IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES ASSOCIATION OF RETILE KEEPERS, INC., *et al.*	)	
Plaintiffs,	)	
v.	)	**Civ. No. 1:13-cv-02007-RDM**
THE HONORABLE SALLY JEWELL, *et al.*	)	
Defendants.	)	

PLAINTIFFS' OPPOSITION TO PROPOSED INTERVENORS HUMANE SOCIETY OF THE UNITED STATES' AND CENTER FOR BIOLOGICAL DIVERSITY'S MOTION TO INTERVENE AS DEFENDANTS

Plaintiffs respectfully request this Court deny Proposed Intervenors', the Humane Society of the United States ("HSUS") and Center for Biological Diversity ("CBD"), Motion to Intervene Under Rule 24 of the Federal Rules of Civil Procedure, either as of right or on a permissive basis. In the alternative, Plaintiffs request that HSUS' and CBD's motion be denied as to the preliminary injunction and reconsidered, if and as appropriate, at the merits stage. As Plaintiffs have indicated, Plaintiffs may narrow the claims at issue, and thus it is prudent for this Court to await decisions by the Defendants relating to any interlocutory appeal and Plaintiffs' subsequent consideration whether to pursue all claims. In all events, Plaintiffs respectfully suggest that if Proposed Intervenors' motion is granted, that it be limited to the merits stage and, then, only to Counts Three and Four (National Environmental Policy Act ("NEPA")) and Five (Administrative Procedure Act ("APA")).

I. STANDARD OF REVIEW

Rule 24(a) of the Federal Rules of Civil Procedure provides that a court must permit a party to intervene in a case if the party meets four requirements: (1) it filed a timely motion; (2) it has a legally protectable "interest relating to the property or transaction which is the subject of the action;" (3) "the disposition of the action may as a practical matter impair or impede [its] ability to protect that interest;" and (4) that interest will not be adequately represented by existing parties. Fed. R. Civ. P. 24(a); *see also Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003) (quoting Fed. R. Civ. P. 24(a)). The legally protectable interest required by the second prong of this test must be "'of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment.'" *Defenders of Wildlife v. Jackson*, 284 F.R.D. 1, 6 (D.D.C. 2012), *aff'd in part, appeal dismissed in part sub nom. Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317 (D.C. Cir. 2013) (quoting *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1292 (D.C. Cir. 1980)). The D.C. Circuit also requires a party seeking to intervene as of right to establish Article III standing. *Id.* at 1323 (citing *In re Endangered Species Act* ("*ESA*") *Section 4 Deadline Litig.*, 704 F.3d 972, 976 (D.C. Cir. 2013); *Jones v. Prince George's Cnty.*, 348 F.3d 1014, 1018-19 (D.C. Cir. 2003)). To do so, "an intervenor, like any party, must show (1) an injury-in-fact that is (a) concrete and particularized and (b) actual and imminent, (2) causation, and (3) redressability." *In re ESA Section 4 Deadline Litig.*, 270 F.R.D. 1, 5 (D.D.C. 2010), *aff'd*, 704 F.3d 972 (D.C. Cir. 2013) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

Federal Rule of Civil Procedure 24(b) grants the Court discretion to permit intervention by a party who "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b). In evaluating such motions, "the court must consider whether

the intervention will unduly delay or prejudice the adjudication of the original parties' rights," *id.* (b)(3), and may also consider "'whether parties seeking intervention will significantly contribute to . . . the just and equitable adjudication of the legal question presented.'" *Ctr. for Biological Diversity v. EPA*, 274 F.R.D. 305, 313 (D.D.C. 2011) (quoting *Aristotle Int'l, Inc. v. NGP Software, Inc.*, 714 F. Supp. 2d 1, 18 (D.D.C. 2010)).

II. PROPOSED INTERVENORS LACK STANDING TO INTERVENE

The party seeking to invoke the jurisdiction of the federal court "bears the burden of establishing" standing. *Lujan*, 504 U.S. at 561. In a case like this "[t]he Supreme Court has stated that standing is 'substantially more difficult to establish' where, as here, the parties invoking federal jurisdiction are not 'the object of the government action or inaction' they challenge." *Public Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1283, 1289 (D.C. Cir. 2007) (quoting *Lujan*, 504 U.S. at 562). An Article III injury in fact must be "(i) 'concrete and particularized' rather than abstract or generalized, and (ii) 'actual or imminent' rather than remote, speculative, conjectural or hypothetical." *In re Navy Chaplaincy*, 534 F.3d 756, 759-60 (D.C. Cir. 2008). It must also be "substantially probable" that the challenged agency action caused that injury. *See Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996) (citing *Kurtz v. Baker*, 829 F.2d 1133, 1144 (D.C. Cir. 1987)).

