IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

REPLY IN SUPPORT OF FEDERAL DEFENDANTS' MOTION TO DISMISS

Federal Defendants S.M.R. Jewell, in her official capacity as Secretary of the U.S. Department of the Interior, and the U.S. Fish and Wildlife Service ("FWS") respectfully submit the following Reply in Support of their Motion to Dismiss.

INTRODUCTION

On February 21, 2014, Federal Defendants moved to dismiss Plaintiff's Complaint challenging the FWS's Final Rule adding four species of large, non-native constrictor snakes to the list of injurious wildlife under the Lacey Act. ECF Nos. 1, 14; 77 Fed. Reg. 3330 (Jan. 23, 2012). Federal Defendants argued that Plaintiff lacked prudential standing under the National Environmental Policy Act ("NEPA") and the Lacey Act, as well as Article III standing, and that two of its claims, Counts One and Four, failed to state a claim. ECF No. 14 ("Def. Mot."). While the evidence that Plaintiff has now put forth in its Opposition is likely sufficient to support Article III standing and prudential standing under the Lacey Act at this stage, Plaintiff still fails to establish prudential standing under NEPA. Plaintiff also has failed to rebut Federal Defendants' argument that Count One fails to state a claim. Count Four, as written, fails to state

a claim and must be amended if Plaintiff wishes to assert a violation of the Lacey Act. Accordingly, the Court should dismiss Counts One, Two, and Three of Plaintiff's Complaint. Count Four should also be dismissed, subject to Plaintiff's amendment.

ARGUMENT

I. Plaintiff Lacks Prudential Standing to Raise Its NEPA Claims

In order to have prudential standing to challenge an agency action, a plaintiff must assert an interest that "fall[s] within the zone of interests protected or regulated by the statutory provision . . . invoked in the suit." *Bennett v. Spear*, 520 U.S. 154, 162 (1997). The zone-of-interests test is intended to exclude those plaintiffs "whose interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 417 F.3d 1272, 1287 (D.C. Cir. 2005). Here, Plaintiff's asserted interests are not within the zone of interests of NEPA and thus Counts Two and Three should be dismissed. With respect to Plaintiff's Lacey Act claims, while Plaintiff's asserted interests are not within the zone of interests protected by 18 U.S.C. § 42(a)(1), Federal Defendants concede that Plaintiff has now provided sufficient allegations at this stage of the case to show that its interests are regulated by this provision.

A. Plaintiff's Alleged Conservation Interests Are Not Within NEPA's Zone of Interests

In its Opposition, Plaintiff attempts to demonstrate prudential standing under NEPA by distancing itself from the economic interests enumerated in its Complaint and instead asserting an array of so-called "conservation" interests. Plaintiff lists four conservation interests in particular: (1) the conservation of the listed snakes via "captive propagation"; (2) public education and outreach which "foster[s] a conservation ethos"; (3) biomedical research; and (4)

"efforts to eradicate invasive Burmese pythons and other species in the Everglades." Pl.'s Opp'n (ECF No. 15) at 3-4. Plaintiff's efforts to demonstrate that it has prudential standing fail, however, because these interests are not environmental interests within NEPA's zone of interests.

In order to have prudential standing under NEPA, a plaintiff must assert an environmental interest. *ANR Pipeline Co. v. FERC*, 205 F.3d 403, 408 (D.C. Cir. 2000); *Town of Stratford, Connecticut v. FAA*, 285 F.3d 84, 88 (D.C. Cir. 2002). The asserted environmental interest need not be a plaintiff's primary interest—"[p]arties motivated by purely commercial interests routinely satisfy [NEPA's] zone of interests test"—but a plaintiff cannot proceed without at least some valid environmental interest. *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1287 (D.C. Cir. 2005) (quoting *Amgen, Inc. v. Smith*, 357 F.3d 103, 109 (D.C. Cir. 2004)).

