IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

FEDERAL DEFENDANTS' RESPONSE TO PLAINTIFFS' SUPPLEMENTAL PRELIMINARY INJUNCTION BRIEF

I. The Statute of Limitations Bars the Court's Consideration of Counts One and Two.

Federal Defendants have repeatedly demonstrated that Plaintiffs' challenge to the U.S. Fish and Wildlife Service's ("FWS") interpretation of the "transportation prohibition"[1] in 18 U.S.C. § 42(a)(1) is barred by the applicable statute of limitations because it is a facial challenge to an interpretation made more than six years ago. *See* ECF Nos. 14, 17, 22, 25, 32 and 44. Plaintiffs' arguments that they would not have had standing to challenge FWS's interpretation within the limitations period or that they are making an as-applied challenge are without merit.

Plaintiffs first argue that the limitations period did not begin to run in 1989,[2] when FWS first provided its interpretation of the transportation prohibition in the preamble to a rule listing the mitten crab as injurious, because they had no reason to be aware of the rule and would not have had standing to challenge it even if they had been aware.[3] ECF No. 45 at 15. As already demonstrated, however, the statute of limitations accrues even at times when a putative plaintiff may lack standing. ECF No. 25 at 3-4; ECF No. 44 at 3-5. Plaintiffs do not rebut the authority

[1] The "transportation prohibition," as used herein, refers to the prohibition in 18 U.S.C. § 42(a)(1) ("Section 42(a)(1)") against "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 injurious species.

[2] In fact, FWS first provided its interpretation of the transportation prohibition in 1982 when it listed the raccoon dog as an injurious species under Section 42(a)(1). Plaintiffs incorrectly contend that FWS did not prohibit interstate transportation within the continental United States when it listed the raccoon dog. ECF No. 45 at 2 n.1. However, FWS's Environmental Assessment on the proposed listing clearly shows that FWS did prohibit such interstate transportation. http://www.fws.gov/injuriouswildlife/pdf_files/Raccoon_dog_EA_and_FONSI.pdf (last visited Apr. 27, 2015) ("permits would also be required for the interstate transportation of live raccoon dogs currently held in the United States for scientific, medical, educational, or zoological purposes. However, the proposal would prohibit interstate transportation of live raccoon dogs currently held in the United States for fur farm propagation or other purposes not listed above."). FWS listed a number of other species as injurious between 1960 and 1982, but none provided an interpretation of the transportation prohibition. 30 Fed. Reg. 9640 (Aug. 3, 1965) (Indian wild dog); 32 Fed. Reg. 20,655 (Dec. 21, 1967) (three birds); 34 Fed. Reg. 19,030 (Nov. 1969) (walking catfish).

[3] That FWS provided its interpretation in the preamble to a rule rather than in the body of the rule is of no moment. As already shown, agency statements made in the preamble to a rule may be challengeable. ECF No. 44 at 3. In fact, courts review and defer to agency interpretations made in even less formal circumstances. *Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1266 (D.C. Cir. 2008) (deferring to agency interpretation in a letter); *Bigelow v. Dep't of Def.*, 217 F.3d 875, 876, 878 (D.C. Cir. 2000) (deferring to agency interpretation in a legal brief).

Federal Defendants have provided, nor have they cited to any authority to support their argument that a lack of standing tolls the statute of limitations.