A. Neither of the Proposed Intervenors Have Demonstrated Organizational Standing

"To establish organizational standing, [an association] must 'allege[] such a personal stake in the outcome of the controversy as to warrant the invocation of federal-court jurisdiction'; that is, it must demonstrate that it has 'suffered injury in fact, including [s]uch concrete and demonstrable injury to the organization's activities—with [a] consequent drain on the organization's resources—constitut[ing] ... more than simply a setback to the organization's

abstract social interests.'" *Nat'l Ass'n of Homebuilders v. EPA*, 667 F.3d 6, 12 (D.C. Cir. 2011) (quoting *Nat'l Taxpayers Union, Inc. v. United States,* 68 F.3d 1428, 1433 (D.C. Cir. 1995)) (alterations in original; internal quotations omitted). "[M]ere organizational interest in the environment, 'no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render [an] organization adversely affected or aggrieved within the meaning of the APA.'" *Chesapeake Climate Action Network v. Export-Import Bank of the U.S.*, Civ. No. 13-1820, 2015 WL 267099, at *14 (D.D.C. Jan. 21, 2015) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972)) (alteration in original).

HSUS and CBD both seek to establish organizational standing,[1] each claiming to have organizational interests in Defendants' administration of the Lacey Act. (*See* Decl. of Nicole Paquette ("Paquette Decl.") ¶ 18, Dkt. No. 55-3 (May 15, 2015); Decl. of Noah Greenwald ("Greenwald Decl.") ¶ 11, Dkt. No. 55-4 (May 15. 2015).) CBD claims to have an "organizational interest in ensuring the Service appropriately interprets and applies the statutory and regulatory provisions of the Lacey Act," as well as in "conserving native wildlife" potentially harmed by importation and trade in these snakes. (Greenwald Decl. ¶¶ 10, 11.) Notably, however, CBD did not submit comments on the initial proposed rule in 2010. Only after Defendants listed the Burmese python and three other species did CBD engage in the rulemaking process. (*Id.* ¶¶ 7-9.) As such, CBD has not demonstrated a particularly strong commitment to the original proposed rule.

[1] If HSUS has standing, which it does not, it would rest solely on an organizational basis. HSUS submitted no member declarations and makes only generalized claims about its members' interests. *See, e.g.*, Paquette Decl. ¶ 15 (claiming "[m]any HSUS members and supporters" view, study, photograph, etc., wildlife allegedly harmed by non-native snakes). Such unsupported claims do not come close to the evidencing the "concrete plans" necessary to establish standing. *CBD,* 563 F.3d at 478.

For its part, HSUS claims "a long history of advocating for strict implementation of the Lacey Act."[2] (Paquette Decl. ¶ 18.) HSUS also claims to have "expended substantial organization time and financial resources participating in the U.S. Fish and Wildlife Service rulemaking" at issue. (*Id.* ¶ 19.) As explained above, this activity does not confer standing. Other than detailing the efforts it dedicated to advocating for the adoption of the rules at issue, (Paquette Decl. ¶ 19), HSUS' claimed advocacy focuses on aspects of the Lacey Act other than its injurious species provisions. (*See* Paquette Decl. ¶ 18 (discussing the Captive Wildlife Safety Act and Endangered Species Act).) While it recites concerns for native wildlife, HSUS' declaration mostly focuses on the organization's disdain for the "exotic pet trade," conditions under which these animals are kept, the individualized harms to families of irresponsible pet owners, and transient impacts of escaped snakes.[3] (*Id.* ¶¶ 6-9, 11, 12, 15-17.) While these are the types of issue for which HSUS is most well-known (as opposed to general environmental advocacy), they are not the concerns of the Lacey Act's injurious species provisions. In 1900, Congress was not concerned with the impacts to human health and the environment wrought, for example, by an escaped circus tiger or elephant, locally significant as those might be to individuals or the environment. Rather, it focused on the adverse impacts invasive species like the starling and fruit bat were having, or could have, on migratory and game birds and on agricultural, horticultural, and forestry products in interstate commerce. Congress never intended to use the law to regulate careless individuals.

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[2] As discussed below, *infra* Part I.C, such general interests in the "proper administration of the laws" do not convey standing. *Lujan*, 504 U.S. 555, 576-77.

[3] Parenthetically, subsection (c) of the Lacey Act does authorize the Secretary to draft regulations to provide for "the transportation of wild animals and birds under humane and healthful conditions." *Id.* § 42(c). While clearly HSUS has institutional interests in these provisions, they are not at issue in this case.

The evidence provided comes nowhere close to meeting the high standards the D.C. Circuit has established for demonstrating organizational standing. "To show injury-in-fact, an organization must allege more than a mere 'setback to [its] abstract social interests.'" *Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.*, 901 F.2d 107, 122 (D.C. Cir. 1990) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982)). The Proposed Intervenors must demonstrate that they have expended "'operational costs beyond those normally expended' to carry out its advocacy mission" in relation to the listing of these species. *Id.* (citing *Nat'l Taxpayers Union*, 68 F.3d at 1434); *see also Turlock Irr. Dist. v. FERC*, Civ. No. 13-1253, 2015 WL 2330449, at *3 (D.C. Cir. May 15, 2015) (noting this Circuit "recognize[s] that the expenditure of resources on advocacy is not a cognizable Article III injury") (citing *Center for Law and Educ. v. Dept. of Educ.*, 396 F.3d 1152, 1162 n.4 (D.C. Cir. 2005)). This is true whether the advocacy takes place through litigation or administrative proceedings. *See Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 12 (D.C. Cir. 2011) (concluding that time and money spent "submitting comments to the EPA" and "testifying before the United States Senate" does not suffice to establish an injury in fact); *see also HSUS v. Vilsack*, 19 F. Supp. 3d 24, 46 (D.D.C. 2013).

