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 PLAINTIFF'S AMENDED COMPLAINT

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 the Amended Complaint of Plaintiff U.S. Association of Reptile Keepers, Inc. ("USARK") under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

INTRODUCTION

On May 23, 2014, Federal Defendants moved to dismiss Plaintiff's Amended Complaint (ECF No. 21) challenging the FWS's 2012 Final Rule adding four species of large, non-native constrictor snakes to the list of injurious wildlife under the Lacey Act. Def.'s Mot. (ECF No. 22); 77 Fed. Reg. 3,330 (Jan. 23, 2012). Federal Defendants argued that the Court lacks jurisdiction over Count One because the relevant statute of limitations has run and that Plaintiff has failed to state a claim as to Counts Two and Three because Plaintiff is not within the zone of interests of the National Environmental Policy Act ("NEPA"). Def.'s Mot. 7-18. Plaintiff's

Opposition, filed on June 11, 2014, does nothing to undermine those arguments. *See* Pl.'s Opp'n (ECF No. 24). Accordingly, the Court should dismiss Counts One, Two, and Three of Plaintiff's Amended Complaint.

ARGUMENT

I. The Court Lacks Jurisdiction to Review Count One

Plaintiff contends that Count One challenges two aspects of the FWS's implementation of the Lacey Act: (1) the FWS's prohibition on transportation (as opposed to shipment) of wildlife it deems to be injurious; and (2) the FWS's application of the prohibition on transportation of injurious wildlife between states within the continental United States. Pl.'s Opp'n 3. Plaintiff argues that the FWS imposed these prohibitions through its 2012 Rule, making its challenges timely. *Id*. at 6. Contrary to Plaintiff's arguments, the FWS did not prohibit transportation of injurious wildlife between states within the continental United States through the 2012 Rule. Instead, the FWS long ago interpreted the Lacey Act to contain these prohibitions. Plaintiff is thus attempting to bring a facial challenge to the FWS's regulations, but such a challenge is time-barred under the applicable six-year statute of limitations in 28 U.S.C. § 2401(a). Moreover, the narrow "as applied" exception does not apply. Consequently, the Court should dismiss Count One for lack of jurisdiction.

A. Count One is Time-Barred.

The FWS first interpreted the Lacey Act to prohibit the interstate transportation of injurious species through its Lacey Act regulations promulgated in 1965. Def.'s Mot. 8 (citing 50 C.F.R. § 16.3). Section 16.3 states that

> importation into or the transportation of live wildlife or eggs thereof between the continental United States, the District of Columbia, Hawaii, the Commonwealth of Puerto Rico, or any territory or possession of the United States by any means

> whatsoever, is prohibited except for certain purposes and under certain conditions as hereinafter provided in this part

50 C.F.R. § 16.3. This Section is a general restriction that applies to all mammals, birds, fish, mollusks, crustaceans, amphibians, and reptiles that the FWS deems to be injurious. *Id.* §§ 16.11-16.15. Section 16.15, which contains the list of reptiles that FWS has deemed to be injurious, similarly prohibits the "importation, transportation, or acquisition" of reptiles listed as injurious without obtaining a permit. *Id*. § 16.15. The brown tree snake was listed injurious in 1990, which was the first reptile to be included in Section 16.15. 55 Fed. Reg. 17,439 (Apr. 25, 1990). The FWS amended Section 16.15 in 2012 to add the four non-native constrictor snakes at issue in this case, but the FWS did not alter Section 16.15's "importation, transportation, or acquisition" language or make any other substantive changes to that Section. Nor did the FWS's 2012 Rule alter Section 16.3.

Plaintiff argues that the FWS's use of "transportation" instead of "shipment" in Section 16.3 was not amenable to challenge until the FWS promulgated the 2012 Rule because Section 16.3 "has no regulatory effect, acting more as a general statement of purpose or preamble." Pl.'s Opp'n 6. Plaintiff is mistaken. As the Section's name indicates, Section 16.3 contains "[g]eneral restrictions" that apply to all wildlife listed as injurious in Sections 16.11-16.15. Thus, contrary to Plaintiff's argument, Section 16.3 has had regulatory effect since its promulgation in 1965:[1] it prohibits importation and interstate transportation of wildlife that FWS has deemed to be injurious, including the reptiles listed in Section 16.15. In addition, the courts

