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.	)	

MOTION TO DISMISS PLAINTIFF'S 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 Motion to Dismiss the Complaint of Plaintiff U.S. Association of Reptile Keepers, Inc. under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

INTRODUCTION

The Lacey Act prohibits, without permit, the importation and interstate transportation of species determined by the Secretary of the Interior to be injurious to the health and welfare of humans, the interests of agriculture, horticulture or forestry, or the welfare and survival of wildlife resources of the United States. 18 U.S.C. § 42(a)(1); 50 C.F.R. § 16.3. On January 23, 2012, the FWS issued a Final Rule adding four species of large, non-native constrictor snakes to the list of injurious wildlife under the Lacey Act. 77 Fed. Reg. 3330. Plaintiff filed this lawsuit on December 18, 2013, alleging that the Final Rule violates the Lacey Act, the National Environmental Policy Act ("NEPA"), and the Administrative Procedure Act ("APA").

Plaintiff's Complaint should be dismissed because Plaintiff lacks both prudential and constitutional standing to bring this suit and fails to state a claim as to Counts One and Four.

STATUTORY AND REGULATORY BACKGROUND

I. The Lacey Act

The Lacey Act, enacted in 1900, is one of the oldest wildlife statutes in the United States. As relevant here, the statute authorizes the Secretary of the Interior, through the FWS, to regulate the importation and interstate transport of species, including offspring and eggs, determined to be injurious to the health and welfare of humans, the interests of agriculture, horticulture or forestry, or the welfare and survival of wildlife resources of the United States. 18 U.S.C. § 42(a)(1); 50 C.F.R. § 16.3. The types of organisms that can be added to the injurious wildlife list are limited to wild mammals, wild birds, fish, mollusks, crustaceans, amphibians, and reptiles. 18 U.S.C. § 42(a)(2).

Species listed as injurious may not be imported or transported between States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the U.S. by any means without a permit issued by the FWS. 18 U.S.C. §§ 42(a)(1), (a)(3); 50 C.F.R. §§ 16.3, 16.22. Permits may be granted for the importation or interstate transportation of live specimens of injurious wildlife and their offspring or eggs for bona fide scientific, medical, educational, or zoological purposes. 18 U.S.C. § 42(a)(3); 50 C.F.R. §§ 16.11-16.15. Intrastate transport or possession within a State of species listed as injurious is not prohibited by the Lacey Act.

Because there is no private right of action under the Lacey Act, judicial review is available, if at all, only through the Administrative Procedure Act. *See, e.g.*, *Strahan v. Coxe*, 127 F.3d 155, 160 (1st Cir. 1997) (no private right of action under the Marine Mammal

Protection Act); *Hill v. Norton*, 275 F.3d 98, 103 (D.C. Cir. 2001) (no private right of action under the Migratory Bird Treaty Act so challenge could only be made under the APA) (superceded by statute on other grounds).

II. National Environmental Policy Act

NEPA serves the dual purpose of informing agency decision makers of the environmental effects of proposed federal actions and ensuring that relevant information is made available to the public so that they may "play a role in both the decisionmaking process and the implementation of that decision." *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA's intent is to focus the attention of agencies and the public on a proposed action so that its consequences may be studied before implementation. 42 U.S.C. § 4321; 40 C.F.R. § 1501.1(c); *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989).

NEPA requires preparation of an Environmental Impact Statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment . . . ." 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.3. To determine whether an EIS is necessary, an agency may prepare an Environmental Assessment ("EA"). 40 C.F.R. §§ 1501.4(b)-(c), 1508.9; *see also Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 503-04 (D.C. Cir. 2010). If the agency concludes that the action will not significantly affect the quality of the human environment, rendering an EIS unnecessary, the agency must issue a Finding of No Significant Impact ("FONSI"). 40 C.F.R. § 1501.4(e).