Nor does HSUS' claim that "[i]f one or both of the injurious listings for eight large constrictor snakes is overturned, HSUS will have to redouble its limited organizational resources to strengthen regulation of large constrictor snakes at both the federal and state levels," (Paquette Decl. ¶ 20), convey standing. This is "a 'self-inflicted harm' not fairly traceable to the challenged government conduct." *HSUS*, 19 F. Supp. 3d at 37 n.4 (quoting *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 177–78 (D.C. Cir. 2012)). That HSUS chooses to "make emergency

expenditures" in the event Plaintiffs' succeed on some or all claims is a voluntary choice. (Paquette Decl. ¶ 20.)

As a final note, each of the Proposed Intervenors make claims about the effect of decision in this case on other interests. For example, HSUS claims that "a ruling from this Court that the Fish and Wildlife Service cannot lawfully regulate interstate transport under the Lacey Act injurious species provisions could have cascading negative impacts on HSUS' efforts to promote strict enforcement of similar provisions in other federal wildlife laws." (Paquette Decl. ¶ 20.) For its part, CBD asserts that "[a]ny decision in Plaintiffs' favor could also set a precedent that would weaken the Lacey Act and make it harder to establish additional Lacey Act listings that the Center is currently working to secure." (Greenwald Decl. ¶ 11.) The organizations provide no explanation for how these harms might occur, and no explanation is readily apparent. These speculative assertions should not be credited by this Court.

B. Proposed Intervenors Have Failed to Demonstrate Injury-In-Fact Sufficient to Demonstrate Associational Standing

Regarding standing's injury-in-fact prong, "a party must demonstrate that it has suffered an injury that affects it in a 'personal and individual way.'" *Ctr. for Biol. Diversity v. U.S. Dept. of Interior*, 563 F.3d 466, 478 (D.C. Cir. 2009) (quoting *Defenders of Wildlife*, 504 U.S. at 560 n.1). And while "'the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing,' [t]his interest … will not suffice on its own 'without any description of concrete plans, or indeed even any specification of *when*' the plaintiff will be deprived of the opportunity to observe the potentially harmed species." *Id.* (quoting *Lujan*, 504 U.S. at 562-64).

Where it is an association seeking to intervene on behalf of its members, as the D.C. Circuit has noted, it must "identify at least one particular member that would suffer a particular

injury in fact." *Waukesha v. EPA*, 320 F.3d 228, 231 (D.C. Cir. 2003). Intervenors bear the burden of demonstrating that absent the Lacey Act listing of these species, there is a "substantial increase in the risk to the enjoyment of the animals" ostensibly affected. *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 479 (D.C. Cir. 2009).

As noted above, HSUS did not attempt to demonstrate that any particular member has standing other in the most broad and vague sense. *Supra* n.1. Thus, HSUS has not carried its burden to show associational standing.

CBD submitted three affidavits in support of its intervention motion, one by Mr. Greenwald, its Endangered Species Program Director, and two by members, each of whom reside in the Florida Keys. Mr. Greenwald's declaration was submitted both on behalf of CBD and as a member. (Greenwald Decl. ¶¶ 3, 5.) Each claim injuries to their aesthetic, professional, economic, spiritual, and moral interests in native wildlife, each of which are purportedly at risk if the rules at issue are vacated or the Lacey Act properly construed. CBD's declarants Stuart Pimm and Christina Celano each assert that the fact these non-native snakes are listed makes it "unlikely" that they "will become established." (Decl. of Stuart Pimm ("Pimm Decl.") ¶ 13, Dkt. No. 55-5 (May 15, 2015); *see also* Decl. of Christina Celano ("Celano Decl.") ¶ 16, Dkt. No. 55-5 (May 15, 2015) (same)). Mr. Greenwald opines on the impacts of the population of Burmese python in the Everglades that was established prior to the listing, (Greenwald Decl. ¶¶ 13, 14.) He also states that he visits Oracle, Arizona each autumn and that, while there, he "like[s] to observe nature." (*Id.* ¶ 15.)

The only concrete (and thus cognizable) injuries alleged are to the CBD declarants' interest in viewing wildlife in the Everglades National Park and elsewhere. (*See, e.g., id.* ¶ 15; Celano Decl. ¶ 7; Pimm Decl. ¶ 11.) But, as to Florida, for injuries to those interests to be

"actual and imminent," Proposed Intervenors would have to demonstrate in concrete terms an incremental increase to the threat to those Everglades resources – beyond that which is occurring from the extant population of Burmese pythons that was already established at the time of the listing.

