IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES ASSOCIATION OF REPTILE KEEPERS, INC.,

CAROLINE SEITZ
3450 Reedy Drive
Annandale, VA 22003,

DR. RAUL EDUARDO DIAZ, JR.
42107 Paseo Rayo Del Sol
Temecula, CA 92591,

BENJAMIN RENICK
240 Highway RB
Saint Charles, MO, 63304,

MATTHEW EDMONDS
3416 Primrose Court #104
Palm Beach Gardens, FL 33410,

Plaintiffs,

- vs. -

THE HONORABLE SALLY JEWELL, *et al.*

Defendants.

Civ. No.: 13-2007

SECOND AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Dated: March 23, 2015

SHAUN M. GEHAN
D.C. Bar No. 483720

THE LAW OFFICE OF SHAUN M. GEHAN
3050 K Street, N.W. – Suite 400
Washington, D.C. 20007
Telephone: (202) 342-8469
Facsimile: (202) 342-8451

DAVID E. FRULLA
D.C. Bar No. 414170

PAUL C. ROSENTHAL
D.C. Bar No. 235242
KELLEY DRYE & WARREN LLP
3050 K Street, N.W. – Suite 400
Washington, D.C. 20007
Telephone: (202) 342-8400
Facsimile: (202) 342-8451

Attorneys for Plaintiffs

I. INTRODUCTION

1. Through this Second Amended Complaint, Caroline Seitz, Dr. Raul Diaz, Matthew Edmonds, and Benjamin Renick join United States Association of Reptile Keepers ("USARK") as Plaintiffs. Further, Plaintiffs extend claims brought in USARK's Complaint and First Amended Complaint to cover Defendants' new rule, entitled, *Injurious Wildlife Species; Listing Three Anaconda Species and One Python Species as Injurious Reptiles*, which was promulgated by Defendants, the Honorable Secretary Sally Jewell and the United States Fish and Wildlife Service (collectively, "FWS"), on March 10, 2015. 80 Fed. Reg. 12702 (March 10, 2015). Plaintiffs also add two m new Counts, as set forth below.

2. The March 2015 final rule completes the rulemaking process initiated on March 12, 2010, via a proposed rule to add nine non-native species of constricting snakes to the list of "injurious" species under the authority of the Lacey Act, 18 U.S.C. § 42. 75 Fed. Reg. 11808 (March 12, 2010). Those nine species were: *Python molurus* (a category in which FWS includes both Burmese and Indian pythons, although FWS has listed the Indian python as a separate species under the Endangered Species Act and the scientific consensus is that these are two distinct species), reticulated python (listed by FWS as *Broghammerus reticulatus* or *Python reticulatus*, but now recognized as *Malayopython reticulatus*), Northern African python (*Python sebae*), Southern African python (*Python natalensis*), boa constrictor (*Boa constrictor*), yellow anaconda (*Eunectes notaeus*), DeSchauensee's anaconda (*Eunectes deschauenseei*), green anaconda (*Eunectes murinus*), and Beni anaconda (*Eunectes beniensis*). 75 Fed. Reg. 11808 (March 12, 2010).

3. This rulemaking process was partially completed on January 23, 2012, when Defendants promulgated a rule entitled *Injurious Wildlife Species; Listing Three Python Species*

and One Anaconda Species as Injurious. 77 Fed. Reg. 3330 (Jan. 23, 2012). Plaintiff USARK filed suit challenging this rule on December 18, 2013, and continues this challenge in this Second Amended Complaint.

4. With promulgation of the March 2015 rule, Defendants have now added four more of the nine species originally proposed to the list of injurious species under the Lacey Act, 18 U.S.C. § 42 ("Section 42"). Of the nine species proposed for listing, FWS ultimately has listed all but the boa constrictor.

5. Under the Lacey Act, designating a species as "injurious to human beings, to the interests of agriculture, horticulture, forestry, or to wildlife or the wildlife resources of the United States" results in a bar to its "importation into the United States, 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 between the continental United States, the District of Columbia, Hawaii, the Commonwealth of Puerto Rico, or any possession of the United States." *Id*. § (a)(1).

6. In the two rules at issue, however, FWS purports to prohibit not only these snakes' importation into the U.S. and commercial shipments between the continental United States and other listed jurisdictions, as provided by law, but also "transportation between[] the States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States by any means whatsoever …, except by permit for zoological, educational, medical, or scientific purposes …." 77 Fed. Reg. at 3333; *see also* 80 Fed. Reg. at 12708 (same). In other words, as to the listed species, FWS purports to prohibit their personal transportation and movement in interstate commerce between and among the continental states.

7. Despite such a long lag between the 2010 proposed and 2015 final rule, Defendants prescribed the new listings to become effective in thirty days. That is, Defendants

have now given reticulated python and green anaconda owners only from March 10, 2015, to April 9, 2015, to adjust to the new restrictions FWS claims attend an injurious species determination. Thousands of these snakes and their eggs are either owned for commercial, scientific, or personal purposes in the United States.

8. Plaintiffs challenge the two rules at issue on several grounds. The first alleges that Defendants act without authority by purporting to disallow certain interstate movements of the listed snakes. The second counts arises under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, and turns solely on the proper construction of the Lacey Act and FWS' regulations. Specifically, whether given the law's plain terms and legislative history, Defendants can criminally or civilly penalize Plaintiffs under Section 42 for transporting the listed snakes among the forty-nine (49) continental states, excluding the District of Columbia, for commercial or non-commercial purposes.

9. Plaintiffs also challenge Defendants' compliance with the requirements of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370e, and the Regulatory Flexibility Act ("RFA"), 5 U.S.C. Chapt. 6. Among other things, Defendants failed to consider alternatives with similar or greater environmental benefits or take the "hard look" at the rules' bases and consequences NEPA requires. Nor did Defendants fulfill its RFA duty to consider meaningful alternatives to minimize adverse economic impacts on small entities, such as limiting the prohibition to imports only or even providing an adjustment period of sufficient length to allow small breeding operations time to minimize financial losses before the 2015 rule's effective date.

10. Finally, Plaintiffs seek relief for Defendants' arbitrary and capricious decisionmaking in violation of the Administrative Procedure Act, 5 U.S.C. § 706. For instance,

the Secretary found certain of these snakes to be injurious to the Nation's interests even though her own analysis showed merely potentially suitable habitat in one to four states or territories, all of which already prohibit or effectively control the species. Concurrently, in the 2015 rule, the Secretary relied on those same state regulatory systems and cooperative efforts of private organizations such as USARK in deciding not to list the boa constrictor.

11. For these reasons, as detailed further below, Defendants have acted unlawfully in promulgating the two rules at issue, and these unlawful actions have caused injury to Plaintiffs' economic, social, and conservation interests. These injuries can be redressed by an order of this Court.