Plaintiffs next argue that "by adding the transportation and shipment provision to the two rules at issue, FWS has rendered the issue fit for judicial review." ECF No. 45 at 15 (citing *Public Citizen v. Nuclear Regulatory Comm'n*, 901 F.2d 147, 152-53 (D.C. Cir. 1990)). *Public Citizen* involved a challenge to the Nuclear Regulatory Commission's 1988 decision to refrain from making rules regarding training of nuclear power plant personnel, and to instead republish a policy statement, first issued in 1985, with some minor amendments. 901 F.2d at 149. The D.C. Circuit held that because the 1988 decision "reopened, reexamined, and reaffirmed" the 1985 decision, the 1988 decision was "subject to renewed challenged." *Id.* at 151. The Court's holding was supported by the longstanding rule that "a claim that agency action was violative of statute may be raised outside a statutory limitations period, by filing a petition for amendment or rescission of the agency's regulations, and challenging the denial of that petition." *Id.* at 152. Although the Commission had not denied a petition from the plaintiff, the Court found that such a requirement would be "a waste of everyone's time and resources" where, as there, "an agency reiterates a rule or policy in such a way as to render the rule or policy subject to renewed challenge on any substantive grounds." *Id.* at 152-53. Here, in contrast, FWS did not reopen, reexamine, or reaffirm its interpretation of the transportation prohibition in its 2012 and 2015 rules challenged here, and requiring Plaintiffs to file a petition for amendment or rescission of FWS's interpretation would not be a waste of time or resources. Thus, *Public Citizen*, as with other cases on the reopener doctrine, is inapposite. *See* ECF No. 17 at 15; ECF No. 25 at 7.

Plaintiffs' finally argue that their challenges fit within the as-applied exception to the statute of limitations. ECF No. 45 at 16. While Federal Defendants recognize that such an

exception exists, we have demonstrated that Plaintiffs' challenge does not qualify. ECF No. 17 at 15; ECF No. 25 at 6-9. Plaintiffs cite to a number of cases for the general proposition that there is an as-applied exception, but fail to show how they fit within the exception.

In fact, the cases Plaintiffs cite demonstrate that they have not brought an appropriate as-applied challenge. In *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, the Fifth Circuit explained that to sustain an as-applied challenge, "the claimant must show some direct, final agency action involving the particular plaintiff within six years of filing suit," such as when the agency has denied the plaintiff's petition to review the application of a regulation to them or to rescind the regulations. 112 F.3d 1283, 1287 (5th Cir. 1997) (cited in ECF No. 45 at 17) (emphasis added). Similarly, in *Coal River Energy, LLC v. Jewell* and *Murphy Exploration and Production Co. v. U.S. Department of Interior*, the D.C. Circuit found that the plaintiffs could challenge a regulation even though the challenge would be outside the limitations period because the agency had applied the regulations to the plaintiffs – by assessing a coal reclamation fee and by issuing an order to pay royalties, respectively. 751 F.3d 659, 664 (D.C. Cir. 2014) and 270 F.3d 957, 135 (D.C. Cir. 2001) (cited in ECF No. 45 at 16, 17). Here, in contrast, Plaintiffs have not petitioned FWS regarding its interpretation of Section 42(a)(1), nor has FWS assessed a fee, issued an order to pay royalties, or otherwise applied its regulation to Plaintiffs. Plaintiffs are not likely to succeed on the merits of Counts One and Two because they are time-barred.

II. Alternatively, Plaintiffs Are Not Likely to Succeed on the Merits of Claims One and Two.

A. Congress Clearly Intended to Prohibit Interstate Transportation of Injurious Species.

Federal Defendants have demonstrated that Congress' intent regarding whether Section 42(a)(1) prohibits interstate transportation of injurious wildlife between states within the

continental United States is clear because Section 42(a)(1) uses the word "or" to show that shipment between the prohibited areas in the list is disjunctive. ECF No. 32 at 13. Moreover, Congress' inclusion of the "District of Columbia" in the list shows an intention to broadly prohibit transportation because it would be absurd to prohibit transportation between Maryland and the District of Columbia but not Maryland and Virginia. *Id.* at 14. Plaintiffs raise a number of arguments to support their narrow reading, but all lack merit.

1. Plaintiffs' Step One Argument Lacks Merit.

Plaintiffs first argue that Congress used the word "or" conjunctively in both 18 U.S.C. § 42(a)(1) and what was 18 U.S.C. § 43, but do not explain how "or" is conjunctive in either Section 42(a)(1) or then-Section 43.[4] ECF No. 45 at 3. The word "or" should be given its ordinary and plain disjunctive meaning in both Sections. *See Lawson v. FMR LLC*, 134 S. Ct. 1158, 1165 (2014) ("In determining the meaning of a statutory provision, we look first to its language, giving the words used their ordinary meaning.") (quotation and citation omitted); ECF No. 32 at 13 ("or" typically joins a disjunctive list).

