IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES ASSOCIATION OF REPTILE KEEPERS, INC., Plaintiff, - vs. - THE HONORABLE SALLY JEWELL, *et al.*, Defendants.	Civ. No.: 13-2007-EGS

UNITED STATES ASSOCIATION OF REPTILE KEEPERS OPPOSITION TO DEFENDANTS' SECOND MOTION TO DISMISS

Plaintiff, the United States Association of Reptile Keepers, Inc. ("USARK"), respectfully requests that this Court deny Defendants', the Honorable Sally Jewell, Secretary of the Department of the Interior, and the U.S. Fish and Wildlife Service ("FWS"), Motion to Dismiss USARK's Amended Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (Def. Mot., (Dkt. No. 19 (May 23, 2014)).) USARK amply demonstrated in its Opposition to Defendants' initial Motion to Dismiss,[1] incorporated herein by reference, that it has standing to raise its claims under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, and has stated a justiciable claim in Count One arising under the Lacey Act, 18 U.S.C. § 42, each via the Administrative Procedure Act ("APA"), 5 U.S.C. Chapt. 7.

INTRODUCTION

On December 18, 2013, USARK filed a four count Complaint alleging Defendants violated the NEPA, the Lacey Act, and the APA when it issued its final rule, *Injurious Wildlife*

[1] (*See* Def. Mot. to Dismiss Pl. Compl. (Dkt. No 14 (Feb. 21, 2014)); Pl. Opp'n to Def. Mot. to Dismiss (Dkt. No. 16-1 (March 10, 2014)).)

Species; Listing Three Python Species and One Anaconda Species as Injurious. *See* 77 Fed. Reg. 3330 (Jan. 23, 2012); (Compl. ¶ 1) (hereafter, "Listing"). Defendants moved to dismiss the case in its entirety, arguing then, as now, that USARK's first claim is time-barred under 28 U.S.C. § 2401(a) and that Plaintiff lacked "prudential standing" to bring claims under NEPA. Defendants had also moved to dismiss Count Four, a Lacey Act claim arising under the APA, but conceded that that count was justiciable upon amendment. (*See* Dkt. No. 17 at 1-2.) After this Motion was fully briefed, this Court issued a Minute Order allowing Plaintiff to file an Amended Complaint, which was docketed on May 9, 2014 (Dkt. No. 21). Despite having produced six declarations along with its Opposition and providing an Amended Complaint that clarified Count One and added facts demonstrating Plaintiff's standing under NEPA, Defendants have now again moved to dismiss the Amended Complaint.

As explained further below, USARK's filings amply demonstrate the organization's standing under NEPA. Furthermore, Defendants incorrectly assert that FWS' 1965 Lacey Act regulations, 30 Fed. Reg. 9640 (Aug. 3, 1965), provided an interpretation of "continental United States" that could be construed as meaning the "several States." (*See* Def. Mot. at 8.) Rather, the regulation merely parrots the words of the statute. *See id.* at 9641 (*codified at* 50 C.F.R. § 13.2 (1966 Cum. Sup.); 50 C.F.R. § 16.3 (2012) (as amended)). Furthermore, Plaintiff's substantive challenge to the January 2012 listing of four species of constricting snakes, along with its putative prohibition on their "transportation," as opposed to "shipment," is clearly timely.

In summation, as explained previously and again below, Defendant's Motion is meritless and should be denied.

ARGUMENT

I. COUNT ONE IS JUSTICIABLE

USARK's first count contains two allegations. The first relates to Defendants' unlawful application of the Lacey Act's prohibitions to activities wholly within the continental United States, in violation of the law's plain terms. (*See* Am. Compl. ¶ 82.) The second, and one which has drawn most fire from Defendants, is that the Listing purports to bar "transportation" across state lines of the snakes at issue rather than the statutory term "shipment." (*Id.* ¶ 83.) The latter term has a distinct meaning and connotation,[2] which, as Plaintiffs will explain, encompasses commercial movements, not a visit to a herpetological veterinarian who happens to be located across a state line. (*See* Lopez Decl. ¶¶ 16-18 (Dkt. No. 16-2).) USARK may bring each of these claims.