NEPA is a procedural statute: it does not dictate the substantive results of agency decision making, but rather prescribes the necessary process. *Robertson*, 490 U.S. at 350. While NEPA requires agencies to take a "hard look" at environmental effects, inherent in NEPA's procedural requirements is a "rule of reason" that relieves agencies of the obligation to consider

every conceivable environmental effect. *See Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 767-68 (2004); *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 736 (D.C. Cir. 2000).

NEPA provides no private right of action to enforce its requirements. *Town of Stratford v. FAA*, 285 F.3d 84, 88 (D.C. Cir. 2002). Thus, to bring suit to vindicate NEPA's requirements, a plaintiff must rely on the provisions of the APA that confer "standing to an 'aggrieved party' within the meaning of the substantive statute upon which the claim is based." *Id.* (citations omitted).

FACTUAL BACKGROUND

I. The Final Rule Adding Four Non-Native Constrictor Snakes to the List of "Injurious" Wildlife

On June 23, 2006, the South Florida Water Management District requested that the FWS consider listing the Burmese Python (*Python molurus bivittatus*) as injurious under the Lacey Act, 18 U.S.C. § 42. 77 Fed. Reg. 3330 (Jan. 23, 2012). The District was concerned about the spread of Burmese Pythons throughout Florida, including in Everglades National Park. *Id*. The FWS published a Notice of Inquiry in the *Federal Register* on January 31, 2008, soliciting information on the *Python*, *Boa*, and *Eunectes* genera for possible addition to the list of injurious wildlife under the Lacey Act. *Id*. On March 12, 2010, the FWS published a proposed rule in the *Federal Register* that proposed adding nine species of large constrictor snakes that are not native to the United States to the Act's list of injurious wildlife: *Python molurus* (which includes both Burmese and Indian Pythons), *Broghammerus reticulatus* or *Python reticulatus* (Reticulated Pythons), *Python sebae* (Northern African Python), *Python natalensis* (Southern African Python), *Boa constrictor* (Boa Constrictor), *Eunectes notaeus* (Yellow Anaconda), *Eunectes deschauenseei* (DeSchauensee's Anaconda), *Eunectes murinus* (Green Anaconda), and *Eunectes*

beniensis (Beni Anaconda). 75 Fed. Reg. 11808 (Mar. 12, 2010); Compl. ¶ 8. The proposed rule announced the availability of the Draft Environmental Assessment and Draft Economic Analysis, and solicited comments on all of these documents. *Id*. at 11811. Although the comment period initially closed on May 11, 2010, the FWS reopened it for an additional 30 days ending on August 2, 2010. 75 Fed. Reg. 38069 (July 1, 2010).

In January 2012, the FWS issued a Final Environmental Assessment, Final Economic Analysis, Final Regulatory Flexibility Analysis, and a Finding of No Significant Impact. 77 Fed. Reg. 3330, 3365. On January 23, 2012, the FWS issued the Final Rule at issue in this case, which amended its regulations under the Lacey Act to add four species of large constrictor snakes to the list of injurious wildlife: *Python molurus*, *Python sebae*, *Python natalensis*, and *Eunectes notaeus*. *Id*.; Compl. ¶ 14; 50 C.F.R. § 16.15.

II. Plaintiff's Complaint

On December 18, 2013, nearly two years after the Final Rule was published, Plaintiff U.S. Association of Reptile Keepers ("USARK"), a non-profit organization representing "all segments of the reptile industry," filed a complaint challenging the Final Rule. ECF No. 1. The Complaint contains four counts alleging that the Final Rule's prohibition on the interstate transportation of listed snakes is *ultra vires* under the Lacey Act (count one); that the FWS violated NEPA and the APA by failing to take a hard look at the environmental consequences of listing the snakes (count two) and by failing to prepare an environmental impact statement (count three); and that the FWS acted arbitrarily and capriciously in violation of the APA in deciding to list the four species of snakes (count four). Compl. ¶¶ 75-93.