[1] On April 13, 1965, FWS published a proposed rule (30 Fed. Reg. 4,721) that would add the interstate transportation prohibition. This proposed rule contained a Section 13.2 that is nearly identical to the current Section 16.3. The language contained in proposed Section 13.2 was published as a final rule on Aug 3, 1965 (30 Fed. Reg. 9,640). The entire subchapter of the regulations was restructured in 1974 and that is when the prior Section 13.2 became Section 16.3. *See* 39 Fed. Reg. 1,158, at 1158 and 1169 (Jan. 4, 1974).

have rejected arguments that justiciability concerns toll the limitations period. *See Alaska v. U.S. Dep't of Agric.*, 932 F. Supp. 2d 30, 34 (D.D.C. 2013) (allowing litigants to delay filing suit to assess justiciability "'would virtually nullify the statute of limitations' in the context of facial challenges to agency rules [ ], thereby upsetting the balance struck by Congress between administrative finality and the interests of litigants." (quoting *Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362, 1365 (9th Cir. 1990) and citing *JEM Broadcasting Co. Inc. v. FCC*, 22 F.3d 320, 326 (D.C. Cir. 1994)).

Even if Plaintiff could not have challenged the "transportation" language in Section 16.3 in 1965, it could have challenged that same language in 1990 when the first reptile was listed as injurious under Section 16.15. While it is true that the 2012 Rule amended Section 16.15 to add the four non-native constrictors, that rule did not add, alter, or amend the language prohibiting "importation, transportation, or acquisition" of the reptile species named in Section 16.15. The 2012 Rule made no substantive changes to Section 16.15 at all; it merely amended Section 16.15 to add the four new species of non-native constrictor snakes as injurious reptiles.[2]

The FWS has also long interpreted the Lacey Act's prohibition on "transportation" of injurious wildlife to apply to transportation between states within the continental United States. Although the geographic language in Section 16.3 of the FWS's regulations mirrors the language in the Lacey Act itself, the FWS has made its interpretation of this language clear through the promulgation of rules listing species as injurious. At least as early as 1989, when it listed the mitten crab as injurious, FWS explained that the "interstate transportation [of crabs] . . . for any purpose not otherwise permitted, would be prohibited." 54 Fed. Reg. 22,286, 22,287 (May 23,

[2] The 2012 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.

1989). The FWS has consistently stated the same position in its other listing rules, including its 2012 Rule. *See* 55 Fed. Reg. at 17,440 ("[I]nterstate transportation of any live brown tree snakes . . . for any purpose not permitted is prohibited."); 56 Fed. Reg. 56,942 (Nov. 7, 1991) ("[I]nterstate transportation of [zebra mussels] . . . for any purpose not otherwise permitted, would be prohibited."); 67 Fed. Reg. 39,865 (June 11, 2002) ("[I]nterstate transportation of [brushtail possums] . . . for any purpose not permitted is prohibited."); 67 Fed. Reg. 62,193, 62,195 (Oct. 4, 2002) ("[I]nterstate transportation of [snakehead fish] . . . is prohibited without a permit."); 72 Fed. Reg. 37,459, 37,461 (July 10, 2007) ("[I]nterstate transportation of [silver carp or largescale silver carp] . . . is prohibited without a permit."); 72 Fed. Reg. 59,019, 59,027 (Oct. 18, 2007) ("[I]nterstate transportation of [black carp] . . . is prohibited without a permit."); 77 Fed. Reg. 3,330 ("By this action, the importation into the United States and interstate transportation between States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States . . . of these four constrictor snakes is prohibited . . . ."). Thus, the FWS did not apply the prohibition on interstate transportation of injurious wildlife between states within the continental United States for the first time in the 2012 Rule. Instead, it has been the FWS's long and consistent position, since at least 1989, that listing a wildlife species as injurious has the effect of prohibiting interstate transportation without a permit.

In sum, the FWS's interpretations of the Lacey Act that Plaintiff contends are *ultra vires* were made through regulations promulgated more than six years ago, not through the 2012 rule. Consequently, Count One is time-barred because, as further explained below, it is a facial challenge to these old interpretations and the narrow "as applied" exception does not apply.

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B. Count One is a Facial Challenge to the FWS's Interpretation of the Lacey Act and Is Untimely.

As demonstrated above, Count One is a facial challenge to the FWS's longstanding positions asserting its authority to prohibit transportation of injurious wildlife between states within the continental United States. Count One does not challenge any aspect of the 2012 Rule itself, but rather attacks the FWS's underlying authority, a cause of action that accrued when the FWS asserted such authority in 1965 (when it promulgated Section 16.3 and first used the "transportation" language) and at least as early as 1989 (when it explained in the mitten crab rule that the interstate transportation ban extended to transportation between states within the continental United States).

