. ¶ 14. Sellers in turn will be forced to euthanize excess snakes that they are now unable to sell. *Id*. Indeed, Plaintiff betrays its true interests by consistently describing itself as representing "all segments of the reptile *industry*." Am. Compl. ¶ 2 (emphasis added); *see also id*. ¶¶ 5, 7, 8, 14, 56.

Liberal use of the term "conservation" does not transform these economic interests into environmental interests sufficient to support a claim under NEPA. The Amended Complaint makes clear that Plaintiff and its members are interested in breeding, selling, researching, and enjoying *captive* snakes. *See* Am. Compl. ¶ 2 ("USARK represents all segments of the reptile industry, including breeders, hobbyists, trade show promoters, service providers, scientists, conservationists, and equipment manufacturers who rely on, trade in, research, conserve, and gain enjoyment from the breeding and maintenance of large, non-native constricting snakes."); USARK Position Statement on Conservation, *available at* http://usark.org/conservation (last visited May 23, 2014) ("Captivity has become integral as a conservation tool for animal species

of the world."). Captive snakes are not part of the natural and physical environment contemplated by NEPA. Rather, they are pets, bred and raised for use and enjoyment by humans in a contained environment. *See, e.g.*, Am. Compl. ¶¶ 3-4 (discussing USARK's "promot[ion] of responsible pet ownership"), ¶ 7 (discussing USARK members' concern about taking "their pets across state lines"), ¶ 12 (referring to Lacey Act's impact on the "pet trade"); ECF No. 16, Ex. 1, Decl. of Philip W. Goss ¶¶ 6-7 ("Most of the breeders and hobbyists that belong to USARK deal in 'morphs,' or python, boa, or other snake species that are selectively bred [in captivity] for unique traits (such as albinism), colors, or patterns. . . . These snakes have been bred in captivity for decades and are far-removed from wild caught individuals.").[2]

Plaintiff fails to tie its interest in captive snakes to the "natural and physical environment," as required by NEPA. Plaintiff does not contend that its members breed listed snakes in order to release them into the wild, either in the United States[3] or in their native habitats abroad. Nor does it argue that the Final Rule impacts its ability to work to protect either the native or non-native habitats of wild snakes.[4] Rather, Plaintiff alleges that the Final Rule prevents its members from importing and transporting captive listed snakes across state lines for purposes of pet ownership, breeding, sale, display at trade shows, and use in public education and research. *See* Am. Compl. ¶ 7 ("The biggest economic drivers [of the reptile industry] are the

[2] Although the declarations were attached to Plaintiff's opposition to Federal Defendants' prior motion to dismiss, Federal Defendants anticipate that Plaintiff will again rely on them in its opposition to the instant motion and therefore utilize them throughout this motion.

[3] In fact, the opposite is true. Plaintiff and its members express an interest in helping to "eradicate nonindigenous species in the United States." Am. Compl. ¶ 3.

[4] The closest Plaintiff comes to making this argument is in the Conservation Position Statement on its website, quoted in the Declaration of Philip W. Goss, in which Plaintiff claims an interest in "saving [] habitats and parts of ecosystems." ECF No. 16, Ex. 1 ¶ 17; USARK Position Statement on Conservation, *available at* http://usark.org/conservation. However, this statement is not tied to the listed snakes and does not explain how the Final Rule would harm Plaintiff's members' ability to protect the habitats of listed snakes.

literally hundreds of large and small trade shows held throughout the country each year to which breeders and hobbyist[s] bring, show, and sell their animals."); ECF No. 16, Ex. 6, Decl. of Michael Cole ¶¶ 15-17 (noting that the Final Rule prevents taking listed snakes to out of state trade shows, shipping them to out of state private collectors, and importing them from Indonesia for sale on the U.S. market); *id*., Ex. 2, Decl. of Lindsey R. Lopez ¶¶ 16-17 (describing loss of pet snake due to inability to transport it across state lines for veterinary care); *id*., Ex. 3, Decl. of Keith Gisser ¶ 8 ("With the inability to sell these animals across state lines, the value of these baby animals has crashed, so we stopped breeding . . . .").

