IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES ASSOCIATION OF REPTILE KEEPERS, INC.
683 N 400 E
Lebanon, IN 46052,

Plaintiff,

- vs. -

THE HONORABLE SALLY JEWELL, *in her official capacity as the Secretary of the Interior*
United States Department of the Interior
1849 C Street, N.W.
Washington, DC 20240,

and

THE UNITED STATES FISH AND WILDLIFE SERVICE
United States Department of the Interior
1849 C Street, N.W.
Washington, DC 20240,

Defendants.

Civ. No.: 13-2007

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Dated: December 18, 2013

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I. INTRODUCTION

1. Plaintiff United States Association of Reptile Keepers ("USARK") challenges the final rule *Injurious Wildlife Species; Listing Three Python Species and One Anaconda Species as Injurious*, which was promulgated by Defendants the Honorable Secretary Sally Jewell and the United States Fish and Wildlife Service (collectively, "FWS") on January 23, 2012. *See* 77 Fed. Reg. 3330 (Jan. 23, 2012). This final rule adds four named species of nonnative constricting snakes to the list of injurious species under the Lacey Act, 18 U.S.C. § 42, the effect of which is to prohibit their "importation into the United States, any territory of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States, or any shipment between the continental United States, the District of Columbia, Hawaii, the Commonwealth of Puerto Rico, or any possession of the United States." *Id*. § (a)(1).

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.

3. While this segment represents a niche within the larger reptile industry, and the United States pet industry at large, many thousands of small businesses are financially reliant on this trade. In particular, collectors and hobbyists earn substantial revenues from breeding and selling what are referred to as "morphs," selectively bred snakes displaying unique colors and genetic traits not found in the species as they exist in the wild. Such morphs can sell for tens of thousands of dollars each.

4. This sector is overwhelmingly driven economically by domestic morphs and common species that are captive-bred for domestic sale and export. Only a small portion of revenues are derived from generally low-value imports.

5. Moreover, the market for large constricting snakes is entirely dependent on interstate transportation and commerce among the continental states. The biggest economic drivers are the literally hundreds of large and small trade shows held throughout the country each year to which breeders and hobbyist bring, show, and sell their animals. Further, a large portion of the industry's customer base are men and women in the armed services who tend to own large reptiles, including the species at issue, in larger proportion than the public as a whole. Military personnel are subject to frequent reassignments, and thus are particularly dependent on the need to move with their pets across state lines.

6. In an economic study commissioned by USARK, it was shown that the vast majority of reptile businesses are small, individual or family-run entities, that the reptile industry as a whole generated revenues of $1.0 billion to $1.4 billion per year, and that 4.7 million households evenly distributed throughout the United States own one or several reptile species. Annual revenues generated by the large constricting snake segment exceed $100 million.

7. USARK also represents conservation biologists and research scientists in the field of herpetology who are passionate about large constricting snakes. These researchers and scientists, among other things, 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. Many of these researchers, conservationists, and scientists fund

their research and conservation efforts through the breeding and sales of morphs and common varieties of these species.

8. On March 12, 2010, FWS proposed to add nine non-native species of constricting snakes to the list of "injurious" species under the authority of the Lacey Act, 18 U.S.C. § 42. 75 Fed. Reg. 11808 (March 12, 2010). The nine species are: *Python molurus* (a category in which FWS includes both Burmese and Indian pythons, although FWS has listed the Indian Python as a separate species under the Endangered Species Act and the scientific consensus is that these are two distinct species), Reticulated python (listed by FWS as *Broghammerus reticulatus* or *Python reticulatus*, but now recognized as *Malopython reticulatus*), Northern African python (*Python sebae*), Southern African python (*Python natalensis*), Boa constrictor (*Boa constrictor*), Yellow anaconda (*Eunectes notaeus*), DeSchauensee's anaconda (*Eunectes deschauenseei*), Green anaconda (*Eunectes murinus*), and Beni anaconda (*Eunectes beniensis*). 75 Fed. Reg. 11808 (March 12, 2010).

9. The FWS proposal was based on a study employing a novel and highly imprecise climate matching model based, *inter alia*, on mean monthly temperatures in the species' native range and locations in the United States. These snakes are mostly tropical and sub-tropical species, the Burmese python being the exception, as its native range includes some temperate areas, although the extent of its habitation of such regions is the subject of scientific dispute. Nonetheless, this study purports to show these snakes could find suitable habitat in large portions of the continental United States (the importation and ownership of such snakes have long been banned in Hawaii, Puerto Rico, and U.S. territories and possessions), including regions experiencing sustained temperatures below freezing, which even Burmese python cannot survive.