"The Supreme Court has defined NEPA's zone of interest as the 'physical environment—the world around us so to speak.'" *Cal. Forestry Ass'n v. Thomas*, 936 F. Supp. 13, 21 (D.D.C. 1996) (quoting *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772 (1983)). In *Metropolitan Edison*, the Court cautioned against reading "human environment" in the statute too broadly for fear that if "give[n] the broadest possible definition, the words 'adverse environmental effects' might embrace virtually any consequence of a governmental action that someone thought 'adverse.'" 460 U.S. at 772. NEPA's regulations echo this limited definition, defining "human environment" to include "the natural and physical environment. . . . This means that economic or social effects are not intended by themselves to require preparation of an [EIS]." 40 C.F.R. § 1508.14.

Here, Plaintiff's claims suffer from precisely the same defect identified by the D.C. Circuit in *National Association of Home Builders*: Plaintiff's "problem is not that their 'economic interests . . . blight [their] qualifying ones[]'; rather, they have failed to demonstrate by a substantial probability that they have any qualifying ones."[1] 417 F.3d at 1288 (internal citation omitted). Plaintiff's alleged conservation interests are not interests in the natural and physical environment. Plaintiff is not concerned about the plight of the listed snakes in the wild.[2] Rather, USARK and its members are interested in *captive* snakes. *See, e.g.*, Compl. ¶ 2 ("USARK represents all segments of the reptile industry, including breeders, hobbyists, trade show promoters, service providers, scientists, and equipment manufacturers who rely on, trade in, and gain enjoyment from the breeding and maintenance of large, non-native constricting snakes."); Pl.'s Opp'n at 3 (USARK "is dedicated to conservation through captive propagation."); USARK Position Statement on Conservation, *available at* http://usark.org/conservation ("Captivity has become integral as a conservation tool for animal

[1] The cases to which Plaintiff cites to demonstrate that an organization with primarily economic interests can also have environmental interests are inapposite here because the plaintiffs in those cases had valid interests in the natural and physical environment. In *Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior*, 731 F. Supp. 2d 15 (D.D.C. 2010), plaintiff was a coalition whose members operated off-road vehicles on parts of the North Carolina coast listed as critical habitat under the Endangered Species Act. The court held that their interest in using the North Carolina beaches for commercial and recreational purposes was an environmental interest within the zone of interests of NEPA. 731 F. Supp. 2d at 20-21. In *The Consolidated Delta Smelt Cases*, 717 F. Supp. 2d 1021 (E.D. Cal. 2010), plaintiff water authorities and agricultural organizations challenged a FWS plan to reduce water supplies to protect smelt critical habitat. Although the court did not expressly consider standing, it did find that the water reductions harmed plaintiffs by causing crop destruction, land subsidence, and reduced air quality, among other things. 717 F. Supp. 2d at 1057-58. Unlike the instant case, both of these cases involved alleged injuries to lands and waters in the physical and natural environment. Here, Plaintiff alleges no such interest in the outdoor, wild habitat of the listed snakes.

[2] In fact, the opposite is true. Plaintiff and its members express an interest in helping to "eradicate non-native snakes" in the United States. Compl. ¶ 7; *see also* Pl.'s Opp'n at 4; *Id.*, ex. 1, Decl. of Philip W. Goss, ¶ 23; *Id.*, ex. 4, Decl. of Kristofer F. Swanson, ¶¶ 6, 8.

species of the world."). In fact, "[m]ost of the breeders and hobbyists that belong to USARK deal in 'morphs,' or python, boa, or other snake species that are selectively bred [in captivity] for unique traits (such as albinism), colors, or patterns." Pl.'s Opp'n, ex. 1, Decl. of Goss, ¶ 6. "These snakes have been bred in captivity for decades and are far-removed from wild caught individuals." *Id*. ¶ 7.