The mere fact that the FWS discussed its regulatory positions in the 2012 rule, and this event caused Plaintiff to file suit and seek relief, does not convert Plaintiff's facial challenge into an as-applied challenge. It is plain on the face of the Amended Complaint that nothing about the particular facts, circumstances, or reasoning of the FWS's 2012 action has any bearing on adjudicating Count One. As the Supreme Court has noted, an as-applied challenge is one in which a plaintiff asserts that a rule was "improperly imposed on" a particular party, and concerns whether that application "may be invalid as applied in" that case. *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 188 (1991). That is different from a facial challenge, in which a plaintiff alleges only that the rule is "facially invalid because it is without statutory authority." *Id.* In other words, a facial challenge is one in which the rule in question is not just invalid in the particular circumstances in which it was applied, but is inherently without statutory authority and thus invalid "in all its applications" and thus "invalid on its face." *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 619 (1991).

Here, Count One raises a facial challenge to the FWS's past interpretations of the Lacey Act to prohibit transportation (as opposed to shipment) of wildlife species listed as injurious between states within the continental United States. Count One does not allege that the manner in which FWS applied those past interpretations was improper or exceeded the agency's statutory authority. Thus, the target of Count One is not the 2012 decision, but the FWS's 1965 and 1989 regulations. Since those regulations are more than six years old, Plaintiff's attempt to challenge them is time-barred. *P&V Enters. v. U.S. Army Corps of Eng'rs*, 466 F. Supp. 2d 134, 144 (D.D.C. 2006), *aff'd*, 516 F.3d 1021 (D.C. Cir. 2008) (holding that a facial challenge to 1986 regulations was barred by 2401(a)'s six-year statute of limitations).

C. The "As Applied" Exception Does Not Apply

Although the D.C. Circuit recognizes two narrow exceptions to the limitations period in 28 U.S.C. § 2401(a), neither of those exceptions applies here. Plaintiff failed to rebut Federal Defendants' argument that the "reopener" exception does not apply, and thus has conceded this point. *See* Def.'s Mot. 9; *Kone v. Dist. of Columbia*, 808 F. Supp. 2d 80, 83 (D.D.C. 2011) ("An argument in a dispositive motion that the opponent fails to address in an opposition may be deemed conceded.") (citation and quotation omitted). Plaintiff does contend that the "as applied" exception applies; however, Plaintiff is mistaken.

There are only two ways to bring an as-applied challenge to attack the facial validity of an agency's regulation once the statutory limitations period has expired: "(1) following enforcement of the disputed regulation; and (2) following an agency's rejection of a petition to amend or rescind the disputed regulation." *Cellular Telecomms. & Internet Ass'n v. FCC*, 330 F.3d 502, 508 (D.C. Cir. 2003); *see also P&V Enters. v. U.S. Army Corps of Eng'rs*, 516 F.3d 1021, 1026 (D.C. Cir. 2008). It is evident from the Amended Complaint, and Plaintiff has not

argued otherwise, that neither circumstance is present here. The 2012 Rule was not an enforcement proceeding against Plaintiff and Plaintiff has not alleged and cannot allege that the FWS has brought an enforcement action against Plaintiff pursuant to the rule. Plaintiff also has not alleged and cannot allege that FWS has denied a petition to rescind its interpretations of the Lacey Act to prohibit transportation of injurious wildlife between states within the continental United States.

Plaintiff argues that it did not have standing or reason to challenge Section 16.3 until 2012. Pl.'s Opp'n 8. However, such a view must be rejected, since it would render all statutes of limitation impermissibly porous. Because the statute of limitations is a condition of the Government's waiver of sovereign immunity, it must be strictly construed. *Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987). As the Ninth Circuit has stated: "We decline to accept the suggestion that standing to sue is a prerequisite to the running of the limitations period." *Shiny Rock*, 906 F.2d at 1365; *see also Alaska v. U.S. Dep't of Agric.*, 932 F. Supp. 2d at 34 (allowing litigants to delay filing suit to assess justiciability "would virtually nullify the statute of limitations in the context of facial challenges to agency rules [ ], thereby upsetting the balance struck by Congress between administrative finality and the interests of litigants") (citations and quotations omitted).