Plaintiff attempts to make its alleged conservation interests appear more "environmental" by referencing its members' efforts to breed threatened and endangered species. Am. Compl. ¶¶ 3, 9. Of the four listed species, only one subspecies of one species, the Indian python (*Python molurus molurus*), is listed as threatened or endangered. *See* U.S. Fish & Wildlife Serv., Listed Animals, *available at* http://ecos.fws.gov/tess_public/pub/listedAnimals.jsp (last visited May 23, 2014). The mere designation of one subspecies as endangered or threatened does not alter the fact that breeding that subspecies in captivity, with no intent to release it into the wild—and every indication that Plaintiff's members' captive-bred specimens would not be suitable for reintroduction— is not an environmental interest. *See* Am. Compl. ¶ 3 (describing USARK's mission as "encouraging development of *captive breeding* techniques for globally threatened and endangered amphibians and reptiles") (emphasis added); ECF No. 16, Ex. 1, Decl. of Goss ¶ 6 ("Most of the breeders and hobbyists that belong to USARK deal in 'morphs,' or python, boa, or other snake species that are selectively bred for unique traits (such as albinism), colors, or patterns."); *id*., Ex. 6, Decl. of Cole ¶ 13 (asserting partial ownership in "most extensive collection of genetic mutation (morphs)" of Burmese pythons in the United States). Nowhere in

its Amended Complaint does Plaintiff express an interest in breeding Indian pythons for reintroduction into their native habitats in southern Asia. In fact, not a single one of the six declarations attached to Plaintiff's opposition to Federal Defendants' motion to dismiss Plaintiff's original complaint mentions breeding Indian pythons in particular, let alone the effect that the Final Rule has had on those efforts.

Plaintiff's references to its members' interest in science and research involving listed snakes are also unavailing. Am. Compl. ¶¶ 2, 9, 22. These scientists study captive snakes in laboratories. *See id.* ¶ 9 (discussing scientists' interest in "research[ing] to better understand the nature and biology of various species" and "develop[ing] captive breeding techniques"); ECF No. 16, Ex. 5, Decl. of Raul E. Diaz, Jr. ¶¶ 2, 11 (describing research on listed snakes conducted "in the lab"). Merely labeling work as "science" or "research" does not transform it into an interest in the natural and physical environment that falls within NEPA's zone of interests. Similarly, lab work conducted for the purpose of learning about the biology of listed snakes is not an environmental interest simply because it relates to animals that can be found in the wild. Even if member scientists did conduct fieldwork among feral snakes, that work would not be hindered by the Final Rule. Scientists would be free to continue to travel to states that have populations of feral listed snakes, such as Florida.

Plaintiff next attempts to bring itself within NEPA's zone of interests by noting that it has an interest in protecting the environment *from* the listed snakes, including in "discouraging the release of non-native species" and "eradicat[ing] nonindigenous species in the United States." Am. Compl. ¶ 3. This interest aligns with the purpose of the Final Rule—preventing the spread of these four non-native, invasive snake species. Indeed, the Final Rule places no limitations on capturing and eradicating listed snakes in the wild. This puts Plaintiff in the difficult position of

arguing that in order to protect the environment from the spread of these non-native species, Plaintiff and its members must be able to import additional listed snakes into the United States and transport listed snakes across state lines.

Judging by the declarations attached to its opposition to Federal Defendants' first motion to dismiss, Plaintiff may attempt to get around this conundrum by suggesting that its members have an interest in removing feral listed snakes from the state in which they were captured. However, this is simply not an environmental interest. Plaintiff's members' declarations make clear that they wish to transport captured snakes across state lines, not for environmental purposes such as reintroducing them into appropriate natural habitats in their native ranges abroad, but rather to maintain them in captivity for breeding, selling, and as pets. *See* ECF No. 16, Ex. 4, Decl. of Kristofer F. Swanson ¶ 8 ("As a breeder, I also had interest in removing 'wild' Burmese from Florida . . . , shipping them to my location in Texas, and setting up breeding from a diverse and strong bloodline of beautiful animals.").