II. PARTIES

12. Plaintiff United States Association of Reptile Keepers is a non-profit membership organization representing reptile breeders, hobbyists, conservationists, collectors, academics, scientists, and businesses that provide the reptile community with equipment, feed, transportation, and specialized veterinary and other services. USARK's mission is to support scientific research, provide public education, and advocate for conservation of all manner of reptile species. The organization promotes responsible private ownership of, and trade in, reptiles, as well as promulgating and endorsing responsible caging standards, sound husbandry, escape prevention protocols, and an integrated approach to vital conservation issues. USARK aims to facilitate cooperation between government agencies, the scientific community, and the private sector in order to produce policy proposals that will effectively address important husbandry and conservation issues, including supporting efforts to prevent the introduction of non-native species of amphibians and reptiles and to help eradicate those that may have become

established. USARK and its members have been and will continue to be harmed by the illegal actions complained of herein.

13. Plaintiff Caroline Seitz is a member of USARK, a lifetime member of the Virginia Herpetological Society, a past member of the Wildlife Rescue League, a licensed wildlife rehabilitator, and president and environmental educator for Reptiles Alive! LLC, a Virginia-based educational and entertainment business which conducts environmental programs for schools, libraries, scout troops, government agencies, and a variety of community organizations throughout Virginia, Maryland, West Virginia, and the District of Columbia. These programs included large constricting snakes including, up until the time of the listing at issue, the Burmese python. Because of Defendants' unlawful actions, Ms. Seitz had to re-locate three of her educational Burmese pythons to a non-educational sanctuary for exotic animals, which was personally traumatizing. Due to the listing of the Burmese python, Ms. Seitz and Reptiles Alive! can only conduct educational activities with their remaining Burmese python within the Commonwealth of Virginia as the uncertainty and administrative burden of seeking individual permits from FWS to allow transport across state lines to conduct such programs is administratively and economically infeasible. Further, even if FWS would grant such a permit, any listed snakes used in educational programs sponsored by Reptiles Alive! held outside the Commonwealth would have to be kept in special containers, depriving attendees of the opportunity to handle and interact with these animals. Ms. Seitz has been and will continue to be harmed by the illegal actions complained of herein.

14. Plaintiff Dr. Raul E. Diaz, Jr., is an assistant professor of biology at La Sierra University and a Research Associate at the Natural History Museum of Los Angeles County. Dr. Diaz is also a webmaster and chair for the Society for the Study of Amphibians and Reptiles; a

member of the Board of Governors for the American Society of Ichthyologists and Herpetologists; Associate Editor for the *Journal of North American Herpetology*; Associate Editor for *Herpetological Review*; Associate Editorial Board member for *Asian Herpetological Research Journal*; Associate Editor for *Amphibian & Reptile Conservation*; and member of (1) the Society for Developmental Biology, (2) the Society for the Study of Evolution, and (3) the JB Johnston Club for Evolutionary Neuroscience. Dr. Diaz conducts research on various biological aspects of large constricting snakes, including studying genetic mutations. He has been harmed by Defendants' unlawful prohibition on importation of, interstate commerce in, and transportation of these constricting snakes because it has impeded his ability to obtain captive and wild gravid Burmese python, reticulated python, and yellow anaconda females that are most useful for his research. For instance, breeders who have supplied Dr. Diaz with specimens in the past have stopped breeding Burmese pythons and the other listed snakes in response to the 2012 rule. Wild specimens of reticulated python from their native Indonesia will also be impossible to obtain as that country does not allow for snake DNA, tissue, or specimens (dead or preserved) to leave the country, but does allow for exports of live animals for the pet trade. Even when appropriate rare genotypes are produced within California or available from elsewhere (assuming FWS would grant the necessary permits), the listing of these species has greatly reduced the number of breeders, increasing the cost of obtaining specimens to prohibitive levels. Finally, Dr. Diaz has a personal collection of Burmese pythons, reticulated pythons, and yellow anacondas. Because of the Defendants' unlawful actions, Dr. Diaz's opportunities for professional advancement are also diminished because he will not be able to relocate to another state with his personal animals and laboratory specimens. Dr. Diaz has been and will continue to be harmed by the illegal actions complained of herein.

15. Plaintiff Matthew Edmonds is a resident of Palm Beach Gardens, Florida who breeds reticulated pythons as a hobby, maintains these animals as pets, conducts educational programs, and engages in some sales to cover the substantial costs of ownership. Mr. Edmonds has owned snakes, including large constricting snakes, since he was five years old and has deep affection for the reticulated pythons in his collection. Mr. Edmonds has concrete plans to relocate to Texas in the next six months to take a new job. With the listing of these species as injurious, Mr. Edmonds will no longer be able to conduct out-of-state educational programs or continue attending several trade shows annually with his pythons beyond Florida. He will also no longer be able to subsidize his personal collection through interstate sales. Most troubling, Defendants' actions will force Mr. Edmonds to choose between turning down the job opportunities in Texas or abandoning his collection of reticulated python and suffering significant emotional injury. Mr. Edmonds has been and will continue to be harmed by the illegal actions complained of herein.

16. Plaintiff Benjamin Renick is owner of Renick Reptiles Inc. of New Florence, Missouri, a company that breeds and sells, in interstate and foreign commerce, reticulated python and green anaconda morphs. Prior to the March 2015 rule, Mr. Renick's collection of reticulated pythons was worth an estimated $1.5 million. This value has diminished by several hundreds of thousands of dollars due to Defendants' restriction on interstate commerce in these species. Also, Renick Reptiles has already lost nearly $500,000 in pre-sales for tyrosinase positive albino green anacondas (a hypomelanistic pigmented morph), a project with over seven years invested. Only five percent of Mr. Renick's sales are within Missouri, a state which lacks a designated port for exports. Without a designated port, Mr. Renick's company will not be able to export any reticulated pythons in the future. Moreover, he will either have to continue to bear the expense

of maintaining his substantial inventory, either by donation to a very limited universe of suitable individuals or institutions, or euthanasia. The significant likelihood that he will have to humanely kill some of the animals he has spent years breeding is causing and will cause Mr. Renick severe emotional distress. This business is Mr. Renick's full-time job and source of economic support for his family. Mr. Renick has been and will continue to be harmed by the illegal actions complained of herein.

17. Defendant, the Honorable Susan Jewell, is the Secretary of the U.S. Department of the Interior. Defendant, by and through her designees at FWS, undertook the illegal and unauthorized actions which are challenged in this case. Secretary Jewell is sued solely in her official capacity.

18. Defendant U.S. Fish and Wildlife Service is a federal agency within the Department of the Interior and to which Defendant Secretary of the Interior has delegated the authority to administer the Lacey Act.