The CBD declarants cannot demonstrate such an incremental increased threat risk. As Plaintiffs have shown, Florida has an extensive regulatory system and sizable population of captive-bred constricting snakes.[4] With the listings in effect, those snakes are confined to the state. Thus, to demonstrate a substantial probability that injuries would occur, Proposed Intervenors would have to at least make some attempt to show that with a resumption of the limited and strictly controlled trade Florida allows, there is a strong probability of an increased risk of escapement, establishment of new populations, and a consequent diminishment of the native wildlife that is the basis of declarants' interest.

To show how unlikely this is, it is worth a brief review of Florida's regulatory structure. First, under Florida law, "[n]o person, party, firm, association, or corporation shall keep, possess, import into the state, sell, barter, trade, or breed [Burmese, Indian, reticulated, Northern African, or Southern African pythons or green anacondas] for personal use or for sale for personal use." Fla. Stat. §§ 379.372.(2)(a)2 & (2)(a)6; (*see* Dkt. No. 53-5). It is unlawful for any person, whether possessing a conditional species permit or not, to capture, keep, possess, or exhibit any reptile of concern in any manner not approved as safe, secure, and proper by the Florida Fish and Wildlife Conservation Commission ("FFWCC"). *Id.* § 379.372(1)(c). Reptiles of concern held in captivity are also subject to inspection by the FFWCC. *Id.* A narrow exemption to the

[4] (*See* Dkt. No. 53-5 (May 15, 2015) (Florida's laws and regulations); *See also* Decl. of Matthew Edmonds, Dkt. No. 28-5, ¶ 5 (April 1, 2015) (statement of a resident of southern Florida who owns a collection of reticulated pythons).) Also, HSUS operates a southern Florida facility where it keeps these snakes. (Paquette Decl. ¶ 5).

prohibition against importing, etc., reticulated pythons and green anacondas applies to traveling wildlife exhibitors that are licensed or registered under the United States Animal Welfare Act or to zoological facilities that are licensed or exempted by the FFWCC from the licensure requirement. Fla. Stat. § 379.372.(2)(e).

Under the regulations implementing these laws promulgated by the FFWCC, an applicant for a conditional species permit for a reptile of concern shall (1) be at least 18 years old, (2) not have been convicted of any violation of venomous reptile or reptile of concern or captive wildlife regulations, including any violation involving importation of wildlife, within three (3) years of the date of application, and (3) specify the location of the facility at which the reptiles of concern shall be maintained. F.A.C § 68A-6.007(2). The applicant must also satisfactorily complete a questionnaire developed by the FFWCC that assesses the applicant's knowledge of general husbandry, nutritional, and behavioral characteristic of the reptile of concern to be possessed. *Id.* § (3)(b). Cages, cases, rooms, pits and/or buildings containing reptiles of concerns must be constructed of specified escape proof materials and have locking devices to prevent unauthorized intrusion. *Id.* § (4).

Applicants seeking to possess reptiles of concern in captivity are required to document in writing a course of action to be taken in preparation for disasters or critical incidents. *Id.* § (9). No later than twenty-four (24_ hours prior to the onset of hurricane-force winds, as predicted by the National Weather Service, all conditional snakes must be placed in two securely woven cloth sacks and placed in a secure container, which must be kept indoors. *Id.* § 68-5.001(3)(e)(5)(b). The same method of securing conditional reptiles (*i.e.*, placement in two secured cloth bags and a secure container) also applies to any transportation of these animals. *Id.* § (4). Such containers must be prominently labeled "Dangerous Reptiles." *Id.*

Any person who keeps or possesses any live reptile of concern also must permanently identify such reptile with a unique passive integrated transponder ("PIT tag"). *Id.* § 68A-6.0072(1)(b). Moreover, records of identification, including PIT tag number, along with information about the specimen being identified (species, specimen name or number, gender, and age) must be maintained in the possessors records for as long as the specimen is possessed. *Id.* § (1)(c). Any escapes must be reported to FFWCC, Division of Law Enforcement, immediately upon discovery of escape. *Id.* § (5).

Finally, though not exhaustively, any person who possesses a live reptile of concern is required to maintain extensive records regarding births, deaths, sales acquisitions, inventory and transfers. *Id.* § 68A-6.0071. For example, records of sale or transfer shall include the date of sale or transfer; quantity and species of reptiles sold or transferred; method of identification and unique passive integrated transponder (PIT tag) number, if applicable, of each specimen sold or transferred; and the license identification number of the recipient where applicable. *Id.* § (1)(c).

Given these laws and regulations, it "stacks speculation upon hypothetical upon speculation," *New York Reg'l Interconnect, Inc. v. FERC*, 634 F.3d 581, 587 (D.C. Cir. 2011), to assume any new populations of non-native snakes will become established, much less that this improbability will be greater if the state's breeders could ship animals out of the state. This "does not establish an 'actual or imminent' injury." *Id.*

The same holds true for other locations mentioned by the Proposed Intervenors. Unlike Florida, where Burmese pythons and Northern African pythons have become established in the Everglades prior to the listing, 77 Fed. Reg. 3330, 3336 (Jan. 23, 2012), none of the eight species

have become established anywhere else in the continental United States.[5] It is one thing for the U.S. Fish and Wildlife Service ("FWS") to implement a rule under its Section 42 authority based on its expert analysis of risk factors (although whether it did so rationally and lawfully in this instance is a subject for merits briefing). It is quite another to grant Article III standing to non-governmental parties based on non-specific speculation that should Plaintiffs prevail, populations of these snakes will suddenly materialize in the wild in Oracle, Arizona, or elsewhere outside of extreme southern Florida, and devour all the native wildlife that declarants enjoy observing. As with Florida, resident, captive populations of these animals exist in all states that allow them. Accordingly, the issue is whether the CBD declarants can demonstrate an injury-in-fact via an incremental increase in the probability that these snakes will colonize places where they have not become established in decades of ownership and trade due solely to vacatur of the rules.