Finally, even if Plaintiff's alleged conservation interests are valid environmental interests within NEPA's zone of interests, Plaintiff cannot demonstrate a substantial probability of actual or imminent harm to those interests. *See Nat'l Ass'n of Home Builders*, 417 F.3d at 1287-89 (finding environmental interest insufficient to bring plaintiff within the zone of interests of NEPA when there was not a substantial probability of actual or imminent harm to that interest as a result of agency action). The Lacey Act and its implementing regulations include a provision allowing individuals to apply for importation and interstate transport permits "for zoological, educational, medical, or scientific purposes." 18 U.S.C. § 42(a)(3); 50 C.F.R. §§ 16.15, 16.22; *see also* U.S. Fish & Wildlife Serv., Permits, http://www.fws.gov/permits/instructions/ObtainPermit.html (last visited May 23, 2014). Plaintiff

has not explained why interstate transportation of listed snakes is necessary for its scientific, research, and public education activities, but assuming that it is, those interests fall squarely under this exception to the Final Rule's general ban on importation and interstate transport. *See* ECF No. 16, Ex. 1, Decl. of Goss ¶ 18 (describing USARK's efforts to "educat[e] the public on the importance of these animals and foster[] a conservation ethos"); *id.*, Ex. 2, Decl. of Lopez ¶ 5 (describing how declarant makes "educational presentations at elementary schools [and] community events"); *id.*, Ex. 5, Decl. of Diaz ¶¶ 2, 11 (describing declarant's scientific research of listed snakes). In fact, one declarant, USARK member Keith Gisser, successfully obtained a FWS permit for his "traveling educational herpetology program," Herps Alive! The Interactive Reptile and Amphibian Experience.[5] *Id.*, Ex. 3, Decl. of Gisser ¶ 4. To the extent that Plaintiff's members' interests do not fit within these permit categories— "zoological, educational, medical, or scientific purposes"—it is because they are non-environmental interests in breeding, selling, and owning listed snakes for economic purposes or as pets.[6]

[5] In his Declaration, Keith Gisser, states that the process for obtaining a permit from the FWS is "convoluted and requires far more time and resources than it should." ECF No. 16, Ex. 3 ¶ 4. While Plaintiff and its members might prefer that the permit process be simpler, the FWS is obliged to ensure that permittees' intended uses of listed snakes are legitimate so that the exceptions do not swallow the rule. What matters is that Mr. Gisser successfully applied for and was granted a permit to continue his educational activities. Moreover, Plaintiff's Amended Complaint does not challenge the permitting process so that issue is not before the Court.

[6] Although Plaintiff never says it directly, if read liberally the Amended Complaint suggests that Plaintiff's interest in "discouraging release of non-native species" may be hampered by the Final Rule because the Rule may "incentiviz[e] the release of listed snakes by irresponsible breeders or pet owners due to economic pressures or when moving to other states." Am. Compl. ¶¶ 3, 59. To the contrary, the Final Rule does not prevent or impede Plaintiff's efforts to educate the public about the danger of releasing captive nonnative animals into the wild and advocate for and provide resources to support responsible pet ownership and disposal. To the extent Plaintiff's members can demonstrate that they must transport listed snakes between states to successfully carry out these educational efforts, they can apply for a permit.

NEPA "cannot be used as a handy stick by a party with no interest in protecting against an environmental injury to attack a defendant." *Nat'l Ass'n of Home Builders*, 417 F.3d at 1289. Because Plaintiff's asserted interests are not within the zone of interests of NEPA, Plaintiff fails to state a valid claim in Counts Two and Three of its Amended Complaint.

CONCLUSION

For the reasons stated above, Federal Defendants respectfully request that the Court dismiss Counts One, Two, and Three of Plaintiff's Amended Complaint with prejudice.

Respectfully submitted this 23rd day of May, 2014.

SAM HIRSCH
Acting Assistant Attorney General
Environment & Natural Resources Division

/s/ Meredith L. Flax
Meredith L. Flax
Senior Trial Attorney (D.C. Bar 468016)
U.S. Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
Ben Franklin Station, P.O. Box 7611
Washington, D.C. 20044-7611
Phone: (202) 305-0404
Fax: (202) 305-0275
Email: meredith.flax@usdoj.gov

/s/ Clare M. Boronow
Clare M. Boronow
Trial Attorney (Admitted to the Maryland Bar)
U.S. Department of Justice
Environment & Natural Resources Division
Natural Resources Section
Ben Franklin Station, P.O. Box 7611
Washington, D.C. 20044-7611
Phone: (202) 305-0492
Fax: (202) 305-0506
Email: clare.boronow@usdoj.gov

Attorneys for Federal Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of May, 2014, a copy of the foregoing Motion to Dismiss Plaintiff's Amended Complaint was filed via the Court's electronic case filing (ECF) system, which will send notice to all counsel of record.

/s/ *Meredith L. Flax*
MEREDITH L. FLAX