III. JURISDICTION AND VENUE

19. USARK brings this action under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, the Small Business Regulatory Enforcement and Fairness Act ("SBREFA"), 5 U.S.C. Chapt. 6, and NEPA, 42 U.S.C. §§ 4321-4370e.

20. This court has subject matter jurisdiction pursuant to 5 U.S.C. § 702 (APA); 5 U.S.C. § 611 (SBREFA); and 28 U.S.C. § 2201 (Declaratory Judgment Act). The relief request is authorized by 28 U.S.C. § 2201 (declaratory judgment), 28 U.S.C. § 2202 (injunctive relief), 5 U.S.C. § 702 (declaratory and injunctive relief), and 5 U.S.C. § 611 (injunctive relief).

21. This Court also has jurisdiction pursuant to 28 U.S.C. § 1331, which grants the district courts "original jurisdiction of all civil actions arising under the … laws … of the United States."

22. Venue lies in this Court pursuant to 28 U.S.C. § 1391(e), as the Defendant Secretary of Interior is an officer of the United States and FWS is an agency of the United States.

23. An actual, justiciable controversy exists between the parties within the meaning of 28 U.S.C. § 2201.

24. The Federal Government has waived sovereign immunity in this action pursuant to 5 U.S.C. § 702.

25. Plaintiffs have exhausted all administrative remedies, the agency action challenged is final and ripe for review, and, as shown herein, USARK has associational standing to bring these claims because "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organizations' purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

IV. STATUTORY BACKGROUND

A. THE LACEY ACT AND ITS IMPLEMENTING REGULATIONS

1. The Law's Terms and FWS' Interpretation

26. The Lacey Act was first adopted in 1900. It grants the Secretary the authority, employed in the regulations at issue, to declare reptiles (among other types of animals) to be "injurious" to "interests in agriculture, horticulture, forestry, or to wildlife or the wildlife resources of the United States." In relevant part, the law provides:

> The importation into the United States, 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 between the continental United States, the District of Columbia, Hawaii, the Commonwealth of Puerto Rico, or any possession of the United States, of [certain enumerated animals]; and such other species of wild mammals, wild birds, fish (including mollusks and crustacea), amphibians, reptiles, brown tree snakes, or the offspring or eggs of any of the foregoing which the Secretary of the Interior may prescribe by regulation to be injurious to human beings, to the interests of agriculture, horticulture, forestry, or to wildlife or the wildlife resources of the United States, is hereby prohibited….

18 U.S.C. § 42(a)(1) (hereafter, "Section 42").

27. Subsection (b) provides for civil fines, up to six months in prison, or both for any persons found guilty of violating Section 42 "or any regulation issued pursuant thereto." *Id.* § (b). Plaintiff USARK's members and the individual Plaintiffs therefore face the real and imminent threat of criminal prosecution for engaging in any of the acts the law and regulations prohibit. As such, there is an actual controversy between the parties within the meaning of the Declaratory Judgment Act.

28. The two rulemakings at issue each amend 50 C.F.R. § 16.15, "Importation of live reptiles or their eggs," by adding the names of the eight species of snakes to the regulations. *See* 77 Fed. Reg. at 3366; 80 Fed. Reg. at 12745. Those regulations contain a prohibition on "transportation" of any of the listed reptiles. 50 C.F.R. § 16.15.

29. Defendants' Lacey Act regulations also contain a provision entitled "General restrictions" which, in relevant part, provides:

> 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 interests of forestry, agriculture, and horticulture, and to the welfare and survival of the wildlife or wildlife resources of the United States; *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 ….

Id. § 16.3 (emphasis added). This regulation was first adopted in essentially the same form in 1965. *See* 30 Fed. Reg. 9,640 (Aug. 3, 1965).

30. As interpreted by FWS, this language bars all conveyance of listed species, whether for personal or commercial purposes and by any means, between and among all political entities – states, districts, territories, and possessions – subject to the authority of the United States.

31. The regulation's phrase "between the continental United States, the District of Columbia, Hawaii, the Commonwealth of Puerto Rico, or any territory or possession of the United States" is drawn directly from Section 42. However, FWS' interpretation of this language, as expressed in the preambles of the 2012 and 2015 rules, *see e.g.*, 80 Fed. Reg. at 12702 ("[I]nterstate transportation between States … is prohibited"), is inconsistent with the law's plain meaning and congressional intent, as explained below.

2. The Geographic Scope of the Lacey Act's Prohibitions

32. When the Lacey Act was amended in 1960, Congress prohibited both "importation into the United States, any territory of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States" and "shipment between the continental United States, the District of Columbia, Hawaii, the Commonwealth of Puerto Rico, or any possession of the United States." 18 USC §§ 42(a)(1). These two different formulations are purposeful and must be given effect. For example, "United States" in the importation provision means all states, while Congress listed Hawaii, as distinct from the "continental United States," as a separate political entity "between" which shipments are disallowed. Congress explicitly did not bar shipments between the 49 continental states.

33. In fact, in the same 1960 bill, Congress also amended the section of the Lacey Act that covers conveyance of unlawfully obtained wildlife—the section which, until this bill, had also covered movement of injurious animals. Public Law 86-702, 74 Stat. 753 (Sept. 2, 1960), *codified at* 18 U.S.C. § 43 (1964) (hereafter, "Section 43").[1] Here, Congress described a completely different and more sweeping range over which movements disallowed under Section 43 apply; to wit, "to or from *any State* or territory." *Id.* (emphasis added). This language is similar to that used in the original Lacey Act, which forbade transport of injurious species by common carrier "from *one State or Territory* to *another State or Territory*, or from the District of Columbia or Alaska." C. 553, sec. 3, 31 Stat. 188 (May 25, 1900), *later codified at* 18 U.S.C. § 43 (1976 ed.).

34. The use of different language to describe the geographic application of Section 42's importation and shipment provisions, not to mention the distinct variation used in Section 43, is purposeful and must be given effect. *See Keene Corp. v. United States*, 508 U.S. 200, 208 (1993). In the rules at issue, however, FWS purports to apply the geographic scope of the importation and shipment provisions as if they were conterminous.

35. The Lacey Act's shipment restriction has long been interpreted by FWS and others, consist with the law's words, as permitting interstate commerce in listed species between and among the 49 continental states. For example, in a 1977 proposed rule to expand the list of injurious species, the Service stated: "Pursuant to the statute, the proposed regulations would also prohibit the shipment of injurious 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." 42 Fed. Reg. 12972, 12974 (March 7, 1977). During

[1] This section was repealed by the Lacey Act Amendments of 1981, Pub. L. 97-79, 95 Stat. 1073 (Nov. 16, 1981), and recodified in Title 16, United States Code. *See* 16 U.S.C. §§ 3371-3378.

congressional hearings on an earlier version of this proposed rule, FWS special agent-in-charge Richard Parson explained that "there is no restriction that we find in section 42 of the Lacey Act to interstate shipments, with the possible exception of restrictions from areas off the continental United States, such as Puerto Rico, the Virgin Islands, and Hawaii." Report on Hearings on Proposed Injurious Regulations, Serial No. 93-46, at 151 (Dec. 12, 1974). This interpretation of the law's effect was adopted by FWS long after promulgation of the 1965 regulation.