10. Most significantly, this action represented the very first instance in which Defendants sought to use their authority under the Lacey Act to list as injurious species that were both in the pet trade and widely held throughout the United States as pets. As such, the proposal generated a significant amount of controversy. Even personnel within FWS recognized this was a significant extension in the use of the Lacey Act and some questioned whether use of this law was appropriate in this instance.

11. Of the nine species proposed for designation as injurious reptiles, the Burmese python, Reticulated python, and Boa constrictor are the major species in trade, with Boa constrictor accounting for the majority of revenues. Some of the species are not in trade at all and, in the case of DeSchauensee's anaconda, are not known to ever have been imported into or exist within the United States.

12. The proposal to list the nine species as injurious and to ban their interstate transport itself caused tens of millions of dollars in economic losses to the reptile industry. These losses were due to a market contraction fed by buyers' fears of making a large investment in a pet or broodstock in light of FWS' proposed ban on interstate transport. As a result of the proposed rule alone, many of USARK's members were forced to euthanize broodstock representing hundreds of thousands of dollars in investment due to the high cost of maintaining species in the face of a market which had evaporated.

13. Moreover, according to the economic report USARK commissioned, the listing of nine species of snakes was estimated to result in total economic losses in first year revenues of between $76 million and $104 million. Total economic losses over a ten year period from the proposed action, assuming historic growth patterns, range from $505 million $1.2 billion.

14. Ultimately, on January 23, 2012, Defendants listed four of the nine species—Burmese python, Northern African python, Southern African python, and Yellow anaconda—largely based on the assumption that Burmese pythons, at least, "could find suitable climatic conditions in roughly a third of the United States." 77 Fed. Reg. at 3332. (Defendants have, to date, taken no action as to the other five species included in the proposed rule.)

15. To justify its decision, FWS highlighted scientific reports most supportive of its findings and selectively quoted from others, ignoring and downplaying contradicting reports and findings. In so doing, Defendants made determinations that were either unsupported or contradicted by the record, appearing to justify a decision already made. Overall, FWS failed to meet the standards of reasoned decisionmaking and provided no rational basis for its actions.

16. FWS also did not take the "hard look" the National Environmental Policy Act ("NEPA") requires or meet its procedural obligations under the law, failing to conduct a required environmental impact analysis. Instead, FWS made a finding of no significant impact based on a faulty environmental assessment that did not evaluate important scientific information, address significant conservation concerns raised by USARK and others, or discuss or acknowledge the proposal's controversial nature or the debate regarding the science unpinning the action.

17. Further, contrary to the Lacey Act's plain terms and congressional intent, FWS' rule purports to bar interstate shipments or commerce in the listed snakes within the continental United States, save for limited transfers for zoological, educational, medical, or scientific purposes and subject to a slow and cumbersome permitting process.

18. These and other unlawful actions have caused injury to USARK's and its members' economic and conservation interests. These injuries can be redressed by an order of this Court.

II. PARTIES

19. Plaintiff United States Association of Reptile Keepers is a non-profit membership organization representing reptile breeders, hobbyists, conservationists, collectors, academics, scientists, and businesses that provide the reptile community with equipment, feed, transportation, and specialized veterinary and other services. 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. USARK and its members have been and will continue to be harmed by the illegal actions complained of herein.

20. Defendant, the Honorable Susan Jewell, is the Secretary of the U.S. Department of Interior. Defendant, by and through her designees at FWS, undertook the illegal and unauthorized actions which are challenged in this case. Secretary Jewell is sued solely in her official capacity.

21. Defendant U.S. Fish and Wildlife Service is a federal agency within the Department of the Interior and to which Defendant Secretary of Interior has delegated the authority to administer the Lacey Act.

III. JURISDICTION AND VENUE

22. USARK brings this action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706 and the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370e.

23. This court has subject matter jurisdiction pursuant to 5 U.S.C. §§ 701-06 (APA judicial review provisions); 28 U.S.C. § 2201 (Declaratory Judgment Act). The relief request is authorized by 28 U.S.C. § 2201 (declaratory judgment), 28 U.S.C. § 2202 (injunctive relief), and 5 U.S.C. § 701-706.