The Court should also be unmoved by Plaintiff's assertion that, if it "cannot raise this claim, then Defendants have essentially granted themselves legislative authority they do not constitutionally have." Pl.'s Opp'n 8. Plaintiff does not claim to have been unaware of the FWS's interpretations before now. Publication of a rule in the Federal Register by itself is presumptively sufficient notice to trigger the statute of limitations. *See Shiny Rock*, 906 F.2d at 1365-66. Thus, the fact is that Plaintiff could have—but did not—challenge the FWS's

interpretations when they were first promulgated. Moreover, Plaintiff could have—but did not—petition the FWS to rescind its interpretations. Hence, Plaintiff's allegation that the FWS's interpretations are immune from judicial review is without merit. *See California Sea Urchin Comm'n v. Jacobson*, Civ. No. 13-5517, 2014 WL 948501, at *8 (C.D. Cal. Mar. 3, 2014) (similarly finding that the plaintiffs' claim in that case while untimely, was not immunized from judicial review).

The law in the D.C. Circuit identifies how and when a party may bring an as-applied challenge to a regulation once the statutory limitations period has expired. Without any allegation that the FWS took a final action against Plaintiff to enforce the prohibition on interstate transportation of injurious wildlife between states within the continental United States or that the FWS denied Plaintiff's petition to amend or rescind its interpretations of the Lacey Act to prohibit such transportation, the Amended Complaint does not meet the requisite criteria. Therefore Count One must be dismissed.

II. Counts Two and Three Fail Because Plaintiff is Not Within the Zone of Interests of NEPA

Plaintiff argues that it falls within the zone of interests of NEPA because its claims "are indisputably environmental." Pl.'s Opp'n 8. Though Plaintiff and its members assert a range of economic and "conservation" interests, none of these are interests in the natural and physical environment sufficient to bring Plaintiff within the zone of interests of NEPA.

While it is true that the zone of interests test "is not meant to be especially demanding," the Supreme Court recently affirmed the test's import: "a statutory cause of action extends only to plaintiffs whose interests fall within the zone of interests protected by the law invoked." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388-89 (2014) (internal quotation marks and citation omitted). In order to fall within NEPA's zone of interests, a

plaintiff must assert a valid environmental interest. *ANR Pipeline Co. v. FERC*, 205 F.3d 403, 408 (D.C. Cir. 2000); *Town of Stratford, Conn. v. FAA*, 285 F.3d 84, 88 (D.C. Cir. 2002).

Plaintiff suggests that NEPA's zone of interests "is perhaps as broadly stated as any that Congress ever adopted, encompassing a wide array of environmental and human interests." Pl.'s Opp'n 9. However, the Supreme Court has cautioned against such an overbroad interpretation of "human environment" in NEPA 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.'" *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772 (1983). Instead, "[t]he 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*, 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.

Despite liberal use of the term "conservation," Plaintiff's interests are not environmental and do not fall within the zone of interests of NEPA. Plaintiff USARK represents individuals involved in the captive reptile industry. ECF No. 15, Ex. 1, Goss Decl. ¶¶ 4, 5, 6. Its members raise and maintain listed snakes as pets and breeding stock. *See, e.g., id.*, Ex. 1, Goss Decl. ¶¶ 6, 11; *id*, Ex. 2, Lopez Decl. ¶¶ 2, 16; *id*, Ex. 3, Gisser Decl. ¶¶ 4, 8; *id*, Ex. 4, Swanson Decl. ¶¶ 11, 20; *id*, Ex. 5, Diaz Decl. ¶ 8; *id*, Ex. 6, Cole Decl. ¶¶ 13, 15. This is clear from the very name of the organization: United States Association of Reptile *Keepers*.

Plaintiff attempts to make its interests appear environmental by framing them as conservation interests. In particular, Plaintiff identifies two distinct types of alleged conservation

engaged in by its members: (1) conservation of the four listed species and (2) conservation of the Everglades and other portions of the United States under threat from the four listed species. Plaintiff's members allegedly engage in the former by educating the public about the listed species, engaging in scientific research concerning the listed species, and breeding listed snakes in captivity. Pl.'s Opp'n 10-14. They engage in the latter by "supporting efforts to eradicate non-indigenous species in the United States," particularly in the Everglades. Am. Compl. ¶ 3; Pl.'s Opp'n 14-15.

These two interests are clearly at odds. On the one hand, Plaintiff's members allegedly have an interest in "conserving" the listed species in the United States[3] and, on the other, an interest in destroying wild populations of listed snakes in the United States. *See* Am. Compl. ¶ 1 (recognizing that the four listed species are not native to the United States). Plaintiff's interest in eradicating feral listed snakes from their non-native habitats can only be reconciled with its interest in conserving those same snakes by recognizing that Plaintiff's true interest is in maintaining listed snakes in captivity as part of the reptile industry.