Congress' intention to use "or" disjunctively is further supported by the context of the 1960 amendments. In addition to adding the transportation prohibition to the existing prohibition on importation, Congress clarified that fish, reptiles, amphibians, mollusks, and crustaceans could be listed as injurious, and not just birds and mammals. Congress also removed English sparrows and starlings from Section 42(a)(1), both species that had been introduced into the continental United States and had established large populations in the wild, but only after they had already spread "throughout the country and no feasible means for controlling their numbers

[4] Plaintiffs' reference to the definition of "United States" in 18 U.S.C. § 5 adds nothing to their argument because it does not explain Congress' inclusion of the District of Columbia in the transportation prohibition. *See* ECF No. 45 at 5. 18 U.S.C. § 5 defines the "United States" in the geographical sense, and the District of Columbia is indisputably within the geographic "continental" United States along with 49 of the 50 states. Had Congress wanted to limit the transportation prohibition as Plaintiffs argue, it would not have included the District of Columbia in the list.

or range ha[d] been devised." H.R. Rep. No. 86-1883 (1960), ECF No. 31-1 at 000016. Congress was thus aware that only after the species had established large populations in the wild throughout the continental United States would neither the prohibition against importation nor interstate transportation have any effect in limiting further harm. These changes show that Congress was concerned with preventing harm from injurious species to the entire United States and curbing their spread throughout the country, not merely between the continental United States and non-continental United States. A broad construction is also consistent with the underlying purposes of the Lacey Act as expressed by Congress prior to 1960. *See* 33 Cong. Rec. H4871 (Apr. 30, 1900) (discussing problems non-native species can cause) (attached hereto as Exhibit 1); H.R. Rep. No. 474 at 2 (Mar. 1, 1900) (same), ECF No. 31-1 at 00002.

Plaintiffs' references to other statutes that use the phrase "continental United States" are similarly misplaced. ECF No. 45 at 5. Plaintiffs argue that these other statutes use "continental United States" to refer to a single entity. Whether that is true or not, all of these other statutes use the conjunctive "and" and not the disjunctive "or" as Section 42(a)(1) does. Congress' use of "or" in Section 42(a)(1) is consistent with its broad intent, as described above.[5]

2. Congress' Actions Have Ratified FWS's Interpretation.

Even if the Court were to find that Congress' intent in 1960 with respect to the transportation prohibition is not clear, Congress' actions since 1960 have ratified FWS's interpretation of the prohibition. ECF No. 32 at 17, 19; ECF No. 44 at 7-11. Of greatest importance are Congress' actions in 1990 and 2010, amending Section 42(a)(1) to add the zebra mussel and Asian carp, respectively.

[5] Moreover, Plaintiffs provide no authority for the idea that a court can look to other statutes in this manner. While it is a "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning," *Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S. Ct. 1997, 2004-05 (2012) (emphasis added), the same is not necessarily true of identical words used in different statutes. To the contrary, Congress' use of language in each statute is context specific. *See Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989).

Plaintiffs try to minimize the importance of these amendments by characterizing them as "ancillary" or passed during a "lame-duck" Congress, without discussion, and without opposition. ECF No. 45 at 7-9, 11, 13. But a law is a law, and once passed, Constitutional considerations require that the law be given proper effect. *Dodd v. United States*, 545 U.S. 353, 371 (2005) (courts will not interpret a congressional statute in such a manner as to effectively nullify an entire section); *Washington Water Power Co. v. Fed. Energy Regulatory Comm'n*, 775 F.2d 305, 314-15 (1985) (courts should not interpret a bill to be meaningless). Moreover, the lack of debate or opposition demonstrates that this issue was uncontroversial precisely because Congress was aware of, and accepted and agreed with, FWS's interpretation of Section 42(a)(1)'s transportation prohibition. Had there been any true objection or concern about whether Section 42(a)(1) prohibited interstate transportation between states within the continental United States, the respective amendments could have been stopped "by a single objection." *Wash. Water*, 775 F.2d at 317 (because it was passed under a unanimous consent calendar, a single objection could have stopped the 1905 Act).