As this Court found in *National Association of Homebuilders*,

> the assertion that NRDC's members "can be injured by ecological damages" that may result if plaintiff succeeds in this action is not only general, it is also too speculative to satisfy the injury-in-fact requirement, even at the pleading stage. NRDC asks the court to presume that if ditches are not regulated, they will be polluted in a way that somehow damages NRDC and its members. This explanation of the increase in harm to the environment is not "sufficiently concrete" for the purposes of standing, and it does not demonstrate a "concrete injury" to NRDC's interests.

519 F. Supp. 2d at 93 (citing *Sierra Club v. Mainella*, 2005 WL 3276264, at *7 (D.D.C. Sept. 1, 2005) (alterations in original)). As in that case, so too here are the claims "too speculative to satisfy the injury-in-fact requirement." *Id.*; (*see also Clapper v. Amnesty Int'l USA,* 568 U.S. ___, 133 S.Ct. 1138, 1147–48, 1150 & n. 5, 185 L.Ed.2d 264 (2013) (observing that injury must be "certainly impending" rather than "premised on a speculative chain of possibilities," and

[5] Of course, other locations such as Puerto Rico and Hawaii have long prohibited the importation and ownership of non-native snakes, and those laws are federally enforceable under the Lacey Act's Title 16 provisions.

noting that "we have found standing based on a 'substantial risk' that the harm will occur"). Proposed Intervenors have not demonstrated "substantial risk" (or even remote possibility) of injury and thus have not met their burden of showing that they possess the necessary standing to support intervention. On this basis, HSUS' and CBD's intervention motion should be denied.

C. Even if the Court Finds Standing With Respect to Plaintiffs' NEPA and Arbitrary and Capricious Claims, Intervention Should Not Be Granted as to the Statutory Construction Counts One and Two

Even if the Court finds that the Proposed Intervenors have the necessary standing to intervene in defense of the rules at issue, which, for the reasons stated above, Plaintiffs respectfully suggest it should not, this Court should not find standing as to the statutory construction claims, Counts One and Two. Of course, standing is assessed on a claim-by-claim basis. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006).

Proposed Intervenors have demonstrated no special interest or expertise in the meaning of the law. "Congress expresses its purpose by words. It is for [courts] to ascertain — neither to add nor to subtract, neither to delete nor to distort." *62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593, 596 (1951). "It is … the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Nor can Proposed Intervenors provide any additional insight as to the Government's interpretation of the statute as it has evolved over time. Finally, the Proposed Intervenors certainly have no greater interest than the government in defending its understanding and enforcement of the law.

Most significantly, HSUS and CBD can claim no injury from a proper construction of the Lacey Act. Their interest in proper administration of the statute is no more particularized than that of the public at large. When a party's claim of injury is in common with most other persons,

the claim equates to a "generalized grievance" addressed more appropriately to other branches of government and not to the courts in the form of an intervention motion. *See United States v. Richardson*, 418 U.S. 175, 179 (1974). The Supreme Court has reasoned that "when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction . . ." *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975). Similarly, in *Fla. Audubon Soc'y v. Bentsen*, this Circuit determined that a party seeking to intervene must show that it is "not injured the same as everyone else, lest the injury be too general for court action, and suited for political redress." 94 F.3d at 667 n.4.

Here, the Proposed Intervenors claim they have assisted Defendants in the past with enforcement of the Lacey Act, albeit related to provisions other than those dealing with injurious species. (Paquette Decl. ¶ 18.) HSUS contends it has a long history of advocating for the Lacey Act's implementation, while CBD asserts it maintains an organizational interest in confirming that Defendants appropriately "interpret[] and appl[y] the statutory and regulatory provisions of the Lacey Act to effectuate congressional intent." (*Id*., Greenwald Decl. ¶ 11.) These asserted interests constitute generalized grievances, as a "large class of citizens" share the same interests in ensuring that statutes are correctly followed and that laws are properly administered.

The Supreme Court has held, moreover, that "the public interest in the proper administration of the laws . . . [cannot] be converted into an individual right . . . that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue." *Lujan*, 504 U.S. at 576-77; *see also Amer. Fed'n of Gov. Employees v. Pierce*, 697 F.2d 303 (D.C. Cir. 1983) (finding that "[a]ny interest that a congressman has in the execution of laws would seem to be shared by all citizens equally" and that injury to that interest is a "generalized

grievance[] about the conduct of government" which lacks the specificity to support a claim of standing). Because the Proposed Intervenors' claimed interests relate to the proper administration and enforcement of a federal statute, the Proposed Intervenors have failed to demonstrate a specific enough interest to confer standing.