Snakes maintained in captivity with no intent to release them into the wild are not part of the natural and physical environment contemplated by NEPA. *See, e.g.*, 42 U.S.C. § 4321 (including among purposes of NEPA the "promot[ion] [of] efforts which will prevent or eliminate damage to the environment and biosphere" and the "enrich[ment] [of] the

[3] Plaintiff has not argued, nor do its members' declarations indicate, an interest in conserving listed snakes in their native habitats abroad. In fact, the only mention of the listed species' native ranges occurs in the Declaration of Michael Cole who operates a breeding facility in Indonesia. ECF No. 15, Ex. 6, Cole Decl. ¶ 15. Mr. Cole's declaration makes clear that this facility is used to breed snakes for sale to collectors worldwide and not for reintroduction or conservation of snakes in their native habitats. *Id*. ¶¶ 15-17, 20-22. Moreover, Mr. Cole's declaration does not state that he is a member of USARK. The declarations of non-members cannot be used to bring USARK within the zone of interests of NEPA. *Am. Trucking Ass'ns, Inc. v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 247 (D.C. Cir. 2013).

understanding of ecological systems and natural resources important to the Nation"); 40 C.F.R. § 1508.14 (defining "human environment" in NEPA as "the natural and physical environment"). A comparison helps make this point: an organization dedicated to the maintenance, propagation, and study of a particular breed of cat has no interest in the environment under NEPA. The mere fact that the animal at issue here can be found in the wild does not alter the fact that, because Plaintiff's interest in the animal is limited to captivity, Plaintiff does not fall within the zone of interests of NEPA.

Plaintiff tries to tie its interest in captive snakes to the environment by listing four ways in which its members are involved in alleged "conservation" efforts. Because all four of these efforts involve only captive snakes and have no demonstrated impact on the natural and physical environment, Plaintiff fails to show that it falls within NEPA's zone of interests. First, Plaintiff argues that its members breed snakes in captivity "to preserve genetic diversity and natural characteristics to ensure that no species goes extinct." Pl.'s Opp'n 13. Plaintiff's members' declarations do not support this argument. None of the declarants discuss breeding listed snakes for natural characteristics and none state that they breed listed snakes in order to prevent the extinction of the four listed species.[4] Instead, they discuss breeding snakes for the "newest and most spectacular color and pattern mutations" so that they can sell them at a premium.[5] ECF No.

[4] One declarant, Lindsey Lopez, mentions "breed[ing] some species of reptiles, mostly those that are species of concern according to conservation status." ECF No. 15, Ex. 2, Lopez Decl. ¶ 6. It is not clear from that statement whether Ms. Lopez breeds any of the four listed species, let alone whether she breeds them for genetic diversity, which is typically required as part of an animal's Species Survival Plan or similar conservation breeding effort.

[5] Plaintiff states in its Opposition that by arguing that its members' snakes are not suitable for reintroduction to their native habitats, Federal Defendants "concede" in their Motion to Dismiss that captive bred snakes "do not have the survival capabilities of their wild cousins." Pl.'s Opp'n 13 n.5. Federal Defendants make no such concession. The proliferation of listed snakes initially kept as pets but later released into the wild clearly indicates otherwise. *See* 77 Fed. Reg. at

15, Ex. 6, Cole Decl. ¶ 20; *see also id*., Ex. 1, Goss Decl. ¶ 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.").

Moreover, of the four listed species, only one subspecies—the Indian python (*Python molurus molurus*)—is listed as either threatened or endangered under the Endangered Species Act. *See* U.S. Fish & Wildlife Serv., Listed Animals, *available at* http://ecos.fws.gov/tess_public/pub/listedAnimals.jsp. The Indian python is also the only one of the four species listed in Appendix I of the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"), the most protective of the CITES Appendices, meaning that the species is threatened with extinction and that trade in specimens of this species is permitted only in exceptional circumstances. *See* http://www.cites.org/eng/app/appendices.php (official CITES website maintained by CITES Secretariat on behalf of the parties to CITES). Because none of Plaintiff's declarants claim to breed Indian pythons, Plaintiff has failed to show that its efforts to protect threatened and endangered species from extinction have been harmed by the Final Rule.