Likewise, Plaintiff's alleged injuries are not related to the natural or physical environment. Plaintiff does not contend that its members breed listed snakes in order to release them into the wild, either in the United States or in their native habitats abroad. Nor does it argue that the Final Rule impacts its ability to work to protect either the native or non-native habitats of wild snakes.[3] Rather, Plaintiff alleges that the Final Rule prevents its members from importing and transporting captive listed snakes across state lines for purposes of pet ownership, breeding, sale, display at trade shows, and use in public education and research. *See*, *e.g.*, Compl. ¶ 5 ("The biggest economic drivers [of the reptile industry] are the literally hundreds of large and small trade shows held throughout the country each year to which breeders and hobbyist[s] bring, show, and sell their animals."); Pl.'s Opp'n at 4 ("Trade shows . . . are also an integral part of USARK's conservation education mission as these events afford the public the opportunity to see and learn about these species.") (internal quotation marks omitted); *id*., ex. 2,

[3] The closest Plaintiff comes to making this argument is in the Conservation Position Statement on its website, quoted in the Declaration of Philip W. Goss, in which Plaintiff claims an interest in "saving [] habitats and parts of ecosystems." Pl.'s Opp'n, ex. 1 ¶ 17; USARK Position Statement on Conservation, *available at* http://usark.org/conservation. However, even if the Court liberally construed the Goss Declaration to argue that Plaintiff has an interest in preserving the habitat of listed snakes which is hindered by the Final Rule, that interest would be insufficient to support standing. Plaintiff is asserting associational standing here, not organizational standing, so it must show that its *members* have an interest in the environment. *See* Pl.'s Opp'n at 8. Nowhere in its Complaint, Opposition, or attached declarations do Plaintiff's members express an interest in protecting either the native habitats of listed snakes abroad or the non-native habitats of listed snakes in the United States.

Decl. of Lindsey R. Lopez, ¶¶ 16-17 (describing loss of pet snake due to inability to transport it across state lines for veterinary care); *id*., ex. 3, Decl. of Keith Gisser, ¶ 8 ("With the inability to sell these animals across state lines, the value of these baby animals has crashed, so we stopped breeding . . . .").

Simply put, captive snakes are not a part of the "natural and physical environment" contemplated by NEPA. A simple comparison helps to make this point. An organization with an interest in breeding and conserving Golden Retrievers does not have an interest in the environment merely because it works to propagate a particular species of animal. The mere fact that the species Plaintiff and its members breed, sell, study, and enjoy are traditionally viewed as "wild", undomesticated animals, does not alter the fact that, when captive, these animals are pets; they are not part of the natural and physical environment. *See, e.g*., Pl.'s Opp'n, ex. 1, Decl. of Goss, ¶ 10 (explaining that many USARK members own snakes as "pets" and noting that "[o]nly certain species [of snakes] appeal to certain people, and substituting other species is not an option, much as people favor one breed of dog over another"); *id*., ex. 2, Decl. of Lopez, ¶¶ 16-17 (describing pet Burmese python named Fuji); *id*., ex. 4, Decl. of Swanson, ¶¶ 17-19 (describing Burmese pythons as "pets," including an albino Burmese python named Mitch); *id*., ex. 5, Decl. of Raul E. Diaz, Jr., ¶¶ 2, 7-8 (describing housemate's pet Burmese python and two pet Yellow Anacondas); *id*., ex. 6, Decl. of Michael Cole, ¶¶ 10, 13 (noting that declarant is a member of the Pet Industry Joint Advisory Committee and keeps listed snakes as pets).