24. This Court also has jurisdiction pursuant to 28 U.S.C. § 1331, which grants the district courts "original jurisdiction of all civil actions arising under the … laws … of the United States."

25. Venue lies in this Court pursuant to 28 U.S.C. § 1391(e), as the Defendant Secretary of Interior is an officer of the United States and FWS is an agency of the United States.

26. An actual, justiciable controversy exists between the parties within the meaning of the 28 U.S.C. § 2201.

27. The Federal Government has waived sovereign immunity in this action pursuant to 5 U.S.C. § 702.

28. Plaintiffs have exhausted all administrative remedies, the agency action challenged is final and ripe for review, and, as shown herein, USARK has associational standing to bring these claims because "(a) [their] members would otherwise have standing to sue in their own right; (b) the interests [they] seek[s] to protect are germane to the organizations' [purposes]; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

IV. LEGAL BACKGROUND AND FACTUAL ALLEGATIONS

A. The Lacey Act

29. The United States Congress adopted the Lacey Act in 1900 as one of the Nation's earliest conservation laws. Much as it does in its current version, the original law prohibited the "[t]he importation into the United States, or any Territory or District thereof," of certain enumerated species "and such other birds and animals as the Secretary of Agriculture may from time to time declare to be injurious to the interests of agriculture or horticulture." 18 U.S.C. § 391 (1925-1926 ed.).

30. In a related provision, the 1900 Act also made it unlawful for "any person or persons to deliver to any common carrier, or for any common carrier to transport from one State or Territory to another State or Territory, or from the District of Columbia or Alaska, any foreign animals or birds the importation of which is prohibited," as well as wild animals or birds taken in violation of state, territorial, or district law. C. 553, sec. 3, 31 Stat. 188 (May 25, 1900), *codified at* 18 U.S.C. § 43 (1976 ed.).

31. Following several governmental reorganizations and revisions to the law, most substantially those enacted by the Lacey Act Amendments of 1981, Pub. L. 97-79, 95 Stat. 1073 (Nov. 16, 1981), authority over administration of the Lacey Act was transferred to the Secretary of Interior and some of the law's provisions were transferred from the Criminal Code, Title 18, United States Code, to Title 16, United States Code, which deals with conservation. *See* 16 U.S.C. Chapt. 53.

32. For present purposes, the most relevant of the Lacey Act changes made since its adoption was the repeal of Section 43 of Title 18, United States Code, by the 1981 Amendments. *See* 16 U.S.C. § 3378(b)(2). Section 3372 of Title 16, United States Code, replaced and

expanded the prohibitions of former 18 U.S.C. § 43. Currently this provision of law, among other things, bars import, export, transportation, sale, and receipt of fish, wildlife, and plants acquired, transported, or sold in violation of United States law, treaty or regulation, tribal law, or the laws of any state or foreign nation. 16 U.S.C. § 3372(a)(1), (2). Importantly, however, the Lacey Act no longer prohibits interstate shipments, sales, or export of wildlife determined by the Secretary to be "injurious" under the Act's Title 18 provisions.

33. Rather, under present law, inclusion on the list of injurious species includes only a prohibition on "[t]he importation into the United States, any territory of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States, or any shipment between the continental United States, the District of Columbia, Hawaii, the Commonwealth of Puerto Rico, or any possession of the United States …." 18 U.S.C. § 42(a)(1).

B. The National Environmental Policy Act

34. NEPA is "our basic national charter for protection of the environment." 40 C.F.R. § 150.1(a). Enacted in 1970, NEPA establishes procedures to ensure agencies: (1) take a "hard look" at the environmental consequences of their actions before these actions occur by ensuring that the agency carefully considers detailed information concerning significant environmental impacts; and (2) make relevant information available to the public so that it may also play a role in both the decision making process and the implementation of that decision. *See* 40 C.F.R. § 150.1.

35. NEPA and the regulations promulgated thereunder by the Council on Environmental Quality ("CEQ") require that all federal agencies prepare an environmental

impact statement ("EIS") for all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); *see also* 40 C.F.R. § 1501.4.

36. The fundamental purpose of an EIS is to force the decision-maker to take into account NEPA's policies and goals before the federal government takes a particular action. 40 C.F.R. § 1502.1. An EIS analyzes the potential environmental impacts, alternatives and mitigation opportunities for major federal actions.