The Complaint states that Plaintiff "and its members have been and will continue to be harmed by the illegal actions complained of herein." *Id.* ¶ 19. Plaintiff generally alleges that its

members "rely on, trade in, and gain enjoyment from the breeding and maintenance of large, non-native constricting snakes." *Id.* ¶ 2. Plaintiff also alleges that it "represents conservation biologists and research scientists in the field of herpetology who are passionate about large constricting snakes" and engage in a variety of educational and research activities with respect to these snakes, which they fund through the breeding and sale of these species. *Id.* ¶ 7. Plaintiff does not identify any specific member that allegedly has been harmed.

With respect to alleged harm to Plaintiff itself, the Complaint alleges only that

> USARK's mission is to support scientific research, provide public education, and advocate for conservation of all manner of reptile species. The organization promotes responsible private ownership of, and trade in, reptiles, as well as promulgating and endorsing responsible caging standards, sound husbandry, escape prevention protocols, and an integrated approach to vital conservation issues. USARK aims to facilitate cooperation between government agencies, the scientific community, and the private sector in order to produce policy proposals that will effectively address important husbandry and conservation issues.

Id. ¶ 19.

STANDARD OF REVIEW

I. Motion to Dismiss Under Rule 12(b)(1) for Lack of Subject Matter Jurisdiction

Jurisdiction is a threshold issue that must be addressed before considering the merits of a case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-96 (1998). Federal Rule of Civil Procedure 12(b)(1) provides for dismissal of a claim for lack of subject matter jurisdiction. The burden of proving subject matter jurisdiction rests with plaintiff, the "party asserting [the federal court's] jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Rempfer v. Sharfstein*, 583 F.3d 860, 868-869 (D.C. Cir. 2009). Federal courts are courts of "limited jurisdiction," and are presumed to lack jurisdiction unless a plaintiff establishes its existence. *Kokkonen*, 511 U.S. at 377.

Where, as here, a motion to dismiss makes a facial attack on the complaint, the reviewing

court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Ord v. Dist. of Columbia*, 587 F.3d 1136, 1140 (D.C. Cir. 2009) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). "The court may look beyond the allegations contained in the complaint to decide a facial challenge, 'as long as it still accepts the factual allegations in the complaint as true.'" *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 539 F. Supp. 2d 331, 337-38 (D.D.C. 2008) (quoting *Jerome Stevens Pharm., Inc. v. FDA*, 402 F.3d 1249, 1253-54 (D.C. Cir. 2005)).

The elements of standing are "an indispensable part of the plaintiff's case," and "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). At the pleading stage, a plaintiff's factual allegations must be more than merely conclusory legal statements to the effect that standing exists or that the plaintiff was injured. As the Supreme Court has stated, "[i]t is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Warth v. Seldin*, 422 U.S. 490, 518 (1975).

II. Motion to Dismiss Under Rule 12(b)(6) for Failure to State a Claim

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of a complaint. *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). A court considering a Rule 12(b)(6) motion presumes the factual allegations of the complaint to be true. *See, e.g., United States v. Philip Morris, Inc.*, 116 F. Supp. 2d 131, 135 (D.D.C. 2000). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted); *Bell Atl. v. Twombly*, 550 U.S. 544, 562 (2007). The court

need not accept as true inferences unsupported by facts set out in the complaint or legal conclusions cast as factual allegations. *Warren v. Dist. of Columbia*, 353 F.3d 36, 39 (D.C. Cir. 2004); *Browning*, 292 F.3d at 242. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555).

ARGUMENT

I. Plaintiff Lacks Standing

A necessary condition precedent to the exercise of a federal court's power to declare legal rights and to fashion appropriate remedies in a given case is a demonstration by the party invoking the court's authority that it has standing to sue. *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464, 471 (1982). Standing consists of two strands: Article III standing and prudential standing. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004). Both Article III standing and prudential standing are threshold jurisdictional requirements. *Ass'n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 674 (D.C. Cir. 2013). The Court need not consider standing in any particular order. *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 179 (D.C. Cir. 2012) ("[T]here is no mandated sequencing of jurisdictional issues.") (internal quotation omitted). Here, Plaintiff lacks both prudential and Article III standing.