Plaintiff attempts to make its alleged conservation interests appear more "environmental" by referencing its efforts to "preserv[e] threatened and endangered species around the world." Pl.'s Opp'n at 3-4. Of the four listed species, only one subspecies of one species, the Indian python (*Python molurus molurus*), is listed as threatened or endangered. *See* U.S. Fish &

Wildlife Serv., Listed Animals, *available at* http://ecos.fws.gov/tess_public/pub/listedAnimals.jsp. The mere designation of one subspecies as endangered or threatened does not alter the fact that breeding that subspecies in captivity, with no intent to release it into the wild—and every indication that Plaintiff's members' captive-bred specimens would not be suitable for reintroduction— is not an environmental interest.[4] *See* Pl.'s Opp'n, ex. 1, Decl. of Goss, ¶ 6 ("Most of the breeders and hobbyists that belong to USARK deal in 'morphs,' or python, boa, or other snake species that are selectively bred for unique traits (such as albinism), colors, or patterns."); *id*., ex. 6, Decl. of Cole, ¶ 13 (asserting partial ownership in "most extensive collection of genetic mutation (morphs)" of Burmese pythons in the United States). Plaintiff's members express no interest in breeding Indian pythons for reintroduction into their native habitats in India and Sri Lanka. In fact, not a single one of Plaintiff's six declarants mentions breeding Indian pythons in particular, let alone the effect that the Final Rule has had on those efforts.

The non-environmental nature of Plaintiff's interest in the listed species is reinforced by Plaintiff's recognition that these species are non-native and invasive. Compl. ¶¶ 2, 8, 57 (recognizing listed snakes are "non-native"); Pl.'s Opp'n at 4 (noting existence of "invasive Burmese pythons and other species in the Everglades"). Plaintiff specifically notes that its members are involved in efforts to "eradicate these species in regions to which they are non-native." Compl. ¶ 7; *see also* Pl.'s Opp'n at 4; *id*., ex. 1, Decl. of Goss, ¶ 23; *id*., ex. 4, Decl. of Swanson, ¶¶ 6, 8. Given Plaintiff's asserted interest in eradicating wild non-native snakes and the fact that none of the four listed species is native to the United States, *see* 77 Fed. Reg. 3330,

[4] This is not to say that Plaintiff lacks a legitimate interest in the conservation, preservation, and propagation of the listed species. It is only to say that these interests are not interests in the physical and natural environment when they involve only captive animals.

3331, it is clear that Plaintiff's and its members' interest in these snakes is in breeding and raising them in captivity, not maintaining a wild population of the snakes in the United States.

Moreover, Plaintiff's members' efforts to eradicate listed snakes from the Everglades and other ecosystems in the United States are not impeded by the Final Rule—the Final Rule places no limitations on capturing listed snakes in the wild. In fact, those efforts dovetail with the Rule's goal of preventing the spread of these four invasive species. To the extent Plaintiff's members allege that their interest in removing listed snakes from the state in which they were captured is harmed by the Rule's ban on interstate transport, that is not an environmental interest. Plaintiff's members' declarations make clear that they wish to transport captured snakes across state lines, not for environmental purposes such as reintroducing them into appropriate natural habitats in their native ranges, but rather to maintain them in captivity for breeding, selling, and as pets. *See* Pl.'s Opp'n, ex. 4, Decl. of Swanson, ¶ 8 ("As a breeder, I also had interest in removing 'wild' Burmese from Florida . . . , shipping them to my location in Texas, and setting up breeding from a diverse and strong bloodline of beautiful animals.").

Even if Plaintiff had alleged conservation interests that are valid environmental interests within NEPA's zone of interests, Plaintiff fails to explain in its Opposition how they are harmed by the Final Rule. As Federal Defendants noted in their Motion, the Lacey Act and its implementing regulations include a provision allowing individuals to apply for importation and interstate transport permits "for zoological, educational, medical, or scientific purposes." 18 U.S.C. § 42(a)(3); 50 C.F.R. §§ 16.15, 16.22; Def. Mot. at 11; *see also* U.S. Fish & Wildlife Serv., Permits, http://www.fws.gov/permits/instructions/ObtainPermit.html. Plaintiff's public education and scientific research interests fall squarely under this exception to the Rule's general ban on importation and interstate transport. *See* Pl.'s Opp'n, ex. 1, Decl. of Goss, ¶ 18