36. The fact that the Lacey Act does not bar interstate shipments of injurious wildlife between each of the continental states has been repeatedly noted over the years. In a 1993 report, the U.S. Office of Technical Assessment ("OTA") stated: "Interstate transport of injurious fish and wildlife listed under the Lacey Act, such as the zebra mussel (*Dreissena polymorpha*), is not prohibited by Federal law." OTA, *Harmful Non-Indigenous Species in the United States*, OTA-F-565, at 165 (Sept. 1993). OTA and others have seen this as a "weakness" in the law. *See, e.g.*, Eric Biber, *Exploring Regulatory Options for Controlling the Introduction of Non-Indigenous Species to the United States*, 18 VA ENVTL LJ 375, 401 (1999) (opining the "between the continental United States" language "might provide authority to regulate commerce of [non-indigenous species] between the mainland U.S. and the insular possessions, but not the spread of NIS within the United States.").

B. THE NATIONAL ENVIRONMENTAL POLICY ACT

37. NEPA is "our basic national charter for protection of the environment." 40 C.F.R. § 150.1(a). Enacted in 1970, NEPA establishes procedures to ensure agencies: (1) take a "hard look" at the environmental consequences of their actions before these actions occur by ensuring that the agency carefully considers detailed information concerning significant environmental impacts; and (2) make relevant information available to the public so that it may also play a role

in both the decision making process and the implementation of that decision. *See* 40 C.F.R. § 150.1.

38. NEPA and the regulations promulgated thereunder by the Council on Environmental Quality ("CEQ") require that all federal agencies prepare an environmental impact statement ("EIS") for all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); *see also* 40 C.F.R. § 1501.4.

39. The fundamental purpose of an EIS is to force the decision-maker to take into account NEPA's policies and goals before the federal government takes a particular action. 40 C.F.R. § 1502.1. An EIS analyzes the potential environmental impacts, alternatives and mitigation opportunities for major federal actions.

40. An EIS must provide a detailed statement of: (1) the environmental impact of the proposed action; (2) any adverse environmental effects that cannot be avoided should the proposed action be implemented; (3) alternatives to the proposed actions; (4) the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; and (5) any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented. 42 U.S.C. § 4332(C).

41. An EIS must "inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1. NEPA also requires federal agencies to analyze the direct, indirect, and cumulative effects of the proposed action. 40 C.F.R. §§ 1508.7 & 1508.8. "Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative," and "may also include those resulting from actions

which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial." *Id.* § 1508.8.

42. In addition to alternatives and impacts, NEPA requires agencies to consider mitigation measures to minimize the environmental impacts of the proposed action. *Id.* § 1502.14 (alternatives and mitigation measures); *id.* § 1502.16 (environmental consequences and mitigation measures).

43. An agency may first prepare a detailed Environmental Assessment ("EA") to determine whether the action may significantly affect the environment and whether it requires a full EIS. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.9. An EA is "a concise public document" that serves, among other things, to "provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." *Id.* As with any document prepared under NEPA, an environmental assessment is intended to "ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b).

44. Significance is based upon the "intensity" and "context" of the action. 40 C.F.R. § 1508.27. "Context" refers to the geographic and temporal scope of the agency action and the interests affected. *Id.* § (a). "Intensity" addresses the severity of the impacts. *Id.* § (b). Factors relevant to intensity include: the degree to which the effects on the quality of the human environment are likely to be highly controversial; the degree to which the action may adversely affect an endangered or threatened species or its critical habitat; the presence of "uncertain impacts or unknown risks;" whether the action is "related to other actions with individually insignificant but cumulatively significant effects;" and whether the project "threatens a violation" of other laws. *Id.*

45. If, after preparing an EA, the agency determines an EIS is not required, the agency must provide a "convincing statement of reasons" why the project's impacts are insignificant and issue a Finding of No Significant Impact or "FONSI." 40 C.F.R. §§ 1501.4, 1508.9 & 1508.13.

C. REGULATORY FLEXIBILITY ACT ("RFA")

46. The RFA requires any agency developing a rule for which the APA or any other law requires a "general notice of proposed rulemaking" to publish an "initial regulatory flexibility analysis" ("IRFA") which "shall describe the impact of the proposed rule on small entities" in conjunction with such proposed rule. 5 U.S.C. § 603(a).

47. A "small entity" for RFA purposes includes a small business, which has "the same meaning as the term 'small business concern' under section 3 of the Small Business Act." *Id.* § 601(3). A small business concern is defined as "one which is independently owned and operated and which is not dominant in its field of operation." 15 U.S.C. § 632(a)(1).

48. In conjunction with a final rule, the agency must publish a "final regulatory flexibility analysis" ("FRFA") which includes:

> (1) a statement of the need for, and objectives of, the rule;
>
> (2) a statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;
>
> (3) the response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments;
>
> (4) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;

> (5) a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and
>
> (6) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

5 U.S.C. § 604(a).

49. A FRFA is subject to judicial review under the standards of review established by the APA. *Id.* § 611(a)(1).

VI. FACTUAL ALLEGATIONS

A. PROCEDURAL HISTORY

50. Due to concerns relating to Defendants' assertions regarding the effects of the listing on interstate commerce and transportation within the continental United States, Defendants' lax and selective science, inadequate NEPA and Regulatory Flexibility Act analyses and compliance, and other reasons stated herein and contained in the record, USARK filed suit challenging the 2012 final rule in this Court on December 18, 2013.

51. On March 21, 2014, FWS filed a Motion to Dismiss USARK's Complaint.

52. On April 29, 2014, Judge Emmet G. Sullivan entered a Minute Order denying Defendants' Motion to Dismiss without prejudice and granting USARK leave to amend its Complaint.

53. On May 9, 2014, USARK filed its First Amended Complaint, which Defendants moved to dismiss as to all but one count on May 23, 2014.

54. Briefing on Defendants' Second Motion to Dismiss was completed on June 23, 2014.

55. On July 18, 2014, USARK's case was transferred to Judge Reggie B. Walton by consent. On December 9, 2014, USARK's case was then randomly reassigned to Judge Randolph D. Moss.

B. PLAINTIFFS' INTERESTS ADVERSELY IMPACTED BY THE RULES

56. The herpetological community in the United States encompasses a wide variety of interests, including commercial, environmental, educational, academic, bio-medical, and personal interests.