Congress' actions here are best characterized as a ratification of FWS's interpretation,[6] as Congress was both aware of FWS's interpretation when it acted and amended Section 42(a)(1) without changing that interpretation. ECF No. 44 at 12 (citing ratification cases). Plaintiffs argue that no ratification occurred here because these amendments did not involve a "comprehensive revision" or reenactment of Section 42(a)(1), but comprehensive revision is not required. ECF No. 45 at 10-11. In fact, courts have found ratification where Congress amended a statute and

[6] Federal Defendants would not characterize Congress' actions as an implied amendment. An implied amendment occurs where a later act of Congress impliedly amends or repeals an earlier act with which it irreconcilably conflicts. *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 468 (1982). Here, there is no irreconcilable conflict between the 1960 amendments and the 1990 and 2010 amendments. Instead, as explained above, these amendments show that Congress understood and agreed with the goal of prohibiting interstate transportation of injurious species between states within the continental United States.

failed to change the provision which an agency interpreted. *Kay v. FCC*, 443 F.2d 638, 646-47 (D.C. Cir. 1970) (amendment of a section of the Communications Act). Here, as in *Kay*, Congress has twice amended Section 42(a)(1) to prohibit the interstate transportation of species between states within the continental United States without amending the transportation prohibition in that section.

Plaintiffs also argue that these amendments cannot qualify as ratification because Congress was not sufficiently aware of FWS's interpretation when it amended Section 42(a)(1) to add the zebra mussel and Asian carp. ECF No. 45 at 9, 11.[7] However, Congress indisputably amended Section 42(a)(1) for the express purpose of preventing the further spread of zebra mussels and Asian carp between states within the continental United States. ECF No. 44 at 8-9. Based on this fact alone, Congress clearly understood Section 42(a)(1) to prohibit interstate transportation between states within the continental United States. Moreover, Congress did not act in a vacuum. FWS provided its views on the transportation prohibition through testimony by FWS officials. *Id.* at 11. The fact that FWS provided its interpretation through testimony, members of Congress made statements that show they agree with that interpretation, and then Congress passed the legislation to effectuate such a prohibition, show that Congress as a whole shares and endorses FWS's view.

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[7] *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978) ("*TVA*"), does not support Plaintiffs' argument. *TVA* dealt with implied repeal by an appropriations law of the Endangered Species Act's requirement that federal agencies ensure that their actions are not likely to jeopardize listed species. It did not address ratification. Moreover, while implied repeal, like ratification, requires Congressional awareness, *TVA* is distinguishable. In *TVA*, the agency argued that statements made by the Appropriations Committee indicated that Congress did not intend for the ESA to apply to the construction of the Tellico Dam. The Court rejected this argument because the Appropriations Committee had no jurisdiction over endangered species and there was no indication that the entire Congress was aware of the agency's position. 437 U.S. at 191-92. Here, in contrast, the zebra mussel and Asian carp amendments were not appropriations laws, and there is every indication that Congress was aware of FWS's position. Consequently, Congress' amendments in 1990 and 2010 ratified FWS's interpretation of the transportation prohibition.

Plaintiffs' rhetoric about federalism concerns also does not support their argument because nothing they point to indicates that Congress had federalism concerns when it amended Section 42(a)(1) in 1960, which is the only statute relevant here. ECF No. 45 at 12-13.