(describing USARK's efforts to "educat[e] the public on the importance of these animals and foster[] a conservation ethos"); *id*., ex. 2, Decl. of Lopez, ¶ 5 (describing how declarant makes "educational presentations at elementary schools [and] community events"); *id*., ex. 5, Decl. of Diaz, ¶¶ 2, 11 (describing declarant's scientific research of listed snakes). In fact, one declarant, USARK member Keith Gisser, successfully obtained a FWS permit for his "traveling educational herpetology program," Herps Alive! The Interactive Reptile and Amphibian Experience.[5] *Id*., ex. 3, ¶ 4. To the extent that Plaintiff's members' interests do not fit within these permit categories— "zoological, educational, medical, or scientific purposes"—it is because they are non-environmental interests in breeding, selling, and owning listed snakes for economic purposes or as pets.

B. Plaintiff Has Now Provided Sufficient Factual Allegations at the Motion to Dismiss Stage to Show That at Least One of Its Members is Within the Zone of Interests Regulated by the Lacey Act.

To survive a motion to dismiss for lack of prudential standing under the Lacey Act, Plaintiff must allege sufficient facts to show that its interests are arguably within the "zone of interests" protected or regulated by 18 U.S.C. § 42(a)(1), the statutory provision at issue. *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 492 (1998). This provision authorizes the Secretary of the Interior to ban the importation and interstate transportation of species of non-native wildlife that she determines are "injurious" to people; agricultural,

[5] In his Declaration, Keith Gisser, states that the process for obtaining a permit from the FWS is "convoluted and requires far more time and resources than it should." Pl.'s Opp'n, ex. 3 ¶ 4. While Plaintiff and its members might prefer that the permit process be simpler, the FWS is obliged to ensure that permittees' intended uses of listed snakes are legitimate so that the exceptions do not swallow the rule. What matters is that Mr. Gisser successfully applied for and was granted a permit to continue his educational activities. Moreover, Plaintiff's Complaint does not challenge the permitting process so that issue is not before the Court.

horticultural, and forestry interests; and wildlife or the wildlife resources of the United States. *See also* Def. Mot. at 12 (citing legislative history regarding the purposes of the Lacey Act).

Plaintiff has not provided sufficient allegations to show that its interests are within the "zone of interests" protected by 18 U.S.C. § 42(a)(1), despite its arguments to the contrary. The Lacey Act is intended to protect various interests from being harmed by injurious species. This statutory provision does not even arguably protect those who, like Plaintiff's members, are interested in owning, breeding, or studying an injurious species, whether for economic or other reasons. Plaintiff tries to argue that the Lacey Act's reference to "agricultural, horticultural, and forestry" interests provides "similar indicia of economic concerns" as the Supreme Court has found sufficient to support prudential standing under the Endangered Species Act ("ESA"). Pl.'s Opp'n at 7 (citing *Bennett v. Spear*, 520 U.S. 154, 176-77 (1997)). However, the relevant statutory provision at issue in *Bennett*, Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), specifically requires a consideration of "the best scientific and commercial data available" which the Supreme Court found is intended, in part, to prevent uneconomic jeopardy determinations such as the one to which the petitioners claimed they were the victims. There is no similar requirement in the Lacey Act that is intended to prevent uneconomic determinations that a species is injurious. Instead, 18 U.S.C. § 42(a)(1) is intended to prevent the opposite economic problem—injury to agricultural, horticultural, and forestry interests that is potentially caused by allowing injurious wildlife to be imported into and spread throughout the United States.

In addition, while the Lacey Act may carve out certain non-native birds that are kept as pets, Pl.'s Opp'n at 7-8, this does not indicate that Plaintiff—some of whose members allegedly participate in trade in the non-native constrictor snakes added to the list of injurious species—are within 18 U.S.C. § 42(a)(1)'s "zone of interests." Had Congress intended to exclude pets from

being deemed injurious wildlife, it could have done so. Congress' failure to carve out other species kept as pets indicates that it did not intend to protect those species or those that keep them as pets.