Even if Plaintiff's members do breed listed snakes to protect them from extinction, nowhere do Plaintiff or its members mention an intent to release captive bred snakes into the wild in either their native habitats or the United States. Rather, the declarations of Plaintiff's members indicate that they breed listed snakes in captivity in order to sell them as pets or

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3,332-3,333 (noting that the "primary pathway for entry [of listed snakes] into the United States is the commercial pet trade" and later intentional release or escape from inadequate enclosure, and that there are now thousands of Burmese pythons, a probable small population of Northern African pythons, and occasional records of yellow anacondas in the wild in Florida). Rather, Federal Defendants were making the point that the snakes bred by Plaintiff's members are not intended for reintroduction into their native ranges or for the preservation of the genetic diversity reflected in the wild because they are bred for colors and patterns of interest to collectors, not for natural characteristics.

conduct scientific research on them. *See* ECF No. 15, Ex. 3, Gisser Decl. ¶ 8 (discussing sale of baby Burmese pythons bred in captivity); *id*., Ex. 4, Swanson Decl. ¶¶ 2, 9, 10 (discussing sale of captive bred snakes); *id*., Ex. 5, Diaz Decl. ¶ 8 (discussing "breeding colony of reticulated pythons" for use in research); *id*., Ex. 6, Cole Decl. ¶¶ 16, 20 (discussing breeding snakes abroad in order to sell them in the United States). Plaintiff has failed to show that breeding snakes in captivity with no intent to release them into the wild is in any way connected to the physical and natural environment.

Second, Plaintiff argues that its members' involvement in scientific and biomedical research involving listed snakes constitutes an environmental interest. Only one of Plaintiff's declarants, Dr. Raul E. Diaz, Jr., purports to engage in scientific and medical research, let alone research involving listed snakes. In his declaration, Dr. Diaz claims only to be a "supporter" of USARK, not a member. *Id*., Ex. 5, Diaz Decl. ¶ 3. If he is not a member of the organization, his declaration cannot be used to bring USARK within the zone of interests of NEPA. *Am. Trucking Ass'ns*, 724 F.3d at 247. But even if Dr. Diaz is a member of USARK, his declaration does not explain what he is researching and why listed species are required for that research. Indeed, of the four listed species, he claims only to research the yellow anaconda. Although he describes the research conducted by others on pythons and makes general statements about the genome of the Burmese python, he never explains his personal research and why the yellow anaconda is necessary to conduct it. *See* ECF No. 15, Ex. 5, Diaz Decl. ¶¶ 8-11. He also states that he "hope[s] to be able to return to freely us[ing] the Burmese python," but, again, does not explain the nature of his intended research on the Burmese python and why the Burmese python is essential to that research. Such a generalized statement of future intent with no description of

concrete plans is insufficient to demonstrate that the Final Rule has injured Dr. Diaz. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992).

Assuming that Dr. Diaz does conduct research that requires access to listed snakes, his declaration makes clear that he studies captive snakes in a captive environment. He obtains his snakes from private sellers and maintains his own breeding colony of reticulated pythons in his laboratory. *Id*., Ex. 5, Diaz Decl. ¶¶ 8, 11. And assuming that his personal research is related to the broad statements he makes regarding the Burmese python's genome's use in finding "genes involved in mammalian diseases" and understanding "the evolution of the snake body plan," *id*. ¶ 10, those interests are unrelated to the natural and physical environment. Dr. Diaz is not studying feral snakes, he is not researching how snakes live in the wild, and he is not even obtaining his snakes from wild populations. Simply put, Plaintiff fails to point to any scientific research being conducted by its members on listed snakes that is harmed by the Final Rule, let alone any scientific research that could qualify as an "environmental interest" within the zone of interests of NEPA.[6]

Plaintiff argues that the "scientific research sector of its members" is distinct from its "pet trade sector" and accuses Federal Defendants of conflating these two groups in their effort to downplay the environmental interests of Plaintiff's member scientists. Pl.'s Opp'n 13 n.5, 14. However, Plaintiff's declarations make clear that the two sectors significantly overlap in that

[6] Plaintiff states that "[s]cientific research has long been considered sufficient to confer NEPA standing when a major federal action threatens to interfere with that research." Pl.'s Opp'n 14. The lone case that Plaintiff cites to support that broad pronouncement, *Winter v. NRDC*, dealt with a preliminary injunction sought by plaintiffs against the Navy to stop the Navy's use of sonar that could allegedly harm marine mammals. 555 U.S. 7, 12 (2008). The Court referred to scientific research only in passing in a laundry list of other interests as part of its consideration of the balance of the equities prong of the preliminary injunction test. *Id*. at 25-26. That case did not address NEPA's zone of interests, let alone whether scientific research fell within it.