A. Plaintiff Lacks Prudential Standing

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).

Where, as here, a plaintiff asserts causes of action under the APA, the plaintiff's interests must be "within the 'zone of interests' of the relevant substantive statute." *Ass'n of Battery Recyclers*, 716 F.3d at 676 (Silberman, concurring); *see also Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990) ("[A] plaintiff must establish that the injury he complains of . . . falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.").

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

For Counts Two and Three, Plaintiff must allege sufficient facts to show that its interests are within the "zone of interests" of NEPA. The D.C. Circuit has held that because NEPA "is a statute aimed at the protection of the environment," a plaintiff must assert an environmental interest to fall within the zone of interests protected by NEPA. *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) ("[A] NEPA claim may not be raised by a party with no claimed or apparent environmental interest."). Purely economic interests are not within NEPA's zone of interests and are therefore insufficient to support standing unless accompanied by valid environmental interests. *ANR Pipeline*, 205 F.3d at 408; *Town of Stratford*, 285 F.3d at 88.

Here, Plaintiff fails to assert any environmental interests that could confer prudential standing. Plaintiff's primary concern is economic: it alleges that, by prohibiting interstate transport of the listed snakes, the Final Rule has and will continue to cause the market in these snakes to contract. Compl. ¶12. Plaintiff claims that potential buyers will refrain from

purchasing snakes because they cannot take them across state lines. *Id*. Sellers in turn will be forced to euthanize excess snakes that they are now unable to sell. *Id*. Not only are these interests entirely economic, they are also totally unrelated to the environment: they involve the breeding and selling of *captive* snakes as part of the pet industry.[1] *See* 40 C.F.R. § 1508.14 (defining "human environment" in NEPA "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].").

Plaintiff also asserts a "conservation" interest, alleging that many of its member "researchers, conservationists, and scientists fund their research and conservation efforts through the breeding and sales of morphs and common varieties of these species." Compl. ¶¶ 7, 18, 69. Despite the label given it by Plaintiff, this interest is also economic. Plaintiff's concern is not that the Final Rule will prevent its members from engaging in research concerning listed snakes, but rather that the Rule will impact the funding for that research, which is allegedly derived from breeding and selling the snakes. The mere fact that this economic interest is held by member scientists is insufficient to bring Plaintiff within the zone of interests of NEPA: "To sue under NEPA, a plaintiff's interests must be 'systematically, not fortuitously' aligned 'with the interests of those whom Congress intended to protect.'" *W. Wood Preservers Inst. v. McHugh*, 925 F.

[1] Plaintiff alleges in passing that the Rule may "incentiviz[e] the release of listed snakes by irresponsible breeders or pet owners due to economic pressures or when moving to other states." Compl. ¶ 56. Although the introduction of captive nonnative snakes into the wild is potentially an environmental concern, it does not impact Plaintiff, an organization that represents those involved in the captive reptile industry. *See id*. ¶¶ 2, 19; *cf. W. Wood Preservers Inst. v. McHugh*, 925 F. Supp. 2d 63, 74 (D.D.C. 2013), *on reconsideration in part* 292 F.R.D. 145 (D.D.C. 2013) (finding plaintiff's general allegations about potential harm to the environment insufficient to support prudential standing when there was no evidence that plaintiffs themselves would be impacted by the alleged environmental harms). Nowhere does Plaintiff allege that it or any of its members have an environmental interest that would be affected if breeders or pet owners release unwanted captive snakes into the wild.

Supp. 2d 63, 74 *on reconsideration in part*, 292 F.R.D. 145 (D.D.C. 2013) (quoting *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918, 924 (D.C. Cir. 1989)).