57. As a result of these rules, individuals who own one or more of the listed species of constricting snakes, whether for commercial purposes, scientific research, or personal interest, may no longer move to another state without first selling, donating, or killing their animals. Due to Defendants' unlawful interpretation of the law, even local transit across a state line is a crime, imposing an unconstitutional burden on the right travel,. For instance, although ownership and possession is lawful in both states, a reticulated python owner in Maryland will lose access to the only local herpetological veterinarian because that specialist is in Virginia.

58. In terms of the commercial interests impacted by the rules, although the large constricting snake segment represents a niche within the larger reptile industry, and the United States pet industry at large, many hundreds of small businesses rely financially on breeding and selling these animals. In particular, breeders earn substantial revenues from "morphs," or snakes selectively bred over many years and generations to obtain unique genetic characteristics. These include distinctive colors and patterns not typically found in nature; different size characteristics, such as dwarfism; or other traits. Morphs can sell for tens of thousands of dollars each.

59. The commercial sector is overwhelmingly driven by captive-bred morphs and common species sold domestically and for export. Only a small portion of revenues are derived from imports of wild snakes, which are generally lower in value.

60. Moreover, the market for large constricting snakes is depends almost entirely on interstate commerce among the continental states where sale and ownership is lawful. The biggest economic drivers are the literally hundreds of large and small trade shows held throughout the country each year where breeders and hobbyists bring, show, and sell their animals.

61. The ability to transport snakes is also vital to the well-being of the market. For instance, many men and women in the armed services own large reptiles, including the species at issue. Military personnel are subject to frequent reassignments, and thus are particularly dependent on the need to move with their pets across state lines. More generally, many individuals are unwilling to make a large investment in one of the listed constricting snakes because ownership limits career opportunities and domicile choices or because essential services are only located in a nearby state.

62. An economic study USARK commissioned demonstrated that the vast majority of reptile businesses are small, individual or family-run entities, that the reptile industry as a whole generated revenues of $1.0 billion to $1.4 billion per year, and that 4.7 million households evenly distributed throughout the United States own one or several reptile species. The most recent study from the American Pet Products Association in 2013-2014 found that now 5.6 million households in the U.S. have pet reptiles. Annual revenues generated by the large constricting snake segment exceed $100 million.

63. In terms of educational, environmental, research, and academic interests, conservation biologists and research scientists in the field of herpetology rely on the trade and free movement of the species at issue. These researchers and scientists, among other things, engage in public education; conduct research to better understand these animals' nature and biology; conduct genetic research with applications for human and animal health and welfare; and develop captive breeding techniques for large constricting snakes which are, or may become, threatened with extinction in their native ranges.

64. Some researchers, conservationists, and scientists fund their research and conservation efforts through the breeding and sales of morphs and common varieties of these species.

65. Researchers and academics also rely on private commercial breeders and hobbyists to obtain specimens and animals, their eggs, and embryos. New organisms in basic scientific research are key in future bio-medical discoveries. For example, use of commercially imported reticulated pythons from across their natural range has led to the discovery of diverse body patterns among these snakes and large differences in body sizes. Study of genetic and phenotypic diversity such as gigantism and dwarfism in wild and captive-bred Burmese python and reticulated python is being undertaken to increase our basic understanding of body plan design across species. The first complete sequence of any snake genome belongs to the Burmese python, making this species ideal for bio-medical research and other studies. These animals may also provide key connections with other developmental pathways in the lab, leading to discoveries with applications for human health.

66. Environmental educators also rely on the ability to transport the listed snake species across state lines on regional or national bases to conduct their programs. Live

interactions with the listed snake species are an integral component of these educational programs.

67. Finally, there are small businesses that utilize skin sheds of animals such as the Burmese and reticulated python to create "leather" for use in textile products. This technological breakthrough reduces, and could potentially eliminate, the need for hunting and killing these animals in the wild. This sector of the industry, however, depends of the continued viability of large scale breeders to survive.

C. IMPACT OF THE CONTROVERSIAL RULES AT ISSUE

68. Of the nine species initially proposed for designation as injurious reptiles, the Burmese python, reticulated python, and boa constrictor are the major species in trade. Some of the other species are not in trade at all and, in the case of DeSchauensee's and Beni anaconda, are not known to ever have been imported into or exist within the United States.

69. The proposal to list the nine species as injurious and to ban their interstate transport itself caused a contraction in the market for these animals resulting in millions of dollars in economic losses to the reptile industry. These losses were due to buyers' reluctance to spent substantial sums on a pet or broodstock in light of FWS' proposal to restrict their movement among continental states.

70. The 2012 listing of the original four species caused the Burmese python market to collapse, putting many of USARK's members and others in an agonizing position of either bearing the significant costs of maintaining broodstock and offspring the market for which had ceased to exist, or to minimize losses by giving away or euthanizing animals representing hundreds of thousands of dollars in investment and to which they were emotionally attached.

71. Most businesses that are particularly dependent on breeding large constricting snakes and have substantial investments in developing new forms over the course of years and decades will not be able to continue to operate following the 2015 rule. This rule compounds earlier losses from the listing of the Burmese python and other snakes. Breeders specializing in reticulated python and green anaconda morphs that were in development long prior to the 2010 proposed rule hold inventories of animals whose economic value has been much reduced. These inventories must either be liquidated by the rule's April 9, 2015, effective date, causing great financial loss and personal anguish, or maintained at great personal expense.

72. Some of these reticulated python and green anaconda breeders have had orders canceled in the wake of the new listing. Some orders cannot be fulfilled by the effective date because it is currently too cold to ship these animals, eggs are currently incubating, or females are gravid. For those designated for export, the necessary permits required by the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES") cannot be obtained before April 9, 2015. Both the reticulated python and green anaconda are listed on CITES Appendix II because they are depleted in parts of their native range.

73. Plaintiff Matthew Edmonds, who breeds reticulated pythons and has a substantial collection of these animals, has definitive plans to relocate from Palm Beach Gardens, Florida, to Texas in the next six months. He is currently re-evaluating these plans in light of this species' listing. Even though Texas allows reticulated python possession and ownership, Mr. Edmonds will either have to forego better paying and more satisfying career opportunities being offered or divest himself of animals he loves.

74. Moreover, only a handful of breeders and only one major breeder of reticulated python and green anaconda are located in a state with a "designated port," one through which the

export of live animals is permitted. Breeders not located in a state with a designated port are denied the opportunity to earn revenues from the export of their animals.

75. According to the economic report USARK commissioned, the listing of nine species of snakes was estimated to result in total economic losses in first year revenues of between $76 million and $104 million. Total economic losses over a ten year period from the proposed action, assuming historic growth patterns, range from $505 million to $1.2 billion. Actual losses from the two listings of the types described above are substantial and still accruing, but are not known with certainty.