both sectors are concerned with captive snakes. Plaintiff does not argue that its member scientists study listed snakes in the wild. Instead, its declarations make clear that its member scientists obtain their snakes from private breeders and maintain them in captivity just like any other pet owner. ECF No. 15, Ex. 5, Diaz Decl. ¶¶ 8, 11. Nor do the declarations indicate that member scientists are using their research to affect wild snakes either by researching ways to help eradicate wild snakes from their non-native habitats in Florida or protect wild snakes in their native ranges abroad. Their research is entirely contained in the laboratory and has no demonstrated impact on snakes in the wild. *See id*., Ex. 1, Goss Decl. ¶ 25 (noting that "continued scientific research of these species may lead to medical cures for humans"); *id*., Ex. 5, Diaz Decl. ¶¶ 9-10 (discussing research of craniofacial development of African rock python, digestive physiology of Burmese pythons, relevance of Burmese python genes to mammalian diseases, and evolution of "snake body plan"). An interest is not environmental merely because it is "scientific." The science that Plaintiff claims its members conduct in laboratories on captive snakes with no intent to apply it to wild populations has no connection to the natural and physical environment.

Third, Plaintiff alleges that its members have an interest in the environment arising out of their public education efforts. To begin with, it is not clear from Plaintiff's declarations that its members engage in public education specifically involving the four listed species. Rather, the declarations indicate efforts to teach people about conservation and reptiles generally. *See id*., Ex. 1, Goss Decl. ¶ 18 (describing USARK's efforts to "educat[e] the public on the importance of [reptiles]"); *id*., Ex. 2, Lopez Decl. ¶ 5 (referring generally to "educational presentations"); *id*., Ex. 3, Gisser Decl. ¶¶ 2, 4 (describing "traveling educational herpetology program"). Nor does Plaintiff explain why the listed snakes are necessary to its public education mission and why its

members cannot use non-listed snakes to make the same presentations and to foster the same "conservation ethos." Pl.'s Opp'n 10 (quoting ECF No. 15, Ex. 1, Goss Decl. ¶ 18). Indeed, the only declarant who mentions using a listed species as part of his educational program is Keith Gisser, who says only that "[l]arge Burmese Pythons have always been the 'grand finale'" of his presentations. ECF No. 15, Ex. 3, Gisser Decl. ¶ 4. Mr. Gisser does not explain why another large snake species not listed under the Final Rule could not provide an equally compelling grand finale.

Even assuming listed snakes are somehow required for Plaintiff's members' public education and outreach efforts, Plaintiff has not demonstrated any connection between these efforts and the natural and physical environment. The snakes used for these presentations are captive snakes. *Id*., Ex. 2, Lopez Decl. ¶ 5; *id*., Ex. 3, Gisser Decl. ¶¶ 4, 6. The presentations take place at trade shows, schools, and other indoor, controlled environments. *Id*., Ex. 1, Goss Decl. ¶ 19; *id*., Ex. 2, Lopez Decl. ¶ 5. Plaintiff's declarations do not describe any conservation efforts that have resulted from its educational presentations, and a generalized interest in "fostering a conservation ethos" is too far attenuated from both the listed species and the natural and physical environment to be an environmental interest within the zone of interests of NEPA. *See Fla. Audubon Soc'y v. Bentson*, 94 F.3d 658, 671 (D.C. Cir. 1996) (refusing to rely on speculated future events and "predictive assumptions" to find an injury sufficient to support standing). To the extent the presentations encourage conservation of the listed species in particular, that "conservation" is unrelated to the natural and physical environment. As explained above, since Plaintiff and its members acknowledge that the listed species are nonnative and should be eradicated from the wild in the United States, their "conservation"

entails raising snakes in captivity.[7] Just like "science," the label "education" does not transform public presentations involving captive snakes into an interest in the natural and physical environment.

Fourth, Plaintiff argues that its "efforts to eradicate non-native species in the Everglades" qualify as an environmental interest within NEPA's zone of interests. As Federal Defendants pointed out in their Motion, these efforts are not only completely unhindered by the Final Rule, they are also in line with the purpose of the Rule—preventing the spread of invasive species. Plaintiff argues that the Rule hampers its members' efforts to help remove listed snakes from the Everglades by "mak[ing] it more difficult for those from other states . . . to continue to participate in removal efforts." Pl.'s Opp'n 15. To the contrary, the Rule puts no limitations whatsoever on the ability of individuals to participate in the eradication of listed snakes in the Everglades. Admittedly, the Rule does prevent individuals who capture snakes in the Everglades from transporting those snakes to another state. But to the extent that Plaintiff's members wish to use the Everglades as a source of snakes to breed and sell in other states, that interest is not an environmental interest but rather a purely commercial one.[8] *See W. Wood Preservers Inst. v.*

[7] Again, Plaintiff and its members have expressed no interest in conservation of the listed species abroad in their native ranges.