Even if Plaintiff's conservation interest is not merely a disguised economic interest, Plaintiff cannot demonstrate a substantial probability of actual or imminent harm to that interest. *See Nat'l Ass'n of Home Builders*, 417 F.3d at 1287-89 (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). Plaintiff alleges that member scientists

> engage in public education; conduct research to better understand the nature and biology of various species; develop techniques to eradicate these species in regions to which they are non-native; engage in such eradication efforts; and develop captive breeding techniques for large constricting snakes which are, or may become, threatened with extinction in their native ranges.

Compl. ¶ 7. Plaintiff has not explained why interstate transportation of listed snakes is necessary for these activities. However, assuming that it is, all of these activities fall squarely within the Final Rule's provision allowing individuals to apply for interstate transport permits "for zoological, educational, medical, or scientific purposes." 50 C.F.R. §§ 16.15, 16.22. Thus, these interests—many of which align with the Rule's goal of preventing the introduction and spread of these snakes in the wild—are not hindered by the Rule.

NEPA "cannot be used as a handy stick by a party with no interest in protecting against an environmental injury to attack a defendant." *Nat'l Ass'n of Home Builders*, 417 F.3d at 1289. Because Plaintiff's asserted interests are not within the zone of interests of NEPA, Plaintiff lacks prudential standing for its NEPA claims.

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2. Plaintiff Has Failed to Provide Sufficient Factual Allegations to Demonstrate that It Is Within the Lacey Act's Zone of Interests.

For Count One, 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 provision of the Lacey Act at issue. *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 492 (1998) ("[I]n applying the 'zone of interests test', [a court does] not ask whether, in enacting the statutory provision at issue, Congress specifically intended to benefit the plaintiff. Instead [the Court] first discern[s] the interests arguably to be protected by the statutory provision at issue.") (some internal quotation marks and citations omitted).

Here, Plaintiff has not alleged and cannot allege that its interests are within the "zone of interests" protected by Section 42(a)(1) of the Lacey Act. Section 42(a)(1) of the Lacey Act protects human beings; agricultural, horticultural, and forestry interests; and wildlife or the wildlife resources of the United States from non-native wildlife (including reptiles) that the Secretary of the Interior prescribes by regulation to be injurious. 18 U.S.C. § 42(a)(1); *see also* 31 Stat. 187, 188 (May 25, 1900) ("The object and purpose of this Act is to . . . regulate the introduction of American or foreign birds or animals in localities where they have not heretofore existed."); H.R. Rep. 86-1823, at 1 (June 14, 1960) ("The purpose of this legislation, as amended, is to reduce more effectively the hazards arising from the importation of injurious wild animals . . . ."). Plaintiff does not allege that its or its members' interests align with any of these interests, which the Lacey Act aims to protect from snakes found to be injurious. Instead, Plaintiff alleges that it and its members have economic and conservation interests in the snakes themselves. *See* Compl. ¶ 18. As Plaintiff's alleged interests are not even arguably within the zone of interests the statutory provision at issue protects, Plaintiff lacks prudential standing on this basis.

Plaintiff also has not alleged sufficient facts to show that its interests are within the "zone of interests" regulated by Section 42(a)(1). The Complaint fails to identify any particular member of USARK much less provide an allegation that any member is in fact regulated by the addition of these four snake species to the list of injurious wildlife. Absent sufficient factual allegations in the Complaint, Plaintiff has failed to satisfy its burden to demonstrate that it has prudential standing to bring Count One.

B. Plaintiff Also Lacks Constitutional Standing

In order to establish Article III standing, a plaintiff must show that: (1) he has "suffered an 'injury-in-fact'" to a legally protected interest that is both "concrete and particularized" and "actual or imminent," as opposed to "conjectural or hypothetical;" (2) there is a "causal connection between the injury and the conduct complained of;" and (3) it is "likely"—not merely "speculative"—"that [his] injury will be 'redressed by a favorable decision.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotations and citations omitted). The injury must be present "at the commencement of the litigation," *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 732 (2008) (citation omitted), and Plaintiff has the burden of establishing standing, *Am. Library Ass'n v. FCC*, 401 F.3d 489, 492 (D.C. Cir. 2005).