Furthermore, any professed injury stemming from the reading of the Lacey Act advocated by Plaintiffs is even more speculative and remote than explained above. If Plaintiffs prevail on Counts One and Two only, the eight non-native species of constricting snakes will remain on the injurious species list. Their importation will continue to be prohibited, as will shipments between the continental states and Hawaii, Puerto Rico, the District of Columbia, and the territories. States will continue to be able exercise their police powers to implement and enforce any regulations they feel are best suited to their citizens' interests.

Most importantly, if Plaintiffs prevail on Counts One and Two, the animals in trade will be solely captive-bred, as the trade in wild animals will end. A precisely-defined recitation of Plaintiffs' claim thus eliminates the professed injury to Proposed Intervenors' interest in sustainable habitats and healthy populations in these snakes' native range. (*See* Paquette Decl. ¶ 8.) Further, as HSUS correctly notes, captive-bred snakes – and genetic morphs, in particular – are particularly sensitive to environmental conditions and require ideal conditions to survive. (*Id.* ¶¶ 10-11.) Compared to animals that have survived in the wild, captive-bred snakes are even more unlikely to survive and thrive in domestic ecosystems.

For these reasons, Proposed Intervenors clearly have no standing to intervene as to Counts One and Two or, as detailed above, in the case generally.

III. EVEN IF HSUS AND CBD ARE ALLOWED TO INTERVENE, THEIR PARTICIPATION SHOULD BE LIMITED TO THE MERITS STAGE AND TO THE APA AND NEPA CLAIMS

A. Proposed Intervenors Should Not Be Allowed to Intervene as to the Preliminary Injunction

Proposed Intervenors assert that they are seeking to intervene in this case in order to "exercise their own right to appeal" this Court's preliminary injunction order. *See* Prop. Intervenors Mem. in Opp. to Mot. for Extension for Time. (Dkt. No. 63 at 2 (May 28, 2015).) From Plaintiffs' prospective, this Court should not permit intervention for the purpose of challenging the preliminary injunction.

The Proposed Intervenors' belated participation would be prejudicial to Plaintiffs as it would serve to increase the burden which Plaintiffs already face in responding to any appeal filed by the Government. For these reasons, Proposed Intervenors' motion to intervene to contest the preliminary injunction should be denied, even if this Court chooses to allow intervention for the purpose of addressing the merits.

Further, this Court has carefully crafted a preliminary injunction order that balances the Court's legal findings and Plaintiffs' and the public's (including Proposed Intervenors') interests. Defendants and Plaintiffs have since spent substantial time conferring to develop a fair system to effectuate the current injunction. More importantly, however, allowing HSUS and CBD to intervene solely for the purpose of taking an appeal would short-circuit the deliberative decision-making process the United States is undertaking to decide whether it believes an interlocutory appeal is in its and the public's interest. Proposed Intervenors should not be allowed second-guess those determinations or preempt this deliberative process.

In general, moreover, there is a "presumption that post-judgment motions to intervene will be denied." *Associated Builders & Contractors, Inc. v. Herman*, 166 F.3d 1248, 1257 (D.C.

Cir. 1999). The purpose of Rule 24 intervention is to preserve judicial economy by encouraging similar claims to be joined and pursued together. *See Wash. Elec. Coop., Inc. v. Mass. Mun. Wholesale Elec. Co*., 922 F.2d 92, 97 (2d Cir. 1990). By contrast, allowing intervention for the purposes of permitting movants to take an interlocutory appeal would create inefficiencies and thus contravene the values the rule was designed to promote.

1. Factual Background on the Preliminary Injunction Process

Plaintiff filed a motion for a temporary restraining order on April 1, 2015 (Dkt. No. 28) to enjoin the Defendants' promulgation of a rule that would list certain species of constricting snakes as "injurious" under the Lacey Act and was interpreted to prevent breeders, pet owners, and others from transporting the snakes across the state lines. To address the complicated issues of statutory construction and legislative history surrounding the interpretation of the rule, the parties engaged in several rounds of briefing and two hearings were held before this Court. On May 12, 2015, the Court granted Plaintiff's motion for a preliminary injunction in part, (Mem. Op., Dkt. No. 52 (May 5, 2015)), and ordered supplemental briefing as to the scope of the injunction. The Proposed Intervenors' motion to intervene was not filed until May 15, 2015. (Dkt. No. 55) – three days after the preliminary injunction was granted and only three days before the hearing on the scope of the injunction was held.