37. An EIS must provide a detailed statement of: (1) the environmental impact of the proposed action; (2) any adverse environmental effects that cannot be avoided should the proposed action be implemented; (3) alternatives to the proposed actions; (4) the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; and (5) any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented. 42 U.S.C. § 4332(C).

38. An EIS must "inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1. NEPA also requires federal agencies to analyze the direct, indirect, and cumulative impacts of the proposed action. 40 C.F.R. §§ 1508.7 & 1508.8. In addition to alternatives and impacts, NEPA requires agencies to consider mitigation measures to minimize the environmental impacts of the proposed action. 40 C.F.R. § 1502.14 (alternatives and mitigation measures); 40 C.F.R. § 1502.16 (environmental consequences and mitigation measures).

39. An agency may first prepare a detailed Environmental Assessment ("EA") to determine whether the action may significantly affect the environment and whether it requires a full EIS. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.9. An EA is "a concise public document"

that serves, among other things, to "provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." *Id*. As with any document prepared under NEPA, an environmental assessment is intended to "ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b).

40. Significance is based upon the "intensity" and "context" of the action. 40 C.F.R. § 1508.27. "Context" refers to the geographic and temporal scope of the agency action and the interests affected. *Id*. § (a). "Intensity" addresses the severity of the impacts. *Id*. § (b). Factors relevant to intensity include: the degree to which the effects on the quality of the human environment are likely to be highly controversial; the degree to which the action may adversely affect an endangered or threatened species or its critical habitat; the presence of "uncertain impacts or unknown risks;" whether the action is "related to other actions with individually insignificant but cumulatively significant effects;" and whether the project "threatens a violation" of other laws. *Id*.

41. If, after preparing an EA, the agency determines an EIS is not required, the agency must provide a "convincing statement of reasons" why the project's impacts are insignificant and issue a Finding of No Significant Impact or "FONSI." 40 C.F.R. §§ 1501.4, 1508.9 & 1508.13.

C. The Rulemaking at Issue and its Impacts

1. The Final Rule, its Basis, and FWS Inadequate Response to Concerns

42. On January 23, 2012, FWS issued the challenged regulation, partially finalizing FWS' original proposal to list as injurious a total of nine species of constricting snakes. The final rule brought the Burmese, Northern African, and Southern African python, along with

Yellow anaconda, under the Lacey Act's proscriptions. 77 Fed. Reg. at 3330. The five other species of snakes that remain in regulatory limbo are the Boa constrictor (the dominant species in trade), Reticulated python (also commercially important), and three other species of anaconda, Green, Beni, and DeSchauensee's. *Id.*

43. With respect to the effect of the this action, FWS declared:

> As of the effective date of the listing, therefore, their importation into, or transportation between, the States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States by any means whatsoever is prohibited, except by permit for zoological, educational, medical, or scientific purposes (in accordance with permit regulations at 50 CFR 16.22), or by Federal agencies without a permit solely for their own use, upon filing a written declaration with the District Director of Customs and the U.S. Fish and Wildlife Service Inspector at the port of entry. This rule does not prohibit intrastate (within State boundaries) transport of the listed constrictor snake species.

Id. at 3333. In other words, FWS purports to prohibit transportation between – and thus interstate commerce among – the continental states with respect to the species it has listed.

44. FWS based its decision to list these species as injurious on a finding that "[t]he best available information indicates that this action is necessary to protect the interests of human beings, agriculture, wildlife, and wildlife resources from the purposeful or accidental introduction and subsequent establishment of these large nonnative constrictor snake populations into ecosystems of the United States." *Id.*

45. The finding with respect to the listed species' potential for "subsequent establishment" was largely premised on a study by the United States Geological Survey ("USGS") entitled "Giant Constrictors: Biological and Management Profiles and an Establishment Risk Assessment for Nine Large Species of Pythons, Anacondas, and the Boa

Constrictor," often referred to as "Reed and Rodda 2009" after its authors and year of publication. *Id.*

46. This study has come under extensive criticism in scientific journals and other fora on a number of grounds, including its reliance on mean monthly temperatures, questions about the occurrence of species in areas from which native range weather data was gathered, and the controversial decision to consider Indian and Burmese python as a single species. Nonetheless, FWS has defended the U.S. Geological Survey's ("USGS") work as appropriate for use in "risk analysis," asserting critiques presented prior to the partial final rule's publication were adequately rebutted. *Id*. at 3345-46.