A. The Claim Regarding Defendants' *Ultra Vires* Application of the Lacey Act Among and Between the Continental States is Not Time-Barred Because, Among Other Reasons, the Regulations Parrot the Statutory Language

As Plaintiff explained, if a species is designated as injurious, the law provides that its "importation into the United States, or any territory of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States, or any shipment *betwee*n the continental United States, the District of Columbia, Hawaii, the Commonwealth of Puerto Rico, or any possession of the United States." 18 U.S.C. § 42(a)(1) (emphasis added); (*see also* Pl. Opp'n at 14). In other words, by its express terms, the Lacey Act's prohibition extends only to importation into the listed jurisdictions and shipment between those jurisdictions. The statute does not prohibit shipment, transportation, delivery by common

[2] Black's Law Dictionary defines "ship" to mean "[t]o send (goods, documents, etc.) from one place to another, esp. by delivery to a carrier for transportation." Bryan A. Garner, ed., BLACK'S LAW DICT. 1383 (7th ed. 1999). By contrast, "transport" means "[t]o carry or convey (a thing) from one place to another." *Id.* at 15005.

carrier, or any other type of movement of a listed species *among* the continental states. Count One alleges, in part, that Defendants' regulation purporting to ban transportation of, and interstate commerce in, the four listed species among and between the continental states is *ultra vires*, as the Lacey Act does not grant the Secretary that power.

At the merits stage, Plaintiffs will provide ample evidence that Congress literally meant what it said in the statute – that the "continental United States" is singular entity and that the Lacey Act only prohibits "shipment between" the forty-nine continental states and the other listed jurisdictions (*e.g.,* Hawaii, Puerto Rico, and the territories). 18 U.S.C. § 42(a)(1). Plaintiff will provide an illustrative initial example (not exclusive). In 1981, Congress significantly modified and expanded portions of the Lacey Act that, *inter alia*, provide federal penalties for violations of state, tribal, foreign conservation laws, and moved that portion of the law from Title 18 to Title 16 of the U.S. Code. *See generally,* 16 U.S.C. § 3372; (*see also* Am. Compl. ¶¶ 34-35). In doing so, Congress added the following definition: "The term 'State' means any of the *several States*, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, Northern Mariana Islands, American Samoa, and any other territory, commonwealth, or possession of the United States." *Id.* § 3371(i) (emphasis added). The difference between "continental United States" and the "several States" is palpable.

In support of its contention that USARK's claims in the first Count are untimely, the Government points to 50 C.F.R. § 16.3, "General Restrictions," (Defs. Mot. at 8), which was first adopted in in 1965. *See* 30 Fed. Reg. at 9641. The purpose of this provision is unclear, because if it read literally, no live wildlife could ever be imported into the United States. In full, Section 16.3 states:

> **§ 16.3 General restrictions.**
>
> ***Any importation or transportation*** of live wildlife or eggs thereof, or dead fish or eggs or salmonids of the fish family Salmonidae into the United States or its territories or possessions is deemed to be injurious or potentially injurious to the health and welfare of human beings, to the interest of forestry, agriculture, and horticulture, and to the welfare and survival of the wildlife or wildlife resources of the United States; and any such importation into or the transportation of live wildlife or eggs thereof ***between the continental United States, the District of Columbia, Hawaii, the Commonwealth of Puerto Rico, or any territory or possession of the United States*** by any means whatsoever, is prohibited except for certain purposes and under certain conditions as hereinafter provided in this part: *Provided*, That the provisions of this section shall not apply to psittacine birds (see also §§ 16.32 and 16.33 for other exemptions).

50 C.F.R. § 16.3 (emphasis added). It would be generous to call this provision an "interpretation" of congressional intent. The provision provides no explanation or rationale for FWS' decision to substitute "transportation" for "shipment," and none is provided in the seven paragraph preamble to the final 1965 rule.

For purposes of Count One's claim that Defendants unlawfully applied the shipment/ transportation prohibition to interstate commerce within and among the continental states, however, the key point is that the relevant regulatory language relating to the prohibitions geographic scope (*i.e.*, the second highlighted clause) merely parrots the words of the statute. *Cf.*, *Liparota v. United States*, 471 U.S. 419, 430 n.13 (1985) ("We fail to see how this sentence, which merely parrots the terms of the statute, offers any enlightenment as to what those terms mean."). The Government does not contend the agency adopted an interpretative regulation at any time that addresses this question.[3] Given that the "regulation" and the statute use essentially

[3] In fact, FWS did once propose, but never adopted, a restructuring of Part 16, Title 50, Code of Federal Regulations. *See* 42 Fed. Reg. 12373 (March 7, 1977). This revision, ancillary to a proposal to list nearly all foreign wildlife as injurious unless proven otherwise, *see id.*, would have defined "Continental United States" as including "the 48 conterminous states, the State of

identical language, this is purely a straightforward issue of statutory construction, which is a matter for the Court, not the agency.