B. Even if the Statute is Ambiguous, the Court Must Defer to the FWS's Reasonable Interpretation.

1. The Rule of Lenity is Inapplicable.

As Federal Defendants have explained, controlling law requires this Court to defer to FWS's reasonable interpretation if it determines that Congress' intent with respect to the transportation prohibition in Section 42(a)(1) is ambiguous. ECF No. 44 at 14-18 (citing to *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687 (1995) and its progeny). Plaintiffs fail to acknowledge this binding law, much less distinguish it. Instead, Plaintiffs attempt to manufacture a distinction between criminal laws, which they limit to those in Title 18 of the U.S. Code, and civil laws that call for criminal penalties. Plaintiffs provide no rationale or support for this alleged distinction, and none exists. Furthermore, Plaintiffs are incorrect that courts do not defer to agency interpretations of statutes in Title 18 of the U.S. Code. *See Modern Muzzleloading, Inc. v. Magaw*, 18 F. Supp. 2d 29, 35 (D.D.C. 1998) (finding rule of lenity inapplicable in case challenging agency's decision to classify certain type of rifle as a firearm for purposes of 18 U.S.C. §§ 921-930); *Mujahid v. Daniels*, 413 F.3d 991, 995 (9th Cir. 2005) (deferring to Bureau of Prison's interpretation of 18 U.S.C. § 3624(b)).

Instead, the relevant distinction is between civil cases challenging an agency's regulations pertaining to criminal provisions of a statute and criminal prosecutions. In the regulatory context, the public is provided fair warning of the agency's interpretation of the law through both the notice and comment process and the existence of the regulations on the books. *Sweet Home*, 515 U.S. at 704 n.18 (one of the premises of the rule of lenity is that "fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed") (quotations omitted); *see also Yi v. Fed. Bureau of Prisons*, 412 F.3d 526, 535 (4th Cir. 2005) ("Deference trumps lenity when courts are called

upon to resolve disputes about ambiguous statutory language, at least where the agency interpreting the criminal statute is: (1) responsible for administering the statute; and (2) that agency has promulgated its interpretation pursuant to the notice and comment provisions of the Administrative Procedure Act.") (quoting *Sash v. Zenk*, 344 F. Supp. 2d 376, 383 (E.D.N.Y. 2004)). All of FWS's rules, from 1989 onward, have provided the agency's interpretation of the scope of the interstate transportation prohibition and have gone through notice and comment. Plaintiffs do not complain about a lack of adequate warning here. Therefore, as in *Sweet Home*, fair warning has been provided and this purpose of the rule of lenity is satisfied.[8]

2. FWS's Interpretation is Entitled to Deference.

Plaintiffs argue for the first time that even if the rule of lenity does not apply, FWS's interpretation is not entitled to deference because Congress has not granted FWS the authority to interpret the transportation prohibition. ECF No. 45 at 19-20 (citing *United States v. Mead Corp.*, 533 U.S. 218 (2001)). Their argument misreads *Mead*. The delegation of authority required for *Chevron* deference "may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking or by some other indication of a comparable congressional intent." *Id.* at 227. Further, the delegation of authority may be either explicit or implicit. *Id.* at 229 (*Chevron* applies even absent an express delegation from Congress when it is "apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect that the agency be able to speak with the force of law."). Thus, in determining that the *Chevron* legal lens applies, courts may examine the nature of the legal question, whether the agency is bringing its expertise to bear on the question, the importance of

[8] The other premise of the rule of lenity – that "legislatures and not courts should define criminal activity" – is also satisfied where Congress has delegated responsibility to an agency to implement a statute and ambiguous statutory language has left a gap for the agency to fill. *Sweet Home*, 515 U.S. at 704 n.18; *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

the issue to the administration of the statute, the complexity of that administration, and the consideration given the issue by the agency. *Barnhart v. Walton*, 535 U.S. 212, 222 (2002).