However, while Plaintiff is not within the "zone of interests" protected by 18 U.S.C. § 42(a)(1), Plaintiff has now, through declarations, provided facts that appear sufficient at the motion to dismiss stage to show that at least one of its members is within the "zone of interests" regulated by 18 U.S.C. § 42(a)(1). Accordingly, Federal Defendants withdraw their motion to dismiss as to Plaintiff's Lacey Act claim on prudential standing grounds, but reserve the right to assert lack of prudential standing at the summary judgment stage if the facts warrant such an argument. Although Federal Defendants do not contest prudential standing at this time, as explained in Section III below, Count One should be dismissed for failure to state a claim.

II. Plaintiff Has Put Forth Sufficient Evidence to Establish Constitutional Standing at the Motion to Dismiss Stage

Plaintiff alleges that Federal Defendants "fail[] to recognize the varying levels of proof required at different litigation stages" while at the same time quoting the D.C. Circuit's requirement that "a petitioner whose standing is not self[-]evident should establish its standing by the submission of its arguments and any affidavits or other evidence . . . at the first appropriate point in the review proceeding—either in response to a motion to dismiss for want of standing or, with the petitioner's opening brief." Pl.'s Opp'n at 9-10; *Rainbow/PUSH Coal. v. FCC*, 396 F.3d 1235, 1239 (D.C. Cir. 2005) (quoting *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002)) (internal quotation marks omitted). Here, Plaintiff's Complaint did not make clear whether Plaintiff was asserting associational standing or standing on its own behalf and did not clearly identify the members and injuries that allegedly supported its standing. To resolve this confusion, Federal Defendants properly challenged Plaintiff's standing in a motion to

dismiss, requiring Plaintiff to then put forth sufficient evidence to support its standing at this stage of the proceedings.[6] Plaintiff has attached affidavits from two members of USARK that allege economic harms that appear to be sufficiently concrete, individualized, and traceable to the Final Rule to survive a motion to dismiss.[7] *See* Pl.'s Opp'n, exs. 3, 4, Decls. of Gisser & Swanson. Therefore, Federal Defendants agree that Plaintiff has put forth sufficient evidence to establish Article III standing at this stage of the litigation but reserve the right to challenge Plaintiff's Article III standing on summary judgment. *See Nat'l Whistleblower Ctr. v. Dep't of Health & Human Serv*., 839 F. Supp. 2d 40, 46 (D.D.C. 2012) (citing *Lujan v. Def. of Wildlife*, 504 U.S. 555, 561 (1992)) (noting that a plaintiff faces a higher burden in proving standing at the summary judgment stage than the motion to dismiss stage).

[6] Plaintiff alleges that Federal Defendants asserted in their motion to dismiss that an organizational plaintiff must identify at least one injured member in its complaint in order to have standing. Pl.'s Opp'n at 10. To the contrary, Federal Defendants assert that, once its standing is challenged in a motion to dismiss, a plaintiff must then identify at least one injured member. *See Rainbow/PUSH*, 396 F.3d at 1239; *Summers v. Earth Island Inst*., 555 U.S. 488, 497-98 (2008).