An organization can sue on its own behalf if it meets these requirements. *See Nat'l Taxpayers Union v. United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995). In addition, an association has standing to sue on behalf of its members "if (1) at least one of its members would have standing to sue in his own right; (2) the interest it seeks to protect is germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the member to participate in the lawsuit." *Am. Trucking Ass'ns, Inc. v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 247 (D.C. Cir. 2013) (quoting *Rainbow/PUSH Coal. v. FCC*, 330 F.3d 539, 542 (D.C. Cir. 2003)).

As to the first prong, "it is not enough to aver that unidentified members have been injured. Rather, the petitioner must specifically 'identify members who have suffered the requisite harm.'" *Chamber of Commerce of U.S. v. EPA*, 642 F.3d 192, 200-01 (D.C. Cir. 2011) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009)).

Plaintiff fails to establish an injury-in-fact to either itself or its members. Plaintiff asserts two injuries suffered as a result of the Final Rule: (1) economic losses due to the contraction of the market for listed snakes and (2) harm to "conservation" interests. Plaintiff cannot demonstrate standing for itself because both of these harms allegedly have been suffered by Plaintiff's members rather than by USARK. Nowhere in the Complaint does Plaintiff allege that USARK, as an organization, has suffered economic losses as a result of the Final Rule due to, for example, a drop in membership or donations. The losses it cites are to breeders and businesses that have allegedly lost buyers due to the listing. Compl. ¶¶ 3, 12-13. Similarly, the conservation interests referenced in the Complaint are those of researchers and scientists who study the listed snakes and fund their work by breeding and selling them. *Id*. ¶¶ 7, 56, 69. Nowhere does Plaintiff claim that its own efforts to educate the public, support research, and advocate for conservation have been impacted by the Rule. *See id*. ¶ 19.

Plaintiff also fails to establish standing on behalf of its members because it does not identify a single individual or business that is a member of its organization and that has suffered the alleged injuries. Plaintiff refers only to vague categories of people affected by the Final Rule: "researchers, conservationists, and scientists," "small, individual or family-run [businesses]," "military personnel," and "the reptile industry." Compl. ¶¶ 5-7, 12. The Complaint does not name a single person who owns a listed snake, a business that trades in listed snakes, or a scientist who funds his or her research by breeding and selling listed snakes and who

is also a member of USARK. Because it has failed to identify even one member who has been or will be harmed by the Rule, Plaintiff lacks standing to proceed with this action on behalf of its members. *See Summers*, 555 U.S. at 498; *Chamber of Commerce*, 642 F.3d at 201; *see also Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 478 (D.C. Cir. 2009) ("Standing analysis does not examine whether the environment in general has suffered an injury.").

Even if Plaintiff had alleged that USARK itself suffered the alleged injuries or identified specific members who had suffered them, Plaintiff's allegations are too conclusory and speculative to support standing. Potential future injuries cannot support standing unless Plaintiff can demonstrate "*both* (i) a *substantially* increased risk of harm and (ii) a *substantial* probability of harm with that increase taken into account." *Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1295 (D.C. Cir. 2007) (emphasis in original). Plaintiff fails to meet this burden. First, with regard to the alleged economic injuries, Plaintiff refers only to economic losses allegedly caused by the FWS's initial proposal to list nine species of constrictor snakes as injurious under the Lacey Act. Compl. ¶¶ 12-13. Nowhere does it explain how or why the Final Rule, which lists only four of the nine species proposed for listing, will have similar economic effects. Unlike the proposed rule, the Final Rule omits the Boa Constrictor, which accounts for nearly 20 percent of live constrictor snake imports and U.S. bred snakes.[2] *Rulemaking to List Four Constrictor Snake Species Under the Lacey Act: Final Economic Analysis* (Jan. 12, 2012) at 16, *available at* http://www.fws.gov/injuriouswildlife [hereinafter *Final Econ. Analysis*]. Of the four snakes listed in the Final Rule, only the Burmese Python currently exists in the U.S. in significant numbers and that species accounts for only 7.9 percent of live constrictor snake imports and U.S. bred snakes. *Id.* Plaintiff has not met its burden to demonstrate that the Final