Here, Congress delegated authority to the Secretary of the Interior to "prescribe by regulation" species that are injurious. Section 42(a)(1). In order to determine whether a species is injurious, FWS must necessarily define the context in which the species would cause harm. Thus, Congress implicitly granted FWS authority to interpret the scope of the prohibitions in Section 42(a)(1) because the potential for spread of a species, including which areas within the United States may be affected and the role of human transport, is integral to determining whether a species is injurious.[9] *See* Lacey Act Evaluation Criterion "Potential to survive, become established, and spread," 77 Fed. Reg. 3330, 3337 (Jan. 23, 2012); 80 Fed. Reg. 12,702, 12,712 (Mar. 10, 2015). Such an implicit grant of authority is all that is required. *Chamber of Commerce v. NLRB*, 721 F.3d 152, 161-16 (4th Cir. 2013) (court should determine whether substantive terms of statute imply that Congress intended agency to have authority to issue rules); *Prod. Tool Corp. v. Emp't & Training Admin.*, 688 F.2d 1161, 1166-67 (7th Cir. 1982) (Department of Labor has rulemaking authority to issue permanent labor certification regulations even where Congress did not specifically grant authority to issue regulations); *United States v. Home Concrete Supply, LLC*, 132 S. Ct. 1836, 1843-44 (2012) ("it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law").

[9] That the question at hand concerns the scope of the agency's jurisdiction is immaterial. To the extent that there is statutory ambiguity concerning the scope of the agency's jurisdiction, the courts owe *Chevron* deference to an agency's interpretation of its regulatory authority. *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1871 (2013).

FWS's first articulation of its interpretation in a rule's preamble does not affect the Step Zero analysis. *Barnhart*, 535 U.S. at 222.[10] Step Zero is solely concerned with the delegation of authority from Congress in determining whether the *Chevron* framework applies, not the persuasive effect of the agency's argument. *Mead*, 533 U.S. at 227-31. Plaintiffs' arguments confuse the relationship between *Mead* and the deference afforded an agency under the framework articulated in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). ECF No. 45 at 20. *Skidmore* is not a threshold determination that the agency must pass in order to move past Step Zero. Rather, as *Mead* made clear, *Skidmore* is the deference that may still be accorded to the agency if the agency fails at Step Zero. 533 U.S. at 235-36. Thus, even if the Court were to find against FWS at Step Zero, the appropriate standard would be *Skidmore* deference rather than "no deference" as Plaintiffs advocate. As already demonstrated, FWS's interpretation is reasonable and has been consistently applied for more than forty years. ECF No. 32 at 14-19. Consequently, Plaintiffs are not likely to succeed on the merits of Counts One and Two.

III. Plaintiffs Have Failed to Demonstrate a Likelihood of Success on their Regulatory Flexibility Act ("RFA") Claim.

Plaintiffs concede that they must demonstrate some prejudice to succeed on their RFA claim,[11] but fail to show a likelihood of satisfying that requirement for two reasons. First, the alleged violations on which their prejudice is premised are not requirements under the RFA and

[10] Plaintiffs also imply that FWS's interpretation fails at Step Zero because it did not provide a reason for changing its position. *See* ECF No. 45 at 20-21. The interpretation FWS provided in the raccoon dog (or mitten crab) listing was not a change in position, but the first articulation finalized in a rulemaking. *See Mingo Logan Coal Co. v. EPA*, No. 10-0541 (ABJ), 2014 WL 4828883, at *11 (D.D.C. Sept. 30, 2014) ("Declining to take a position when nothing requires the agency to take a position cannot serve as the foundation for an argument that the agency changed course when it took an official position for the first time.") (citing *Fox v. Television Stations*, 556 U.S. 502, 514-15 (2009)).

[11] Plaintiffs cite cases discussing the injury required for standing in their attempt to minimize the prejudice required to succeed on an RFA claim. ECF No. 45 at 21 (citing *Lujan v. Def. of Wildlife*, 504 U.S. 555, 572 n.7 (1992); *Sugar Cane Growers Co-op of Fla. v. Veneman*, 289 F.3d 89, 94-95 (D.C. Cir. 2002)). Because standing is not at issue here, these cases are inapposite. As Federal Defendants have explained, because the harmless error standard applies to RFA claims, Plaintiffs cannot succeed on their RFA claim unless they can demonstrate that they were actually prejudiced by the alleged violation. ECF No. 44 18-25.

thus cannot be the basis of a successful claim. Second, even if Plaintiffs' alleged violations were valid requirements of the RFA, Plaintiffs have not shown that they were prejudiced by them.