[7] Of the six affidavits attached to Plaintiff's Opposition, only two—those of Keith Gisser and Kristofer F. Swanson—support USARK's standing. The affidavits of Raul E. Diaz, Jr. and Michael Cole do not assert that they are members of USARK. Pl.'s Opp'n, exs. 5, 6. Only injuries suffered by members of an organization can support that organization's associational standing. *Am. Trucking Ass'ns, Inc. v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 247 (D.C. Cir. 2013). The affidavit of Philip W. Goss describes USARK generally but does not assert individual harms suffered by Mr. Goss. Pl.'s Opp'n, ex.1. Thus, that affidavit also does not support associational standing. *Am. Trucking Ass'ns*, 724 F.3d at 247. (finding that an association has standing to sue on behalf of a member only if the member has suffered an injury and thus would have standing to sue in his own right). Finally, the affidavit of Lindsey R. Lopez fails to support standing for USARK because the injury she allegedly suffered—the death of her snake due the inability to cross state lines to obtain veterinary care—has already occurred. Pl.'s Opp'n, ex.2, ¶ 16. "[W]here the plaintiffs seek declaratory and injunctive relief, past injuries alone are insufficient to establish standing." *Dearth v. Holder*, 641 F.3d 499, 501 (D.C. Cir. 2011).

III. Count One Fails to State a Claim and Amendment is Futile.

Count One should be dismissed for failure to state a claim because it alleges that the 2012 Final Rule is *ultra vires* based solely on a regulatory interpretation of the Lacey Act as prohibiting interstate transportation of species listed as injurious that was promulgated in 1965. Amendment is futile because a claim challenging the FWS's 1965 regulations would be time-barred under the applicable statute of limitations at 28 U.S.C. § 2401(a) and the limited circumstances in which the substance of a rule can be reviewed after the statute of limitations has expired do not apply.

As Federal Defendants have explained, the FWS's Lacey Act regulations promulgated in 1965 interpreted the Lacey Act to prohibit the interstate transportation of injurious species. Def. Mot. at 16 (citing 50 C.F.R. § 16.3 ("[I]mportation into or the transportation of live wildlife or eggs thereof between the continental United States . . . by any means whatsoever, is prohibited except for certain purposes and under certain conditions as hereinafter provided in this part.")). Plaintiff admits that the gravamen of Count One is a challenge to Federal Defendants' allegedly unlawful expansion of the statutory term "shipment" beyond its commonly understood legal meaning. Pl.'s Opp'n at 14. However, the FWS did not change or expand the statutory word "shipment" through the 2012 Final Rule. The FWS interpreted the term "shipment" through its regulations in 1965. Since that time, as a consequence of the 1965 regulatory interpretation, when the FWS has added species to the list of injurious wildlife the effect has been to prohibit the interstate transportation of the species.

Plaintiff argues that it is not challenging Section 16.3 of the regulations, and that the 2012 Final Rule amended 50 C.F.R. § 16.15, not Section 16.3. Pl.'s Opp'n at 15. While it is true that the 2012 Final Rule amended Section 16.15, and not Section 16.3, the Final Rule did not add,

alter, or amend the language prohibiting "importation, transportation, or acquisition" of the reptile species named in Section 16.15, nor did it affect the applicability of Section 16.3 as a general restriction that applies to all species listed as injurious. Instead, the Final Rule primarily just amended Section 16.15 to add the four new species of non-native reptiles.[8] Consequently, to the extent Plaintiff wishes to challenge the FWS's allegedly unlawful expansion of the Lacey Act term "shipment" to ban interstate transportation of species listed as injurious, it would need to challenge the FWS's 1965 regulations—whether Section 16.3, Section 16.15, or both. As it stands now, Plaintiff's complaint is deficient because it improperly identifies the 2012 Final Rule as the source of the prohibition on interstate transportation of injurious species and does not mention the FWS's regulations.