B. USARK's Claim Challenging the Transportation Ban is Not Time-Barred

As noted above, Section 16.3, first adopted in 1965 in essentially its current form, is a general statement, largely aping the Lacey Act's language. Its regulatory purpose and effect is unclear, as FWS does not now nor has ever purported to ban all wildlife imports. *But see supra* n.3. Regardless, Defendants arguments are misplaced because USARK is challenging 50 C.F.R. § 16.3.

Rather, the Listing at issue in this case amends section 16.15, "Importation of live reptiles or their eggs." See 77 Fed. Reg. 3330, 3366 (Jan. 23, 2012) (*codified at* 50 C.F.R. § 16.15). Specifically, the regulation at issue provides: "The importation, transportation, or acquisition of any live specimen, gamete, viable egg, or hybrid of the [four species at issue] is prohibited except as provided under the terms and conditions set forth in § 16.22." *Id.* As the challenged regulation was adopted in 2012, USARK is well with the six year statute of limitations. See 28 U.S.C. § 2401(a).

It is far from clear that Section 16.3 would have been amenable to legal challenge, even in 1965. Indeed, it was not until 1967 that the Supreme Court decided *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), which final and definitively decided the question that the APA provides for "pre-enforcement review" of a regulation. *See id.* at 139-40. Further, this provision has no regulatory effect, acting more as a general statement of purpose or preamble. Thus, a

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Alaska and the District of Columbia," *id.* at 12974 (proposed § 16.3), and included a new prohibition on shipment of listed wildlife "between any two of the following geographic areas: the continental United States, the State of Hawaii, the Commonwealth of Puerto Rico, or any possession of the United States." *Id.* at 12977 (proposed § 16.22). In other words, the only time Defendants ever gave any sustained thought to the scope of the prohibition, they read the Lacey Act in its only natural way.

party would have had difficulty showing concrete injury from its promulgation. The operative sections of the regulations, including 50 C.F.R. § 16.15 at issue here, are found in Subpart B. These sections list injurious species by species type and implement the prohibitions attached to each. As the four species of constricting snakes were listed in January 2012, this case was brought well within the 28 U.S.C. § 2401(a) limitations period.

Even if this Court were to construe the "transportation" regulation as being adopted in 1965, it nonetheless has jurisdiction to hear and decide this substantive legal challenge. Defendants' claims to the contrary notwithstanding, this Circuit recognizes applicable exceptions to statutory limitations periods that apply to this case. (*See* Defs. Mot. at 9-10 (citing cases).) The D.C. Circuit has long recognized that "agencies have an ever-present duty to insure that their actions are lawful. An agency can hardly be heard to say that at a time when it was considering whether to take a certain action, it would have steadfastly ignored a commenter's showing that the action was unlawful." *Pub. Citizen v. Nuclear Regulatory Comm'n*, 901 F.2d 147, 152 (D.C. Cir. 1990) (citations omitted). The court went on to hold that "a claim that agency action was violative of statute may be raised outside a statutory limitations period." *Id.* The rule that a plaintiff may challenge "the substance of an agency decision as exceeding constitutional or statutory authority … later than six years following the decision by filing a complaint for review of the adverse application of the decision to the particular challenger" has been repeatedly followed. *Wind River Min. Corp. v. United States*, 946 F.2d 710, 714-15 (9th Cir. 1991) (collecting cases).

The notion that USARK cannot bring an "as applied" challenge "because such a challenge is only available to 'a party against whom a rule is applied'" simply begs the question. (Defs. Mot. at 9 (quoting *Indep. Bankers of Am. v. Bd. of Governors of Fed. Reserve Syst.*, 195

F.3d 28, 34 (D.C. Cir. 1999)).) The Listing is being "applied" to USARK's members and others in the reptile community, under the threat of criminal penalty. Until the Listing was promulgated with its attendant unlawful ban on interstate transport, Plaintiff had no cause of action, standing, or, indeed, any reason to challenge Section 16.3 *in vacuo*. If, under the facts of this case and the allegations made, USARK cannot raise this claim, then Defendants have essentially granted themselves legislative authority they do not constitutionally have.