As to the first issue, Plaintiffs reiterate that they were prejudiced by the inability to engage in "informed and detailed discussion" with FWS regarding the proposed listing of the five additional species. ECF No. 45 at 22. However, the RFA does not require an agency to engage in a dialogue with the public. It requires only that the agency make an Initial Regulatory Flexibility Analysis ("IRFA") available for public comment and consider those comments in the Final Regulatory Flexibility Analysis ("FRFA"). 5 U.S.C. §§ 603(a), 604(a)(2). FWS did that here, as demonstrated in Federal Defendants' earlier briefing. ECF No. 32 at 22-23; ECF No. 44 at 19-23. Because FWS has complied with the RFA, Plaintiffs cannot demonstrate prejudice.

Plaintiffs also suggest that they suffered prejudice because FWS did not engage in the same level of RFA analysis for the reticulated python and green anaconda as for the boa constrictor. ECF No. 45 at 22-23 (alleging that FWS engaged in more "meaningful discussions" with boa businesses). Plaintiffs fail to provide any support for this allegation, as there is none.[12] FWS properly took into account the boa's greater ubiquity, as well as the comments it received urging state (and not federal) regulation. *See, e.g.*, 2015 FRFA at 5-6 (ECF No. 45-1); 2015 Final Economic Analysis ("FEA") at 69, available at http://www.fws.gov/injuriouswildlife/. And contrary to Plaintiffs' argument, after soliciting additional comments on the five remaining species, FWS had no duty under the RFA to notify the public of its final decision, or to solicit a second round of comments, in advance of publication of the 2015 FRFA.

Even if Plaintiffs had identified a likely violation of the RFA, they cannot demonstrate

[12] Plaintiffs repeatedly refer to "the record" to support their claim that FWS engaged in "meaningful discussions" with boa constrictor businesses. ECF No. 45 at 22-23. Because Federal Defendants have not yet filed the administrative record for this case, Plaintiffs are presumably referring to documents that the parties have attached to their briefs. However, Plaintiffs do not cite to any particular documents and neither the IRFA nor 2015 FRFA reflect any ongoing dialogue with boa constrictor interests.

prejudice because FWS fully considered everything that Plaintiffs allege it should have considered as part of the 2015 FRFA. The core of Plaintiffs' RFA argument is that because they were unable to comment on the effect of the 2012 Rule on the reticulated python and green anaconda markets, FWS failed to consider those impacts. ECF No. 45 at 24. But, as Federal Defendants have explained in detail, FWS expressly solicited and considered comments on the economic landscape post 2012. ECF No. 44 at 18-25. Plaintiffs not only were aware of the opportunity to comment, they took advantage of it. *Id*. They admit as much when they say that USARK members "explained [] to FWS" the unique circumstances and vulnerabilities of reticulated python and green anaconda businesses in light of the 2012 Rule "in their comments during the 2014 re-opened comment period."[13] ECF No. 45 at 23. Plaintiffs cannot claim prejudice from an inability to comment when they acknowledge submitting comments.

Plaintiffs' failure to identify any specific data, studies, or reports that FWS overlooked further undermines their allegation of prejudice.[14] *See Gerber v. Norton*, 294 F.3d 173, 182 (D.C. Cir. 2002). In fact, FWS considered the economic analysis commissioned by USARK at length in the Final Economic Analysis and 2015 FRFA, and even used information from it in calculating economic impacts. 2015 FRFA at 4, 10, 12-13; 2015 FEA at 11, 33. Plaintiffs' bare assertions that FWS failed to consider or misunderstood unidentified data are insufficient to demonstrate prejudice.

Because Plaintiffs have neither identified valid RFA violations nor demonstrated any prejudice as result of alleged violations, they are unlikely to succeed on their RFA claim.