D. THE FINAL RULES AND THEIR BASIS

76. On January 23, 2012, FWS issued the first challenged regulation, partially finalizing FWS' original proposal to list as injurious a total of nine species of constricting snakes. The final rule brought the Burmese, Northern African, and Southern African python, along with yellow anaconda, under the Lacey Act's proscriptions. 77 Fed. Reg. at 3330. Then, on March 10, 2015, the Service added the commercially important reticulated python and three species of anacondas—green, Beni, and DeSchauensee's—to its list of injurious reptiles. 80 Fed. Reg. at 12702.

77. Defendants decided not to list the most widely held and largest selling constricting snake, the boa constrictor, at the time. *Id.* Rather, they chose to rely on cooperative efforts between the federal government, states, and private parties, such as USARK, to control the release and potential establishment in the wild of boa constrictors. *Id.* at 12704-06.

78. The 2010 proposal to list these snakes was the very first instance in which Defendants used their Lacey Act authority to list animals that were both in the pet trade and widely held throughout the United States as pets as injurious. As such, the proposal generated a

significant amount of controversy, drawing over 85,000 comments. Even personnel within FWS recognized this was a significant extension in the use of the Lacey Act, and some questioned whether use of this law was appropriate in this instance.

79. With respect to the effect of these final rules, FWS declared:

> As of the effective date of the listing, therefore, their importation into, or transportation between, the States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States by any means whatsoever is prohibited, except by permit for zoological, educational, medical, or scientific purposes (in accordance with permit regulations at 50 CFR 16.22), or by Federal agencies without a permit solely for their own use, upon filing a written declaration with the District Director of Customs and the U.S. Fish and Wildlife Service Inspector at the port of entry. This rule does not prohibit intrastate (within State boundaries) transport of the listed constrictor snake species.

77 Fed. Reg. at 3333; *see also* 80 Fed. Reg. at 12708 (same). In other words, with respect to the species it has listed, FWS purports to create a federal criminal violation for personal transportation to or from any state, the District of Columbia, and U.S. possessions and territories, as well as for their movement in interstate commerce among continental states.

80. FWS based its decision to list these species as injurious on a finding that "[t]he best available information indicates that this action is necessary to protect the interests of human beings, agriculture, wildlife, and wildlife resources from the purposeful or accidental introduction and subsequent establishment of these large nonnative constrictor snake populations into ecosystems of the United States." 77 Fed. Reg. at 3333; *see also* 80 Fed. Reg. at 12702 (same).

81. The finding with respect to the listed species' potential for "subsequent establishment" was largely premised on a study by the United States Geological Survey ("USGS") entitled "Giant Constrictors: Biological and Management Profiles and an Establishment Risk Assessment for Nine Large Species of Pythons, Anacondas, and the Boa

Constrictor," often referred to as "Reed and Rodda 2009" after its authors and year of publication. 77 Fed. Reg. at 3333; 80 Fed. Reg. at 12703.

82. This study employed a novel and highly imprecise climate matching model based, *inter alia*, on mean monthly temperatures in the species' native range and locations in the United States. These snakes are mostly tropical and sub-tropical species. The Burmese python is the sole exception, as its native range includes some temperate areas, although the extent of its habitation of such regions is the subject of scientific dispute. Nonetheless, this study purports to show these snakes could find suitable habitat in large portions of the continental United States (the importation and ownership of such snakes have long been banned in Hawaii, Puerto Rico, and U.S. territories), including parts of the U.S. with annual sustained temperatures below freezing, where even Burmese python cannot possibly survive.

83. Not surprisingly, the USGS study has come under extensive criticism in scientific journals and other fora on a number of grounds, including its reliance on mean monthly temperatures, questions about the occurrence of the species in areas from which native range weather data were gathered, and the controversial decision to consider Indian and Burmese pythons as a single species. Nonetheless, FWS has defended the USGS' work as appropriate for use in "risk analysis," asserting that critiques presented prior to the 2012 rule's publication were adequately rebutted. *See, e.g.,* 77 Fed. Reg. at 3345-46.

84. Much of FWS' focus in the 2012 final rule is on the Burmese python both because Reed and Rodda 2009 surmised that an area comprising roughly a third of the continental United States could provide suitable habitat for the species and because a population of this species has become established in the Everglades National Park in extreme southern

Florida. *Id.* at 3331 (A small population of African python (either Northern or Southern, which is unclear) has also been identified as breeding in extreme southern Florida. *Id.*)

85. The 2015 final rule likewise focused on the Reed and Rodda 2009 findings with respect to the Burmese python as a substantial basis on which to justify the listing of the reticulated python and three anaconda species. *See, e.g.*, 80 Fed. Reg. at 12706-10.

86. A series of both natural and controlled cold-weather experiments have, however, resulted in a scientific consensus that Burmese python cannot inhabit temperate areas that experience severe winters even occasionally. Based on other experiments, many experts do not believe this species can survive in areas even as far south as Gainesville, Florida. In the 2012 final rule, FWS itself highlighted a finding that the already established southern Florida Burmese python population "may not be able to survive severe winters in regions as temperate as central South Carolina." *See, e.g.*, 77 Fed. Reg. at 3332.

87. Nonetheless, Defendants based their injurious determination for Burmese python on the original Reed and Rodda 2009 theoretical finding that Burmese python "are climatically matched" to areas including "along the coasts and across the *south from Delaware to Oregon*, as well as most of California, Texas, Oklahoma, Arkansas, Louisiana, Mississippi, Alabama, Florida, Georgia, and South and North Carolina." *Id.* (emphasis added).

88. The remaining species included in FWS' 2012 final rules are all tropical species for which even the subtropical regions of southern Florida present weather extremes far beyond those that exist in their native range. *See id.* at 3335-36.

89. Even according to the USGS' controversial findings, suitable climate exists, at most, in small portions of two continental states – Florida and Texas – for the reticulated python, DeSchauenseei's anaconda, Beni anaconda, North and South African pythons, and green

anaconda. Each of these states has effective regulatory structures in place for large non-native constricting snakes.

90. Further, while Hawaii and Puerto Rico also have habitat found suitable for the listed species, their importation and possession in these jurisdictions are already prohibited by state and territorial law.

E. LEGAL SHORTCOMINGS OF THE RULES AT ISSUE

91. To justify its decision to list these eight species of constricting snakes, FWS ignored well-documented and detailed flaws with the USGS climate matching model on which the decisions relied; highlighted scientific reports most supportive of its findings and selectively quoted from others; downplayed contradictory reports and findings; and failed to address findings from scientific reports furnished to the agency during the public comment period. In so doing, Defendants made determinations that were either unsupported or contradicted by the record, appearing to justify a decision already made. The sum effect of these actions was to exaggerate risks in order to build a stronger case for the Lacey Act listing.