47. Much of FWS' focus in the final rule is on the Burmese python both because Reed and Rodda 2009 surmised that an area comprising roughly a third of the continental United States could provide suitable habitat for the species and because a population of this species has become established in the Everglades National Park in extreme southern Florida. *Id.* at 3331 (A small population of African python (either Northern or Southern, which is unclear) has also been identified as breeding in extreme southern Florida. *Id.*)

48. A series of both natural and controlled cold-weather experiments have, however, resulted in a scientific consensus that Burmese python likely cannot inhabit temperate areas that experience severe winters even occasionally. Based on other experiments, many experts do not believe this species can survive in areas even as far south as Gainesville, Florida. FWS itself highlighted a finding that the already established southern Florida Burmese python population "may not be able to survive severe winters in regions as temperate as central South Carolina." *Id*. at 3332.

49. Nonetheless, Defendants based their injurious determination for Burmese python on the original Reed and Rodda 2009 theoretical finding that Burmese python "are climatically matched" to areas including "along the coasts and across the *south from Delaware to Oregon*, as well as most of California, Texas, Oklahoma, Arkansas, Louisiana, Mississippi, Alabama, Florida, Georgia, and South and North Carolina." *Id.* (emphasis added).

50. The remaining species included in FWS' listing are all tropical species for which even the subtropical regions of southern Florida present weather extremes far beyond those in which they exist in their native range. *See id.* at 3335-36.

51. USARK was so concerned about the lax science upon which the proposed listing was based that it filed a detailed request for correction under the Information Quality Act, and appealed its denial. These concerns were not alleviated by FWS' final determinations.

52. USARK and its members actively participated in the rulemaking process, providing comments and providing information both during and after the comment period.

53. Among the information provided was a detailed economic analysis of the reptile industry and the constricting snake sector. The report was commissioned and presented to FWS because the agency had done an inadequate job characterizing the industry and assessing the rule's economic impacts, a view supported by the Small Business Administration's Office of Advocacy.

54. USARK and others also noted that even though the commercially important species have been in trade for over fifty years and outside of the subtropical regions of extreme southern Florida, no populations have become established in the United States. *Id.* at 3358. USARK asserted that captive bred species, particularly the brightly colored morphs, have no survival skills and are adapted neither to the wild nor to prevalent domestic climatic conditions.

55. The organization also commented that FWS appeared to enter the rulemaking process already having decided to list some or all the species and was not receptive to new information. *See id.* at 3354-55. This perception was fueled by FWS officials' public statements made prior to the partial finalization of the listing, such as that of then-FWS' Assistant Secretary for Fish and Wildlife and Parks Thomas Strickland to the *New York Times* to the effect that "the government was not going to back down and that it would approve the regulations by next summer." Leslie Kaufman, NEW YORK TIMES (Jan. 8, 2011), *available at http://www.nytimes.com/2011/01/09/science/earth/09snakes.html*.

56. Defendants also downplayed or ignored important conservation harms stemming from the proposed listing, such as adverse impacts to conservation education program and research to help preserve threatened and endangered species and other conservation programs. Defendants also afforded no credit to concerns that the rule would engender the harms it sought to prevent by incentivizing the release of listed snakes by irresponsible breeders or pet owners due to economic pressures or when moving to other states. *See, e.g., id.* at 3350-52.

57. USARK recommended alternative courses of actions to address FWS' concern regarding the potential invasiveness of these non-native snakes, such as using other legal authorities it has to prohibit their importation. This alternative would have minimized economic impacts resulting from the listing, while minimizing adverse environmental harms, such as the recognized potential for intentional release described above. *See, e.g., id.* at 3352, 3355, 3362.

58. In response, Defendants' erroneously claimed they lacked such authority under the Lacey Act and ignored other legal authorities they have. *Id.* at 3356.

59. State conservation officials also expressed concerns regarding the proposed listing, such as adverse impacts on scarce state conservation resources, the need to deal with

abandoned snakes, and the costs associated with enforcing the prohibition. To the extent Defendants addressed these concerns at all, they did so in a cursory and non-responsive manner.

60. Finally, though far from exhaustively, FWS ignored well-documented and detailed flaws identified with the model on which it relied; failed to address findings from scientific reports furnished to the agency during the public comment period; and selectively quoted only supportive statements from those studies which it did discuss. The sum effect of these actions was to exaggerate risks in order to build a stronger case for the Lacey Act listing.

61. FWS also relied on conclusory statements, some of which are not supported by the record and others which are contradicted by the record, in responding to USARK's and others' comments, as well as in support of its findings.