II. USARK'S CLAIMS FALL WITHIN THE "ZONE OF INTERESTS" THAT NEPA IS DESIGNED TO PROTECT.

USARK raises claims that are indisputably environmental, in accord with NEPA's purpose and it easily meets the not-demanding "zone of interest" test. As it recently clarified, the Supreme Court has held that "[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." *Lexmark International, Inc. v. Static Control Components, Inc.*, __ U.S. __, 134 S. Ct. 1377. 1387 (2013) (citations and internal quotations omitted). For a plaintiff to have standing under the APA, "the interest sought to be protected by the complainant [must be] arguably within the zone of interests to be protected or regulated by the statute ... in question." *Nat'l Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 488 (1998) (citing *Ass'n of Data Processing Service Orgs, Inc. v. Camp*, 397 U.S. 150, 152 (1970)).

A. The "Zone of Interests" Test

"In applying the 'zone of interests' test, we do not ask whether, in enacting the statutory provision at issue, Congress specifically intended to benefit the plaintiff. Instead, we first discern the interests 'arguably ... to be protected' by the statutory provision at issue; we then inquire whether the plaintiff's interests affected by the agency action in question are among

them." *Id.* at 489 (citations omitted). The zone of interest test "is not meant to be especially demanding." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, __ U.S. __, 132 S.Ct. 2199, 2210 (2012). "In enforcing this lenient requirement, a court must apply the test in keeping with Congress' evident intent when enacting the APA to make agency action presumptively reviewable." *City of Duluth v. Nat'l Indian Gaming Comm'n*, CV 13-246 (CKK), 2013 WL 6654079 (D.D.C., Dec. 18, 2013).

In *Bennett v. Spear*, 520 US 154 (1997), the Court stated: "We have made clear … that the breadth of the zone of interests varies according to the provisions of law at issue, so that what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the 'generous review provisions' of the APA may not do so for other purposes." *Id.* at 164 (quoting *Clarke v. Securities Industry Assn.*, 479 U.S. 388, 400 n.16 (1987)). NEPA's purpose is perhaps as broadly stated as any that Congress ever adopted, encompassing a wide array of environmental and human interests. NEPA is intended to "encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation." 42 U.S.C. § 4321.

Given NEPA's capacious ends, the clear environmental aspect to USARK's mission, and, not least, the fact that this case falls under the APA's "generous review provisions," Plaintiff's claims are clearly within that law's zone of interests.

B. Plaintiff's Conservation Mission Falls with Within NEPA's Zone of Interests

"NEPA has twin aims." *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983). The law imposes on a federal agency "the obligation to consider every

significant aspect of the environmental impact of a proposed action" and "it ensures the agency will inform the public that it has indeed considered environmental concerns in its decision making process." *Id.* (internal quotes and citation omitted). However, the D.C. Circuit has "often observed that a party is not precluded from asserting cognizable injury to environmental values because his 'real' or 'obvious' interest may be viewed as monetary or 'disqualified' from asserting a legal claim under NEPA because the 'impetus' behind the NEPA claim may be economic." *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1288 (D.C. Cir. 2005) (quoting *Realty Income Trust v. Eckerd*, 564 F.2d 447, 452 (D.C. Cir. 1977)) (internal quotes omitted).

USARK and its members easily pass this low bar. According to its president, Phillip Goss, "USARK is, as our website states, 'An Education, Conservation and Advocacy Organization for Herpetofauna… Promoting Awareness, Responsible Care & Professional Unity.'" (Decl. of Phillip Goss ("Goss Decl."), ¶ 4 (Exh. 1, Dkt. No. 16-2).) The organization "is dedicated to conservation through captive propagation, and espouses the ideal of 'Preserving Reptiles & Amphibians for Our Future,'" supporting programs that ensure the preservation of threatened and endangered species around the world. (*Id.* ¶ 14; *see also id.* ¶ 17 (discussing and excerpting USARK's "longstanding position statement" on conservation).) Both the organization and its members engage in public education and outreach, focusing on teaching the importance of these species and "fostering a conservation ethos." (*Id.* ¶ 18.) Trade shows, which in addition to being an important economic driver for the industry, are also "an integral part of USARK's conservation education mission" as these events afford the public the opportunity to see and learn about these species. (*Id.* ¶ 19.)