[2] Both the proposed and final rules omit the Ball Python (*Python regius*), which accounts for 64 percent of live constrictor snake imports and U.S. bred snakes. *Final Econ. Analysis* at 16.

Rule is substantially likely to harm its members in light of the fact that the Final Rule affects a relatively small proportion of large constrictor snakes in the U.S. and restricts only importation and interstate transport.

Second, as to the alleged conservation interests, Plaintiff claims that the Final Rule will affect scientists' ability to fund their research of the listed snakes but provides no details about these alleged scientists such as who they are, what institutions they work for, how frequently they move listed snakes across state lines, what proportion of their funding comes from breeding and selling listed snakes, and what proportion of this breeding and selling requires importation or interstate transport. Without these details, Plaintiff has failed to sufficiently allege that the Final Rule has or will cause a substantially increased risk of harm to such scientists.

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

Count One should also be dismissed for failure to state a claim because it incorrectly alleges that the Final Rule prohibits the interstate transportation of the four constrictor species, but FWS interpreted the Lacey Act to prohibit interstate transportation of species listed as injurious through a regulation promulgated in 1965. Amendment is futile because a claim challenging FWS's 1965 regulation would be time-barred under the applicable statute of limitations at 28 U.S.C. § 2401(a).

In Count One, Plaintiff alleges that, in the Final Rule, the FWS "purport[ed] to ban interstate commerce and transportation of the four species of constricting snakes it added to [the] list of injurious species." Compl. ¶ 79. However, it is the FWS's Lacey Act regulations, promulgated in 1965, that interpreted the Lacey Act to prohibit the interstate transportation of injurious species, not the FWS's 2012 rule. *See* 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."). The preamble to the 2012 Rule explained that the effect of adding the four constrictor snakes to the list of injurious species was that the interstate transport of these species was now prohibited, but the 2012 rule itself did not prohibit interstate transport of listed species. Plaintiff's failure to identify the 1965 regulation as the source of the FWS's authority to prohibit the interstate transport of injurious species renders Plaintiff's Complaint deficient because it fails to put the FWS sufficiently on notice of any intent to challenge that regulation. *See Solomon v. Univ. of S. Calif.*, No. 08-cv-1811, 2008 WL 2751335, at *5 (D.D.C. July 15, 2008) (citing *Brown v. Califano*, 75 F.R.D. 497, 498 (D.D.C. 1977)).

Moreover, amendment of the Complaint to add a claim regarding the 1965 regulation would be futile because any challenge to the 1965 regulation is time-barred. *Howard v. Blank*, 891 F. Supp. 2d 95, 102 (D.D.C. 2012) (denying leave to amend complaint where amendment was futile as precluded by the statute of limitations). Any action pursuant to APA Section 706(A)(2) is subject to the limitations period established in 28 U.S.C. § 2401(a), which provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." *P&V Enters. v. U.S. Army Corps of Eng'rs*, 516 F.3d 1021, 1026-27 (D.C. Cir. 2008). A complaint filed after the six year limitations period has expired must be dismissed for lack of subject matter jurisdiction. *Id.* ("[S]ection 2401(a) creates a jurisdictional condition attached to the government's waiver of sovereign immunity.") (quotation omitted). "The right of action first accrues on the date of the final agency action." *Harris v. FAA*, 353 F.3d 1006, 1010 (D.C. Cir. 2004) (citation omitted). Thus, the right to challenge the 1965 rule expired in 1971, six years after the FWS took final action and long before this case was filed. Accordingly, any attempt to amend the complaint to

bring a facial challenge to the 1965 regulation would be futile as precluded by the statute of limitations. *Howard*, 891 F. Supp. 2d at 102.