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[13] In fact, in its July 24, 2014 letter to FWS regarding the proposed listing of the five remaining species, USARK addressed essentially every point that it now claims it lacked the ability to comment on. USARK July 2014 comment letter (attached as Exhibit 2) at 7 (proposing state regulation alternative), 17 (noting that boa constrictor in particular should be subject to state regulation), 25-27 (discussing economic impact of listing five remaining species).

[14] The declarations of individuals attached to Plaintiffs' TRO document the harm to one specific person or business and do nothing to clarify the broader, market-wide implications of the Rule.

IV. The Stahl Declaration Does Not Support a Finding that Plaintiffs Will Suffer Irreparable Harm if the 2015 Rule Remains in Effect.

Plaintiffs attached to their Supplemental Brief a declaration by Dr. Scott J. Stahl that they allege provides additional support for their argument that Plaintiffs will suffer irreparable harm if the 2015 Rule is allowed to remain in effect. To the contrary, the declaration provides evidence that the harms alleged by Plaintiffs are less significant than initially suggested. First, the declaration makes clear that Dr. Stahl himself will not suffer irreparable harm as a result of the Rule. The only harm alleged is economic—the loss of out-of-state clients who own reticulated pythons and green anacondas. But economic harm does not constitute irreparable injury unless "the loss threatens the very existence of the movant's business." *Air Transp. Ass'n of Am., Inc. v. Exp.-Imp. Bank of the U.S.*, 840 F. Supp. 2d 327, 336 (D.D.C. 2012) (citing *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)). Reptiles allegedly account for only 25 percent of Dr. Stahl's caseload. ECF No. 45-2 ¶ 4. That broad category includes turtles, lizards, crocodiles, alligators, as well as all species of snakes. Dr. Stahl does not say what proportion of his patients are snakes, let alone reticulated pythons and green anacondas, but one can assume it is far less than 25 percent of his total caseload. *See* Stahl Exotic Animal Veterinary Services, http://seavs.com/reptiles/ (indicating that Dr. Stahl treats a range of different types of snakes, turtles, and lizards). And of the presumably small percentage of Dr. Stahl's clients that own reticulated pythons and green anacondas, only those who live out-of-state will be affected by the 2015 Rule. Thus, even if Dr. Stahl loses some clients as a result of the 2015 Rule, he has not shown that the losses would be anywhere near significant enough to threaten the very existence of his business.

Second, the declaration and the attached list of veterinarians who belong to the Association of Reptilian and Amphibian Veterinarians ("ARAV") indicate that there are a

substantial number of veterinarians throughout the United States capable of treating large constrictor snakes. Thus, the fear that an owner would not be able to locate medical care for his/her reticulated python or green anaconda as a result of the Rule is overstated. Indeed, every Plaintiff and declarant lives in a state with at least one veterinarian who belongs to ARAV. *See* ECF No. 45-2. David Riston, the declarant who specifically cited the inability to access medical care as an alleged irreparable harm, lives in Maryland which has three ARAV veterinarians. *See* ECF No. 28-5 ¶ 2; ECF No. 45-2. And these veterinarians are only those who are members of ARAV and are listed on their website. There are additional veterinarians who can treat reptiles but are not listed on the ARAV website. *See, e.g.*, http://www.repticzone.com/articles/reptileveterinarians.html (listing reptile veterinarians, including vets not listed on ARAV's website); http://www.reptilesmagazine.com/Reptile-Vets/ (same).

Because Dr. Stahl's declaration demonstrates neither that the existence of his business is threatened by the 2015 Rule nor that in-state veterinarians capable of treating listed snakes are unavailable to Plaintiffs, it does not support Plaintiffs' argument that they will suffer irreparable harm should the 2015 Rule remain in effect.

CONCLUSION

For the foregoing reasons, as well as those set forth in Federal Defendants' Opposition to Plaintiffs' Motion for a Temporary Restraining Order and Supplement Brief, Federal Defendants respectfully request that this Court deny Plaintiffs' Motion for a Preliminary Injunction.

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Respectfully submitted,

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