During the initial briefing on the preliminary injunction, each party's response to the other party's initial briefing, and a later round of supplemental briefing ordered by the Court, the Proposed Intervenors were silent. Their silence did not occur because they were unaware of the ongoing matter – indeed, HSUS moved for leave to file an *amicus* brief in early April, which this Court granted. (Order, Dkt. No. 37 (April, 8, 2015).) Despite HSUS' desire to weigh in as an *amicus*, the Proposed Intervenors waited until the preliminary injunction was granted – and the

possibility of an appeal manifested – to file their motion to intervene. In that motion, the Proposed Intervenors sought to participate not only on the merits but also in the preliminary injunction proceedings. (*See* Motion to Intervene, Dkt. 55-1 at 7 ("Intervenors and their members will suffer injury in fact if Plaintiffs receive their requested relief and the listings are invalidated or enjoined"); *see also* Proposed Intervenors Opp. Mem. to Mot. for Extension for Time (Dkt. No. 63 (May 28, 2015)) (seeking to intervene in this case in order to "exercise their own right to appeal" this Court's preliminary injunction order).)

Plaintiffs oppose the Proposed Intervenors' overdue request to participate in the preliminary injunction proceedings. The request would be untimely, as this Court has already ruled in favor of granting a preliminary injunction (and the injunction has begun). It would be prejudicial to Plaintiffs' interests if the Proposed Intervenors were permitted to lodge an appeal of this Court's preliminary injunction decision without participating in any of the underlying briefing or argument pertaining to the issuing of the injunction. Proposed Intervenors' motion to intervene should be denied with regard to the preliminary injunction proceedings.

2. Proposed Intervenors' Motion to Intervene in the Preliminary Injunction Proceedings is Not Timely

Under Federal Rule of Civil Procedure 24, a motion to intervene must be "timely." *See* Fed. R. Civ. P. 24(a), 24(b). The D.C. Circuit has held that timeliness "is to be judged in consideration of all the circumstances" including "the purpose for which intervention is sought" and the "probability of prejudice to those already parties in the case." *United States v. British Am. Tobacco Austl. Servs. Ltd*., 437 F.3d 1235, 1238 (D.C. Cir. 2006) (internal quotations omitted). Courts measure timeliness "from when the prospective intervenor knew or should have known that any of its rights would be directly affected by the litigation." *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003) (internal quotations omitted).

Courts in this district have found that it may be appropriate to deny intervention for the purposes of challenging a preliminary injunction when the proposed intervenors' motion is filed in the middle of an already-set briefing schedule or during preparations for a hearing on the injunction. In *Van Valin v. Gutierrez*, the proposed intervenors sought to intervene on the merits as well as at the preliminary injunction stage, as a preliminary injunction hearing was scheduled for only two days after the intervention motion was filed. 2008 WL 7759966, at *1 (D.D.C. Aug. 19, 2008). The court found the proposed intervenors' motion to be untimely in relation to the preliminary injunction, although it granted the motion to intervene on the merits of the case. *Id*., at *2; *see also Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 168 (5th Cir. 1993) (affirming the district court's decision to deny intervention at the preliminary injunction stage of the proceedings on the grounds that such intervention would be untimely); *Serv. Emps. Int'l Union v. Husted*, 887 F. Supp. 2d 761, 772 (S.D. Ohio 2012) (denying motion to intervene as untimely because the motion was filed "after briefing had concluded on the Motion for Preliminary Injunction"), *rev'd in part on other grounds*, 696 F.3d 580 (6th Cir. 2012).

The argument for denying intervention in this case is even stronger than in *Van Valin*, where the proposed intervenors moved for intervention prior to the preliminary injunction hearing. 2008 WL 7759966, at *1. Here, the Proposed Intervenors' motion was filed *three days after* the preliminary injunction was granted, when only supplementary issues – such as whether the injunction should cover all states or exclude Florida and Texas – remained. Permitting intervention at this eleventh-hour juncture would disrupt the implementation of the injunction, which has already begun. *See Garcia v. Vilsack*, 304 F.R.D. 77, 84 (D.D.C. 2014) (denying a motion to intervene because intervention at a late date would serve to "disadvantage the existing parties, delay the resolution of this protracted litigation and unnecessarily complicate an already-

complex proceeding by injecting new issues when the litigation has advanced to the point it has reached here").

Thus, this Court similarly should determine that the Proposed Intervenors' motion to intervene is not timely with respect to the preliminary injunction proceedings. The Proposed Intervenors were aware that complicated briefing on the preliminary injunction issue was occurring – indeed, at that time, the Proposed Intervenors made the affirmative decision to weigh in with an *amicus* brief rather than choosing to intervene. Proposed Intervenors waited more than one month after the filing of their *amicus* brief – until this Court granted the preliminary injunction – to file their intervention motion. *Cf. Karsner v. Lothian*, 532 F.3d 876, 886 (D.C. Cir. 2008) (finding a motion to intervene timely but underscoring that the intervenor "moved to intervene before the district court took any action – even by minute order – and thus did not act so late as to prejudice proceedings in that court").

In a footnote, the Proposed Intervenors attempt to justify their decision to file an *amicus* brief rather than an intervention motion due to an "expedited briefing schedule on the TRO and to preserve judicial resources." (*See* Intervention Motion at 10, n.1.) But courts have held that the expedited hearings associated with a preliminary injunction should prompt potential intervenors to act without such delay. *See NAACP v. New York*, 413 U.S. 345, 367 (1973) (motion to intervene filed 17 days after proposed intervenors learned of the lawsuit was found to be untimely because the suit was at a "critical stage" and it was incumbent upon the proposed intervenors "to take immediate affirmative steps to protect their interests" if they wanted to participate). Proposed Intervenors should not be allowed to reset the clock on a preliminary injunction decision which has already been ruled upon and implemented by this Court.