In addition, while the D.C. Circuit has recognized two circumstances in which the substance of a rule can be reviewed after the statute of limitations or other defined period for judicial review has expired, Plaintiff has not alleged that either of those circumstances is present here. The first circumstance where review is permissible after the limitations period has expired is where the agency "reopens" the issue. *P & V Enters.*, 516 F.3d at 1023-24. Plaintiff does not (and could not) claim that the FWS has reopened the 1965 rule through a subsequent rulemaking. The second circumstance in which a late-comer can challenge a rule is in an "as-applied" challenge. *Indep. Bankers of Am. v. Bd. of Governors of Fed. Reserve Syst.*, 195 F.3d 28, 34 (D.C. Cir. 1999). Plaintiff does not assert an "as-applied" challenge, and amendment of the Complaint to do so is futile because such a challenge is available only to "a party against whom a rule is applied." 195 F.3d at 34. As noted above, Plaintiff has not identified any member against whom the rule has been applied. Consequently, Count One is also subject to dismissal for failure to state a claim.

III. Count Four Is Duplicative of Counts One, Two, and Three and Fails to State an Independent Claim

In Count Four, Plaintiff alleges that Defendants violated the APA. Compl. ¶¶ 91-93. This claim must be dismissed both because it is duplicative of Counts One, Two, and Three, and fails to state an independent claim, and because Plaintiff lacks standing to raise it. 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. *See Navab-Safavi v. Broad. Bd. of Governors*, 650 F. Supp. 2d 40, 71 (D.D.C. 2009) (quoting *Stockman v. Fed. Election Comm'n*, 138 F.3d 144, 151 n.14 (5th Cir. 1998)); *see also El Rescate*

Legal Servs. v. Exec. Office of Immigration Review, 959 F.2d 742, 753 (9th Cir. 1991); *Furlong v. Shalala*, 156 F.3d 384, 394 (2d Cir. 1998); *Sierra Club v. Martin*, 110 F.3d 1551, 1555 (11th Cir. 1997); *Preferred Risk Mut. Ins. Co. v. United States*, 86 F.3d 789, 792 (8th Cir. 1996); *Buckeye Cablevision, Inc. v. United States*, 438 F.2d 948, 953 n.2 (6th Cir. 1971). The substantive statutes that Plaintiff alleges Defendants have violated are the Lacey Act and NEPA in Counts One, Two, and Three. *See* Compl. ¶¶75-90 (alleging violations of the Lacey Act and NEPA "via the APA"). Count Four merely recites standards of judicial review under the APA; it does not allege any new violations of the Lacey Act or NEPA or set forth any facts or provisions of the Lacey Act or NEPA to support such an allegation. *See* 5 U.S.C. § 706. Thus, to the extent Count Four's APA claim is premised on a violation of either the Lacey Act or NEPA, it is duplicative of Counts One, Two, and Three. Even if Plaintiff were to amend Count Four to state a new claim under either the Lacey Act or NEPA, the amendment would be futile because, as explained above, Plaintiff lacks prudential standing under both the Lacey Act and NEPA, as well as Article III standing. Accordingly, Count Four should be dismissed.

CONCLUSION

For the reasons stated above, Federal Defendants respectfully request that the Court dismiss Plaintiff's Complaint with prejudice.

Respectfully submitted this 21st day of February, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of February, 2014, a copy of the foregoing Motion to Dismiss Plaintiff's Complaint was filed via the Court's electronic case filing (ECF) system, which will send notice to all counsel of record.

/s/ *Clare M. Boronow*
CLARE M. BORONOW