However, amendment of the complaint to challenge the 1965 regulations would be futile and so should not be allowed. Def. Mot. at 17. A facial challenge to the 1965 regulations is well beyond the applicable six-year statute of limitations in 28 U.S.C. § 2401(a). Moreover, none of the narrow circumstances in which a plaintiff can challenge the substance of a rule after expiration of the limitations period applies here. First, "a party against whom a rule is applied may, at the time of application, pursue substantive objections to the rule, including claims that an agency lacked the statutory authority to adopt the rule." *Indep. Bankers of Am. v. Bd. of Governors of Fed. Reserve Sys.*, 195 F.3d 28, 34 (D.C. Cir. 1999). The D.C. Circuit has explained that such a challenge can be brought "for example, by way of defense in an enforcement proceeding." *Nat'l Labor Relations Bd. Union v. Fed. Labor Relations Auth.*, 834

[8] The Final Rule made other, minor, non-substantive changes to Section 16.15 but did not add or change the substantive language regarding transportation. One need only look at prior versions of the Code of Federal Regulations to confirm that the "importation, transportation, or acquisition language" in Section 16.15 is not new. Moreover, the identical language appears in other Sections of the regulations. *See* 50 C.F.R. §§ 16.11 (mammals), 16.12 (birds).

F.2d 191, 195 (D.C. Cir.1987). This Plaintiff is not asserting its challenge to the ban on interstate transportation by way of defense in an enforcement proceeding.

As-applied challenges are also permitted after expiration of the statute of limitations to challenge an agency's denial of a petition for amendment or rescission of a regulation. *Id.* at 196. Plaintiff alludes to this possible method of obtaining judicial review, but does not and cannot assert that it has petitioned the FWS for amendment or rescission of any regulation. *See* Pl.'s Opp'n at 16.

Second, review is also permissible after the limitations period has expired where the agency "reopens" an issue through a subsequent rulemaking. *P&V Enters. v. U.S. Army Corps of Eng'rs*, 516 F.3d 1021, 1023-24 (D.C. Cir. 2008). Plaintiff argues that "[t]he so-called 'reopening' doctrine may be a stretch, given that the FWS promulgated an entirely new regulation." Pl.'s Opp'n at 16. While Plaintiff's point is not clear, the FWS did not "reopen" the limitations period to the 1965 regulations by its promulgation of the 2012 Final Rule. As explained above, other than adding the four species to the list of injurious reptiles, the 2012 rule made only non-substantive changes to 50 C.F.R. § 16.15. The FWS did not alter or amend the language regarding "transportation" of species listed as injurious and did not reconsider this issue through the rulemaking regarding the four non-native constrictors. *See P&V Enters.*, 516 F.3d at 1024 (reopener doctrine only applies where an agency undertakes a substantive reconsideration of an existing rule). Consequently, Count One should be dismissed for failure to state a claim.

IV. Plaintiff Must Amend Count Four to State a Claim under the Lacey Act Via the APA

Count Four of Plaintiff's Complaint states a freestanding claim under the APA. Compl. ¶¶ 91-93. As Federal Defendants explained in their Motion to Dismiss, the APA provides the

framework for review of allegations that an agency has violated some other underlying substantive statutory requirement; it cannot be the source of a freestanding claim. Def. Mot. at 18-19 (citing cases).

In its Opposition, "Plaintiff acknowledges that Count Four should have been stated to have been raised under the Lacey Act via the APA, and not the APA alone." Pl.'s Opp'n at 17. Plaintiff argues that despite its failure to make this clear, Count Four was "certainly sufficient to put [Federal Defendants] on notice" of its claim. *Id*. at 18. To the contrary, as drafted Count Four could have been read to have stated a claim solely under the APA, under NEPA via the APA, or under the Lacey Act via the APA. Therefore, should Plaintiff intend Count Four to state a claim under the Lacey Act via the APA, it must amend its Complaint to make that clear.

CONCLUSION

For the reasons stated above, Federal Defendants respectfully request that the Court dismiss Counts One, Two, and Three of Plaintiff's Complaint with prejudice. The Court should also dismiss Count Four subject to Plaintiff's amendment of its Complaint to state a claim under a substantive statute such as the Lacey Act.

Respectfully submitted this 18th day of March, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of March, 2014, a copy of the foregoing Reply in Support of Federal Defendants' Motion to Dismiss was filed via the Court's electronic case filing (ECF) system, which will send notice to all counsel of record.

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