These and other conservation efforts are echoed and supported by USARK's members. Many breeders also are engaged in conservation education at the local level. (*See, e.g.*, Decl. of Lindsey Lopez ("Lopez Decl."), ¶ 5 (Exh. 2, Dkt. No. 16-2); Decl. of Keith Gisser ("Gisser Decl."), ¶ 4 (Exh. 3, Dkt. No. 16-2); (Decl. of Kristofer F Swanson ("Swanson Decl."), ¶ 2 (Exh 4, Dkt. No. 16-2).) USARK's members and supporters include academic professionals engaged in biomedical research, (Decl. of Dr. Raul E. Diaz, Jr. ("Diaz Decl.") (Exh. 5, Dkt. No. 16-2)), the National Geographic Society's Resident Herpetologist, Dr. Brady Barr, and the host of the National Geographic channel's Python Hunters, Shawn Helflick. (Goss Decl. ¶ 16.) Collectively, these and many other members engage in important conservation education and activities.

USARK and its members are also engaged in efforts to eradicate invasive Burmese pythons and other species in the Everglades. For example, Michael Cole initiated Florida's python removal program and works with the Everglades National Park personnel. (Decl. of Michael Cole ("Cole Decl."), ¶¶ 6-7 (Exh. 6).) Kristofer Swanson is licensed by the State of Florida's Fish and Wildlife Conservation Commission as a "python remover," although he lives in Texas and travels at his own expense. (Swanson Decl. ¶ 6.) USARK supports these efforts. (Goss Decl. ¶ 23.) All these and other allegations were fairly encompassed in USARK's Complaint.

C. USARK's Evidence Supports its NEPA STanding

Defendants, however, continue to claim that USARK "does not assert any valid environmental interests" and that its "primary concern is economic." (Def.'s Mot. at 12.) The government, however, conflates allegations of injuries caused by the listing—which are "primarily economic" for many members in the trade, but as demonstrated herein, fall

everywhere from primarily environmental to somewhere in between for most USARK members—with the "not demanding" test for prudential standing. "'[P]arties motivated by *purely* commercial interests routinely satisfy the zone of interests test,' we have said, as '[c]ongruence of interests, rather than identity of interests, is the benchmark.'" *National Ass'n of Home Builders*, 417 F.3d at 1288 (quoting *Amgen, Inc. v. Smith*, 357 F.3d 103, 109 (D.C. Cir. 2004)) (emphasis added, alterations in original).[4]

That said, USARK and its members are not "motivated by purely economic interests." Defendants can only arrive at their conclusion that Plaintiff's claims are beyond NEPA's pale by adopting a cramped vision of what NEPA means by the "human environment" that is inconsistent with the statute's broad purpose. For instance, FWS claims, "Captive snakes are not part of the natural and physical environment contemplated by NEPA," focusing on USARK's discussion of the business side of its mission. (*See* Def. Mot. at 13 (discussing pet ownership and the economic importance of "morphs" to the industry).) As discussed above, the interests of the organization and its members extend far beyond the retail trade, into the "natural and physical environment." USARK's and its members' interests in preventing unintentional introductions of non-native reptiles and amphibians through education and responsible ownership and efforts to eradicate non-native species in the Everglades, for example, are directly geared toward protecting the physical environment. Further, conservation education, such as that

[4] *See also Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior*, 731 F. Supp. 2d 15, 20-21 (D.D.C. 2010) (association with commercial fishing operators, tourism dependent business, and motorized beach vehicle enthusiasts had prudential standing under NEPA); *The Consolidated Delta Smelt Cases*, 717 F. Supp. 2d 1021, 1057-58 (E.D. Cal. 2010) (agribusinesses, among others, asserting injuries such as "increased groundwater consumption; land subsidence; reduction of air quality; destruction of family and entity farming businesses; and social disruption and dislocation" had standing).

undertaken by Lindsey Lopez and The Ark of Alamogordo, are nothing if not an effort to "enrich the understanding of the ecological systems and natural resources important to the Nation." 42 U.S.C. § 4321. While the trade shows are economically important, (*see, e.g.*, Goss Decl. ¶ 8), they are "also an integral part of USARK's conservation education mission." (*Id.* ¶ 19.) The prohibition on moving from one state where possession of a Burmese python, for example, is perfectly legal to another state where possession is lawful makes these education efforts difficult, if not impossible.