92. Overall, FWS failed to meet the standards of reasoned decisionmaking and provided no rational basis for its actions.

93. Defendants also downplayed or ignored important conservation harms stemming from the proposed listing, such as adverse impacts to conservation education programs, research to help preserve threatened and endangered species, and other conservation actions. Defendants afforded no credit to concerns that the rules would engender the harms it sought to prevent by incentivizing the release of listed snakes by irresponsible breeders or pet owners due to economic pressures or when moving to other states.

94. In this and other respects, FWS did not take the "hard look" NEPA requires or meet its procedural obligations under the law. For example, Defendants failed to conduct an EIS although the constrictor rules met NEPA requirements for preparing one. Instead, FWS made findings of no significant impact based on two faulty environmental assessments, neither of which evaluated important scientific information, addressed significant conservation concerns raised by USARK and others, or discussed or acknowledged the proposal's controversial nature or the debate regarding the science unpinning the action. For example, in its Final EAs, FWS failed to acknowledge or respond to substantial comments that identified adverse environmental consequences of the listing.

95. Further, neither EA acknowledges or responds to comments made by zoological institutions, USARK, research scientists, academics, or state and federal conservation officials. Environmental issues raised include adverse impacts on conservationists that fund, through sales of common and specially bred "morphs" and "localities" of the listed species, development of captive breeding techniques to maintain genetic diversity and a source of broodstock in order to protect against extinction of these and other species in the wild; the likelihood the unlawful ban on interstate movement of listed species will increase intentional releases; harm to environmental education programs; and placing a burden on state conservation agencies and diverting scarce conservation resources.

96. Defendants' EAs each also failed to engage in a reasoned discussion of major scientific objections to the USGS risk analysis' highly controversial findings, or even mention the existence of a major scientific controversy.

97. Nor, moreover, did Defendants' NEPA or Regulatory Flexibility Act analyses consider significant, lawful alternatives that would have had equivalent or superior

environmental benefits and minimized adverse impacts on small entities. For instance, FWS did not consider cooperative state-federal management efforts for all species, even though Defendants chose to utilize such an approach as an alternative to listing boa constrictors. Nor did FWS consider using other authority it possesses to prohibit imports only. Finally, Defendants never considered a "cooling off" period longer than the APA minimum of thirty days, 5 U.S.C. § 553(d), even though a longer interim period prior to the effective date would have allowed small entities time sufficient time to make business arrangements to minimize economic losses.

98. Further, contrary to the Lacey Act's plain terms and congressional intent to impose restrictions solely on certain commercial shipments, FWS' rule purports to bar *all* interstate transportation, even for non-commercial purposes of the listed snakes, subject only to a limited, discretionary exception for transfers made for zoological, educational, medical, or scientific purposes.

99. FWS also purports to interpret the Lacey Act's geographic scope over which the statutory prohibition on shipments and personal transportation applies in a manner that is at odds with the law's plain terms. Specifically, despite regulatory and statutory language that prohibits only the transportation/shipment of injurious species "between 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); 50 C.F.R. § 16.3, the Defendants purport to prohibit shipments for commercial and other purposes between and among the 49 continental states.

100. This unlawful extension of the Lacey Act's scope infringes on listed species owners' fundamental right to travel. Breeders, hobbyists, academics, and pet owners may not change domicile to a different state, for example, to take a new job unless they first euthanize or

otherwise divest themselves of their pets, breeder animals, and/or collections of listed snakes. Congress did not intend this restriction and it serves no important public purpose.

F. CONCLUSION

101. In sum, Defendants have exceeded their authority under the Lacey Act by purporting to ban interstate transport of and commerce in the listed snakes, failed to conduct a reasoned and lawful rulemaking process, acted arbitrarily and capriciously, and eschewed their responsibilities under the APA, RFA, and NEPA.

102. For these reasons and others, Plaintiffs have been harmed and will continue to be harmed by the Defendants' illegal actions.

COUNT ONE
(Ultra Vires, Lacey Act, 18 U.S.C. § 42, via the APA)

103. Plaintiff alleges paragraphs 1 through 102 as if they were set forth in full herein.

104. The APA provides the right of review to "[a]ny person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702.

105. The APA proscribes agency action that is:

> (A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law . . . .

5 U.S.C. § 706(c).

106. Section 42 of Title 18, United States Code provides:

> The importation into the United States, 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 between the continental United States, the District of Columbia, Hawaii, the Commonwealth of Puerto Rico, or any possession of the United States, of [any enumerated species] or the offspring

> or eggs of any of the foregoing which the Secretary of the Interior may prescribe by regulation to be injurious to human beings, to the interests of agriculture, horticulture, forestry, or to wildlife or the wildlife resources of the United States, is hereby prohibited.

18 U.S.C. § 42(a)(1).

107. In the rulemakings at issue, FWS purports to apply the Section 42 prohibition not merely between continental states and other enumerated jurisdictions, as the law clearly states, but also among and between the continental states themselves.

108. The prohibition on interstate commerce in and transportation between and among the continental states of the listed species in the rules at issue is *ultra vires* and "not in accordance with" 18 U.S.C. § 42, in part because it was promulgated "in excess of [Defendants'] statutory jurisdiction" as the Lacey Act does not give such effect to species included on the list of injurious species nor does it grant Defendants such authority. It is also "contrary to constitutional right [and] privilege" because it infringes the Plaintiff USARK's members and the individual Plaintiffs' fundamental right to travel contrary to Congress' intent and with serving a significant public purpose. Thus, in purporting to enact such a limitation on the species at issue, Defendants abused their discretion, were arbitrary and capricious, and acted not in accordance

COUNT TWO
(Declaratory Judgment Act, APA, Lacey Act, United States Constitution)

109. Plaintiffs allege paragraphs 1 through 108 as if they were set forth in full herein.

110. The APA provides the right of review to "[a]ny person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702.

111. The APA proscribes agency action that is:

> (A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations,

> or short of statutory right; [or] (D) without observance of procedure required by law . . . .

5 U.S.C. § 706(c).

112. The Declaratory Judgment Act, 28 U.S.C. § 2201, provides that in cases of an actual controversy, "any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration."

113. Section 42 of Title 18, United States Code provides:

> The importation into the United States, 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 *between the continental United States, the District of Columbia, Hawaii, the Commonwealth of Puerto Rico, or any possession of the United States,* of [any enumerated species] or the offspring or eggs of any of the foregoing which the Secretary of the Interior may prescribe by regulation to be injurious to human beings, to the interests of agriculture, horticulture, forestry, or to wildlife or the wildlife resources of the United States, is hereby prohibited.

18 U.S.C. § 42(a)(1) (emphasis added).

114. In the rulemaking at issue, FWS purports to apply the Section 42(a)(1) prohibition not merely to transportation and shipment between continental states and other enumerated jurisdictions, as the law clearly states, but also among and between continental states themselves.