[8] Plaintiff compares this case to *Safari Club Int'l v. Jewell*, in which the Court found that exotic wildlife ranchers who owned and raised endangered species of African antelope in Texas had environmental interests under NEPA despite also having commercial interests in allowing hunters to hunt the antelope on their ranches. However, in that case, the ranchers had a demonstrated interest in the conservation of these species of antelope in the wild—their primary asserted interest was raising stocks of endangered antelope for reintroduction to their native habitats and they had shipped animals back to Africa for that very purpose. 960 F. Supp. 2d 17, 51 (D.D.C. 2013). Here, Plaintiff's members express no interest in reintroducing listed snakes bred in the United States back to their native habitats abroad. To the extent Plaintiff is arguing that its members want to use money raised by breeding and selling listed snakes captured in Florida and transported to other states to return to the Everglades and capture additional snakes, that is not an environmental interest in the eradication of invasive species. Rather, it is a commercial interest in using the Everglades as a convenient source of profitable snakes. Even if

McHugh, 925 F. Supp. 2d 63, 74, *on reconsideration in part*, 292 F.R.D. 145 (D.D.C. 2013) ("To sue under NEPA, a plaintiff's interests must be 'systematically, not fortuitously' aligned 'with the interests of those whom Congress intended to protect.'" (quoting *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918, 924 (D.C. Cir. 1989))).

Finally, even if Plaintiff has environmental interests sufficient to bring it within the zone of interests of NEPA, it has not shown that the Final Rule has injured those interests. *See W. Wood Preservers Inst.*, 925 F. Supp. 2d at 73 ("[The D.C.] Circuit has consistently required that in order to bring suit under NEPA, a plaintiff must allege an environmental *harm*.") (internal quotation marks omitted) (emphasis added); *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1288-89 (D.C. Cir. 2005) (finding environmental interest insufficient to bring plaintiff within the zone of interests of NEPA when there was not a substantial probability of actual or imminent harm to that interest as a result of agency action). 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. Plaintiff's members' alleged interests in public education, scientific and medical research, and preservation of genetic diversity fall squarely within these exceptions.

As Plaintiff notes, "the salient consideration under the APA is whether the challenger's interests are such that they 'in practice can be expected to police the interests that the statute protects.'" Pl.'s Opp'n 15 (quoting *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1075 (D.C.

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it were an environmental interest, there is no evidence that those removal efforts have been hindered by the Rule. Indeed, Kristofer Swanson, the only declarant to claim an interest in removing listed snakes from the Everglades, most recently visited the Everglades to remove Burmese pythons in March 2014, over two years after the Final Rule went into effect. ECF No. 15, Ex. 4, Swanson Decl. ¶ 6.

Cir. 1998)). Here, Plaintiff's and its members' interest in breeding, raising, maintaining, and selling captive listed snakes as pets and collector's items cannot be expected to "police" the interest in the natural and physical environment protected by NEPA.[9]

III. Defendants Concede that Plaintiff Has Constitutional Standing at This Stage

Plaintiff argues that it has constitutional standing under Article III to proceed with its claims. Federal Defendants did not challenge Plaintiff's constitutional standing in their Motion to Dismiss and concede that Plaintiff meets Article III's requirements for standing at this stage of the litigation.

CONCLUSION

For the reasons stated above, as well as those provided in Federal Defendants' Motion to Dismiss, Federal Defendants respectfully request that the Court dismiss Counts One, Two, and Three of Plaintiff's Amended Complaint with prejudice.

Respectfully submitted this 23rd day of June, 2014.

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[9] Rather, the Final Rule prohibiting the importation and interstate transportation of listed snakes can be expected to police those interests by preventing the further spread of four invasive species.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of June, 2014, a copy of the foregoing Reply in Support of Federal Defendants' Motion to Dismiss Plaintiff's Amended Complaint was filed via the Court's electronic case filing (ECF) system, which will send notice to all counsel of record.

/s/ *Meredith L. Flax*
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