Defendants' arguments against these interests are not compelling. Indeed, the claim "that breeding [the endangered Indian python] subspecies [of Burmese python] 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[5]—is not an environmental interest," (Def. Mot. at 14), entirely misses the mark. As USARK's president Philip Goss's declaration clearly indicates, the Association's policy on "Conservation through viable captive reptile populations" is a scientific endeavor undertaken completely distinct from the pet trade. (*See* Goss Decl. ¶ 17.) The very idea is to preserve genetic diversity and natural characteristics to ensure that no species goes extinct by developing breeding techniques for not only Endangered Species Act listed species, but also vulnerable populations, such as recognized by the Convention on International Trade in Threatened and Endangered Species ("CITES"). Indeed, CITES itself endorses the principle of captive breeding programs, including those that "'sell surplus specimens to

[5] It must be remarked that Defendants appear here to concede one of Plaintiff's central claims with respect to the listed snakes that are bred for the pet trade. Specifically, that these captive bred animals do not have the survival capabilities of their wild cousins, even were if the climate outside of sub-tropical Florida suitable for these cold-blooded animals. As noted below, USARK is drawing a distinction between its pet trade sector and the scientific research sector of its members.

underwrite the cost of the captive breeding programme.'" *Born Free USA v. Norton*, 278 F. Supp. 2d 5 (D.D.C. 2003) (quoting CITES Resolution Conf. 5.10).

Defendant's next argument, that Plaintiff's members' scientific activities are not within NEPA's zone of interests, is more than a stretch. (Def. Mot. at 15.) Much of what we know about the natural world, including identifying and solving serious conservation problems, is learned through laboratory research. Scientific research has long been considered sufficient to confer NEPA standing when a major federal action threatens to interfere with that research. *See, e.g., Winter v. Natural Resources Defense Council, Inc.*, __ U.S. __, 129 S. Ct. 365, 377 (2008) (noting plaintiffs' reliance on their "scientific research on marine mammals" in their standing declarations to support NEPA claims). Defendants' caricature of Plaintiff's 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" (Def. Mot. at 15) – is not consistent with NEPA's broad concerns for the human environment.

Finally, Defendants' contention that USARK's efforts to assist in eradication of non-native snakes in southern Florida, hampered as they are by the listing and FWS' unlawful interpretation and application of the law, is not a conservation interest within NEPA's zone of interests is simply obtuse. (*See* Def. Mot. at 15-17.) First of all, USARK never claimed "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." (*Id.* at 16.) The Amended Complaint notes that imports account for only a small part of the reptile industry's revenue. (Am. Compl. ¶ 6.) An import-only ban would be a viable alternative to a rule that criminalizes the act of moving from Alaska to Maine with a tropical python in order to address a problem that is confined to extreme southern Florida.

The removal of invasive snakes from the Everglades is a conservation activity, and is one that is impeded by the Listing. The prohibition on transiting across state lines with Burmese python, as Kristofer Swanson noted in his declaration, makes it more difficult for those from other states who are experienced in locating and handling these animals to continue to participate in removal efforts. (*See* Swanson Decl. ¶¶ 8-9.) The fact that these voluntary efforts were subsidized by breeding and sales of the removed species is simply an example of a "market force monetary incentive" that helps to foster conservation efforts. *Safari Club Int'l v. Jewell*, 960 F. Supp. 2d 17, 59 (D.D.C. 2013). *Safari Club* was a case in which an association of Texas ranchers who raised endangered species of African antelope and offered for-profit opportunities to hunters to track and kill them were found to have NEPA standing. *See id.*; *see also Safari Club Intern. v. Salazar*, 852 F. Supp. 2d 102, 107 (D.D.C. 2012). It is fair to say the interests this Court found supported that standing in that case are much less compelling than those asserted here. In short, a hint of commercial interest does not put USARK outside NEPA's zone of interests.

"As the court observed in *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1075 (D.C. Cir. 1998), the salient consideration under the APA is whether the challenger's interests are such that they "in practice can be expected to police the interests that the statute protects." *Amgen, Inc. v. Smith*, 357 F.3d 103, 109 (D.C. Cir. 2004) (quoting 140 F.3d at 1075) (additional citation omitted). When briefing of this case finally begins, it will be clear that the environmental issues emanating from this first-ever listing of a species widely held in the pet trade that FWS overlooked are substantial. USARK fully intends to "police" the purposes for which NEPA was adopted.