3. Proposed Intervenors' Delay Will Prejudice the Parties' Interests

Proposed Intervenors' delay in seeking to participate in the preliminary injunction proceedings will lead to "prejudice to those already parties in the case." *British Am. Tobacco Austl. Servs., Ltd*., 437 F.3d at 1238. At this point in the proceedings, Defendants are determining whether to file an appeal based on the record which already exists as a result of both parties' extensive briefings and this Court's detailed preliminary injunction decision. Plaintiff USARK is attempting to explain the injunction – its benefits and its limitations – to its broad base of members. The timing of the Proposed Intervenors' preliminary injunction motion has forced both parties to consider that issues already litigated may become ripe again for review. Alternatively, the timing of the Proposed Intervenors' preliminary injunction motion concerns Plaintiffs because the Proposed Intervenors have demonstrated an intention to appeal this Court's preliminary injunction decision – before the Defendants have reached their own decision on the likelihood of an appeal.

In this case, Plaintiffs have raised a significant issue of statutory construction. Defendants have explained that any decision to file for either emergency relief or an interlocutory appeal on an incomplete record will need to be carefully considered. In addition, as evidenced by discussion in open court during the preliminary injunction litigation, Plaintiffs may narrow their case, once they know if the United States will file an interlocutory appeal. Simply put, the dust needs to settle before this Court considers adding parties to the case.

If Proposed Intervenors had desired to participate in the preliminary injunction proceedings, they had a sufficient opportunity to seek such involvement earlier in the process and should have done so before the Court granted the preliminary injunction. *See Pharm. Research & Mfrs. of Am. v. Maine Dep't of Human Servs*., 2000 WL 1844663, at *1 (D. Me.

Dec. 14, 2000) (denying motion to intervene as untimely in relation to a preliminary injunction proceeding and reasoning that "[t]here is no good excuse for the intervenors not to have moved to intervene earlier if preliminary injunction was their concern"). As a result of the Proposed Intervenors' unexplained and unreasonable delay, their motion to intervene with respect to the preliminary injunction proceedings should be denied as untimely.

IV. PROPOSED INTERVENORS' REQUEST FOR PERMISSIVE INTERVENTION SHOULD BE DENIED

Permissive intervention under Rule 24(b) is "inherently discretionary," *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998). The D.C. Circuit has long acknowledged the "wide latitude afforded" to district courts under Rule 24(b). *Id*. at 1046 (internal citations omitted). In evaluating motions for permissive intervention, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights, and it also may consider "whether parties seeking intervention will significantly contribute to . . . the just and equitable adjudication of the legal question presented." *Ctr. For Biological Diversity*, 274 F.R.D. at 313; *see also* Fed. R. Civ. P. 24(b)(3). For the reasons stated above relating to Plaintiffs' argument against intervention of right, Plaintiffs also assert that this Court should deny Proposed Intervenors' request to intervene permissively.

As Plaintiffs have amply demonstrated, Proposed Intervenors lack standing. Such demonstrated lack of injury-in-fact, coupled with prejudice to the parties, are sufficient reasons for this Court to exercise its discretion and deny permissive intervention.

In this Circuit, "there is uncertainty over whether standing is necessary for permissive intervention." *Sierra Club v. McCarthy*, --- F.R.D. ---, 2015 WL 1209225, at * 3 n. 2 (D.D.C. Mar. 17, 2015) (citing *In re Vitamins Antitrust Class Actio*ns, 215 F.3d 26, 31 (D.C. Cir. 2000)). Some courts have declined to reach the permissive intervention issue where the movant

has lacked standing. *See Perciasepe*, 714 F.3d at 1327. Similarly here, this Court need not reach the issue of whether standing is necessary for permissive intervention.

When a court determines that permitting a proposed intervenor to intervene would unduly delay the resolution of a case, courts have denied permissive intervention. *See Sierra Club*, 2015 WL 1209225, at *3 n.2; *see also In re ESA Section 4 Deadline Litig*., 270 F.R.D. at 6 (denying intervenors' request to intervene permissively when such intervention would "further delay resolution of this case"). Here Plaintiffs have shown the palpable delay and prejudice that intervention for purposes of the preliminary injunction would cause. Thus, this Court need not resolve the uncertainty over whether standing is necessary for permissive intervention because such intervention would "further delay" the implementation of this Court's preliminary injunction ruling.

For these reasons and others explained above, Plaintiffs respectfully request that this Court deny the Proposed Intervenors' request to intervene permissively under Rule 24(b).

CONCLUSION

For the reasons explained herein, Plaintiffs respectfully urge this Court to deny HSUS' and CBD's Motion for Intervention. In the alternative, Plaintiffs respectfully request that HSUS' and CBD's participation be denied as to the preliminary injunction, subject to reconsideration at the merits stage.

Dated: June 12, 2015

Respectfully submitted,

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