115. Plaintiffs and Plaintiff USARK's members face a real and imminent threat of criminal prosecution and civil enforcement for traveling with or engaging in interstate commerce with any of the eight species of snakes FWS determined to be injurious, merely if such transportation or commerce crosses a state line. This so even if such occurs solely within the continental U.S. and is between jurisdictions where ownership and possession of such animal is lawful.

116. Furthermore, Defendants' interpretation of 18 U.S.C. § 42(a)(1) is not only inconsistent with the statute's plain terms, but also places an impermissible burden on Plaintiffs'

constitutional right to travel without authorization from Congress or to serve any compelling public purpose.

117. Thus, an actual controversy exists and Plaintiffs request this Court declare that the Lacey Act, 18 U.S.C. § 42, does not prohibit transportation with or interstate commerce in species the Secretary deems injurious under the law so long as such transportation or commerce occurs solely between and among continental states, not including the District of Columbia.

COUNT THREE
(NEPA, 23 U.S.C. § 313, APA)

118. Plaintiffs allege paragraphs 1 through 117 as if they were set forth in full herein.

119. The APA proscribes agency action that is:

> (A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law . . . .

5 U.S.C. § 706(c).

120. "An agency's primary duty under the NEPA is to take a 'hard look' at environmental consequences." *Pub. Utils. Comm'n v. FERC*, 900 F.2d 269, 282 (D.C. Cir. 1990) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)) (internal quotes omitted); *see also* 40 C.F.R. § 150.1.

121. "[A]n agency takes a sufficient 'hard look' when it obtains opinions from its own experts, obtains opinions from experts outside the agency, gives careful scientific scrutiny and *responds to all legitimate concerns that are raised*." *Hughes River Watershed Conservancy v. Johnson*, 165 F.3d 283, 288 (4th Cir. 1999) (citing *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378-85 (1989)) (emphasis added).

122. FWS violated NEPA for, among other reasons, issuing an environmental assessment, upon which it based a finding of no significant impact, that failed to: (1) respond to significant environmental concerns raised during the public comment period; (2) provide a reasoned discussion of, or even acknowledge at all, major scientific controversies central to the decisions made; (3) acknowledge the controversy attendant to the fact that the listing of these species was the first time the Lacey Act had been used to list animals widely held as pets and which are in interstate commerce; or (4) examine all relevant data and provide a reasonable explanation for the findings made. For all these reasons, FWS failed, contrary to law, to take a "hard look" at the issues, failed to observe procedures required by law, acted arbitrarily and capriciously, and abused its discretion in violation of NEPA and the APA.

COUNT FOUR
(NEPA, APA)

123. Plaintiffs allege paragraphs 1 through 122 as if they were set forth in full herein.

124. The APA proscribes agency action that is:

> (A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law . . . .

5 U.S.C. § 706(c).

125. NEPA and its implementing regulations require federal agencies to prepare an EIS for all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); *see also* 40 C.F.R. § 1501.4.

126. The listing of, in particular, the reticulated and Burmese pythons as injurious is a major federal action because, among other reasons, they are a species widely held throughout the continental United States, they are subject to interstate commerce, and their listing entails

significant adverse environmental consequences and raises both significant controversy and novel policy issues.

127. FWS' failure to prepare an environmental impact statement in conjunction with the rules at issue is therefore, among other things, an abuse of discretion, arbitrary and capricious, and not in accordance with law, in violation of NEPA and the APA.

COUNT FIVE
(Lacey Act, APA)

128. Plaintiffs allege paragraphs 1 through 127 as if they were set forth in full herein.

129. The APA proscribes agency action that is:

> (A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law . . . .

5 U.S.C. § 706(c).

130. Among other things, in their listing of these of these species of constricting snakes under the Lacey Act, Defendants engaged in result-oriented, predecisional rulemaking; failed to provide reasoned bases for the decisions made; made decisions not supported by the record or contrary to the record; interpreted the Lacey Act in a manner both contrary to the plain terms of the statute and which violates citizens' fundamental right to travel; and overlooked important aspects of the problem it sought to address. Accordingly, FWS abused its discretion and acted arbitrarily, capriciously, and contrary to law, in violation of the APA and the Lacey Act.

COUNT SIX
(Regulatory Flexibility Act, as amended)

131. Plaintiffs allege paragraphs 1 through 130 as if they were set forth in full herein.

132. Plaintiff USARK's members, individual Plaintiffs, or certain of them, are "small entities" as that term is used in the RFA's judicial review provisions, 5 U.S.C. § 611(a)(1).

133. The RFA's judicial review provisions, at 5 U.S.C. § 611(a)(1)-(2), allow a small business entity to seek judicial review of an agency's development and preparation of a FRFA. 5 U.S.C. § 604.

134. The RFA sets out specific requirements and mandatory elements for preparation of a legally adequate FRFA. 5 U.S.C. §§ 604(a)(2)-(5).

135. Defendants' RFA analyses supporting the two final rules at issue do not comply with the RFA and applicable decision-making standards because, among other reasons, the analyses fail to adequately develop and consider alternatives to reduce the economic impacts of the listing, including using other regulatory options other than an injurious listing or providing a reasonable period of time for adjustment prior to the rules' effective date.

PRAYERS FOR RELIEF

WHEREFORE, Plaintiffs respectfully seek an Order of this Court:

(a) Declaring, pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, that the rules at issue were promulgated in violation of the APA and NEPA for, among others, the reasons stated above;

(b) Declaring, pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, that Defendants lack legal authority to ban on interstate transportation or commerce in the listed species within the continental United States;

(c) Declaring, pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, Defendants' purported ban on interstate transportation and commerce in the listed species to be *ultra vires* and contrary to law;

(d) Enjoining Defendants from applying the provisions of the unlawful rules;

(e) Vacating the unlawful rules;

(f) Remanding the rules to FWS to prepare a lawful environmental impact statement and provide a rational basis for any new rule(s) proposed;

(g) Awarding Plaintiffs their costs and attorneys' fees as appropriate;

(h) Providing such other relief as is just and proper.

Dated: March 23, 2015

Respectfully submitted,

/s/ Shaun M. Gehan
Shaun M. Gehan
D.C. Bar No. 483720
The Law Office of Shaun M. Gehan, PLLC
3050 K Street, N.W. – Suite 400
Washington, D.C. 20007
Telephone: (202) 342-8469
Facsimile: (202) 342-8451

David E. Frulla
D.C Bar No. 414170
Paul C. Rosenthal
D.C. Bar No. 235242
Kelley Drye & Warren LLP
3050 K Street, N.W. – Suite 400
Washington, D.C. 20007
Telephone: (202) 342-8400
Facsimile: (202) 342-8451

Attorneys for Plaintiffs