D. USARK Has Constitutional Standing

USARK meets the associational standing requirements of Article III. At least one of its members would have standing to sue in his or her own right on each claim made; the interests USARK seeks to protect are germane to its purpose; and neither the claim asserted nor the relief requested requires that an individual member participate in this action. *See Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002). An "association has an obvious interest in challenging [agency] rulemaking that directly—and negatively—impacts its ... members." *American Trucking Ass'ns, Inc. v. Federal Motor Carrier Safety Admin.*, 724 F.3d 243, 247 (D.C. Cir. 2013). Association members have Article III standing to bring a case in their own right if they: (1) suffer or will suffer an "injury in fact" that is concrete and particularized and actual or imminent, as opposed to conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action; and (3) the injury will likely be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

The evidence USARK provided demonstrates conclusively that the Plaintiff meets every prong of the test for each claim asserted. As described above, USARK's members have strong conservation interests, and those interests are germane to Plaintiff's purpose. Moreover, those interests are injured by the agency action complained of here. Defendants' misconceived interpretation of the Lacey Act as banning interstate commerce and transportation of listed species, *see supra* Part I, means that owners of Burmese python can no longer participate with their animals in out-of-state educational activities. (*See, e.g.*, Cole Decl. ¶ 15; Goss Decl. ¶ 19.) Moreover, important research is not being conducted due to Defendants' actions. (*See, e.g.*, Diaz Decl. ¶¶ 10-12.) The listing has also harmed USARK's and its members' aesthetic interests. For

example, Lindsey Lopez's Burmese python died for lack of medical care because the nearest herpetological veterinarian was located across a state line. (Lopez Decl. ¶¶ 16-18.)

USARK has clearly met its burden of demonstrating constitutional standing appropriate to this stage of the litigation. "As the Supreme Court explained in *Defenders of Wildlife*, the burden of production a plaintiff must bear in order to show it has standing to invoke the jurisdiction of the district court varies with the procedural context of the case." *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002). "Thus, while a plaintiff must 'set forth' by affidavit or other evidence 'specific facts,' to survive a motion for summary judgment …, 'at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presume that general allegations embrace those specific facts that are necessary to support the claim.'" *Bennett*, 520 U.S. at 167-68 (citations omitted); *see also Rainbow/PUSH Coal. v. F.C.C.*, 396 F.3d 1235, 1239 (D.C. Cir. 2005) (quoting *Sierra Club*, 292 F.3d at 900) (emphasis added) (petitioners must submit "any affidavits or other evidence appurtenant thereto *at the first appropriate point in the review proceeding*'—either 'in response to a motion to dismiss for want of standing'" or with an opening brief).

At the pleading stage, "general factual allegations," as the Supreme Court put it is entirely sufficient for a pleading. As the D.C. Circuit noted in *Rainbow/PUSH*, the Government's Motion to Dismiss makes this the "first appropriate point" for USARK to come forward with "affidavits or other evidence" to support the allegations. 396 F.3d at 1239 (internal quotes and citation omitted). Accordingly, Plaintiff has produced six Declarations supporting its claim of Article III and prudential standing.

For administrative challenges in federal district court, "[a]t the pleading stage, general factual allegations ... may suffice, for on a motion to dismiss we 'presum[e] that general

allegations embrace those specific facts that are necessary to support the claim.'" *Lujan*, 504 U.S. at 561 (citation omitted). Beyond this, USARK has come forward with specific evidence of injury, causation, and redressability, which it will have the opportunity to supplement once the Government produces the administrative record and the case proceeds to summary judgment.

CONCLUSION

Plaintiff has more than sufficiently shown that its claims are within NEPA's zone of interests and that it otherwise has constitutional standing. The quantum of evidence provided is beyond what is required at this stage. Therefore, this Court should allow the case to proceed to summary judgment, where Plaintiffs will adduce additional evidence. Accordingly, for reasons stated above, USARK respectfully requests that this Court deny Defendants' Motion to Dismiss.

Dated: June 11, 2014

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES ASSOCIATION OF REPTILE KEEPERS, INC., Plaintiff, - vs. - THE HONORABLE SALLY JEWELL, *et al.*, Defendants.	Civ. No.: 13-2007-EGS

[PROPOSED] ORDER

For reasons stated in the United States Association of Reptile Keepers' Opposition to Defendant's Motion to Dismiss, it is hereby ORDERED this ___ day of _____, 2014, that the Motion to Dismiss is DENIED.

Dated: _____

_____
Hon. Emmet G. Sullivan
United States District Judge