62. As an example of the latter, FWS states that Burmese python, Northern and Southern African pythons, and Yellow anaconda each are "highly likely to spread and become established in the wild due to common traits shared by the giant constrictors." Among the behaviors listed, and most relevant to the potential of these species to become established and spread in the continental United States, are "behaviors that allow [these species to] escape from freezing temperatures." 77 Fed. Reg. at 3338 (Burmese python); *id.* at 3341 (Northern African python); *id.* at 3342 (Southern African python); *id.* at 3343 (Yellow anaconda).

63. Yet the record shows, for example, that Yellow anaconda occupy areas where cold-season monthly mean temperatures are only around 50^{o}F and warm-season temperatures do not exceed 86 ^{o}F. Final EA at 18. There is also no indication in the record suggesting the African species occupy any range where temperatures reach the freezing point.

64. Finally, while there is debate as to whether Burmese python exhibit behaviors such as hibernation, sheltering, or other acts to survive extended periods of sub-freezing

temperatures in their native range—or even whether Burmese python occupy such regions at all, empirical studies of Burmese python established in southern Florida *do not* exhibit such behaviors.

65. In sum, Defendants failed to meet the most basic standards for reasoned decisionmaking under the APA.

3. Legal Flaws with FWS' NEPA Compliance

66. In conjunction with its regulatory action, FWS conducted an EA to determine whether listing the four constricting snake species would have "a major impact on the human environment" and whether it was required under NEPA to prepare an EIS. As a result of this analysis, the Service determined its action would not have such impacts and issued a "finding of no significant impact" rather than preparing an EIS. 77 Fed. Reg. at 3365.

67. The EA prepared was, however, utterly inadequate and incapable of supporting the determination made.

68. For example, in the Final EA, FWS failed to acknowledge or respond to substantial comments that identified adverse environmental consequences of the listing.

69. For example, the EA does not acknowledge or respond to comments made by zoological institutions, USARK, or research scientists, academics, state and federal conservation officials. Environmental issues raised include adverse impacts on captive breeding operations which protect threatened and endangered species that are funded through sales of common and specially bred "morphs" of the listed species; the likelihood the unlawful ban on interstate movement of listed species will increase intentional releases; harm to environmental education programs; and placing a burden on state conservation agencies and diverting scarce conservation resources.

70. The final EA also failed to engage in a reasoned discussion of major scientific objections to the USGS risk analysis' highly controversial findings, or even mention the existence of a major scientific controversy. In fact, the final EA neither cited nor mentioned many of the scientific reports submitted by USARK, its members, and others during the public comment period important to these species' potential invasiveness. Nor did the EA address other reports with results contrary to FWS' determinations which issued after the proposed rule, but before the final rule issued.

71. By contrast, the final EA did cite post-comment studies supportive of the findings made.

72. Finally, the EA failed to consider major alternatives to the proposal that could have minimized the conservation harms noted by the public.

4. Conclusion

73. In sum, Defendants have exceeded their authority under the Lacey Act by purporting to ban interstate transport of the listed snakes, failed to conduct a reasoned and lawful rulemaking process, and eschewed their responsibilities under NEPA.

74. For these reasons and others, Plaintiff has been harmed and will continue to be harmed by the Defendants' illegal actions.

COUNT ONE
(*Ultra Vires*, Lacey Act, 18 U.S.C. § 42, *via* the APA)

75. Plaintiff alleges paragraphs 1 through 74 as if they were set forth in full herein.

76. The APA provides the right of review to "[a]ny person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702.

77. The APA proscribes agency action that is

> (A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law . . . .

5 U.S.C. § 706(c).

78. Section 42 of Title 18, United States Code provides:

> The importation into the United States, any territory of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States, *or any shipment between the continental United States, the District of Columbia, Hawaii, the Commonwealth of Puerto Rico, or any possession of the United States*, of [any enumerated species] or the offspring or eggs of any of the foregoing which the Secretary of the Interior may prescribe by regulation to be injurious to human beings, to the interests of agriculture, horticulture, forestry, or to wildlife or the wildlife resources of the United States, is hereby prohibited.

18 U.S.C. § 42(a)(1).

79. In the rulemaking at issue, FWS purports to ban interstate commerce and transportation of the four species of constricting snakes it added to list of injurious species.

80. The prohibition on interstate commerce in and shipments and transportation between and among the continental states of the listed species is *ultra vires* and "not in accordance with" 18 U.S.C. § 42, because it was promulgated "in excess of [Defendants'] statutory jurisdiction" as the Lacey Act does not give such effect to species included on the list of injurious species nor does it grant Defendants such authority. In purporting to enact such a limitation on the species at issue, Defendants abused their discretion, were arbitrary and capricious, and acted not in accordance with law, in violation of NEPA and the APA

COUNT TWO
(NEPA, 23 U.S.C. § 313, via APA)

81. Plaintiff alleges paragraphs 1 through 80 as if they were set forth in full herein.

82. The APA proscribes agency action that is

> (A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law . . . .

5 U.S.C. § 706(c).

83. "An agency's primary duty under the NEPA is to take a 'hard look' at environmental consequences." *Pub. Utils. Comm'n v. FERC*, 900 F.2d 269, 282 (D.C. Cir. 1990) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)) (internal quotes omitted); *see also* 40 C.F.R. § 150.1.

84. "[A]n agency takes a sufficient 'hard look' when it obtains opinions from its own experts, obtains opinions from experts outside the agency, gives careful scientific scrutiny and *responds to all legitimate concerns that are raised*." *Hughes River Watershed Conservancy v. Johnson*, 165 F.3d 283, 288 (4th Cir. 1999) (citing *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378-85 (1989)) (emphasis added).

85. FWS violated NEPA for, among other reasons, issuing an environmental assessment, upon which it based a finding of no significant impact, that failed to: (1) respond to significant environmental concerns raised during the public comment period; (2) provide a reasoned discussion of, or even acknowledge at all, major scientific controversies central to the decisions made; (3) acknowledge the controversy attendant to the fact that the listing of these species was the first time the Lacey Act had been used to list animals widely held as pets and which are in interstate commerce; or (4) examine all relevant data and provide a reasonable explanation for the findings made. For all these reasons, FWS failed, contrary to law, to take a "hard look" at the issues, failed to observe procedures required by law, acted arbitrarily and capriciously, and abused its discretion in violation of NEPA and the APA.

COUNT THREE
(NEPA, *via* the APA)

86. Plaintiff alleges paragraphs 1 through 75 as if they were set forth in full herein.

87. The APA proscribes agency action that is

> (A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law . . . .

5 U.S.C. § 706(c).

88. NEPA and its implementing regulations promulgated require federal agencies to prepare an environmental impact statement ("EIS") for all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); *see also* 40 C.F.R. § 1501.4.

89. The listing of, in particular, the Burmese python as injurious is a major federal action because, among other reasons, it is a species widely held throughout the continental United States, it is subject to interstate commerce, and its listing entails significant adverse environmental consequences and raises both significant controversy and novel policy issues.

90. FWS' failure to prepare an environmental impact statement in conjunction with the rule at issue is therefore an abuse of discretion, arbitrary and capricious, and not in accordance with law, in violation of NEPA and the APA.

COUNT FOUR
(APA)

91. Plaintiff alleges paragraphs 1 through 90 as if they were set forth in full herein.

92. The APA proscribes agency action that is

> (A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction,

> authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law . . . .

5 U.S.C. § 706(c).

93. Among other things, Defendants engaged in result-oriented, predecisional rulemaking; failed to provide reasoned bases for the decisions made; made decisions not supported by the record or contrary to the record; and overlooked important aspects of the problem it sought to address. Accordingly, FWS abused its discretion and acted arbitrarily, capriciously, and contrary to law, in violation of the APA.

PRAYERS FOR RELIEF

WHEREFORE, Plaintiffs respectfully seek an Order of this Court:

(a) Declaring, pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, that the rule at issue was promulgated in violation of the APA and NEPA for, among others, the reasons stated above;

(b) Declaring, pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, that Defendants lack legal authority to ban on interstate transportation and commerce in the listed species;

(c) Declaring, pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, Defendants' purported ban on interstate transportation and commerce in the listed species to be *ultra vires* and contrary to law;

(d) Enjoining Defendants from applying the provisions of the unlawful rule;

(e) Vacating and remanding the unlawful rule;

(f) Remanding the rule to FWS to prepare a lawful environmental impact statement and provide a rational basis for any new rule proposed;

(g) Awarding Plaintiff its costs and attorneys' fees as appropriate;

(h) Providing such other relief as is just and proper.

Dated: December 18, 2013

Respectfully submitted,

/s/ Shaun M. Gehan

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