IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES ASSOCIATION OF REPTILE KEEPERS, INC., Plaintiff, - vs. - THE HONORABLE SALLY JEWELL, *et al.*, Defendants.	Civ. No.: 13-2007-EGS

UNITED STATES ASSOCIATION OF REPTILE KEEPERS OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiff United States Association of Reptile Keepers, Inc. ("USARK") respectfully urges this Court to deny Defendants the Honorable Sally Jewell's, Secretary of the Department of the Interior, and the U.S. Fish and Wildlife Service's ("FWS") Motion to Dismiss USARK's Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (Defs. Mot., Dkt. No. 14 (Feb. 21, 2014).) USARK has adequately pled the facts necessary at this juncture of litigation to state a claim and demonstrate constitutional and prudential standing to assert its claims under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, the Lacey Act, 18 U.S.C. § 42, and the Administrative Procedure Act ("APA"), 5 U.S.C. Chapt. 7.

INTRODUCTION

On December 18, 2013, USARK filed a four count Complaint alleging Defendants violated the NEPA, the Lacey Act, and the APA, when it issued its final rule, *Injurious Wildlife Species; Listing Three Python Species and One Anaconda Species as Injurious*. *See* 77 Fed. Reg. 3330 (Jan. 23, 2012); (Compl. ¶ 1). As explained in depth below, USARK's complaint met

all applicable pleading standards, adequately alleged all elements of the claims raised, was sufficiently detailed so as to put Defendants on notice, and made allegations sufficient for this stage of litigation to demonstrate standing.

USARK now comes forward with additional evidence and affidavits to demonstrate that the organization meets required constitutional and prudential standards for associational standing on behalf of its members. As explained below, Defendant's Motion is meritless.

ARGUMENT

I. USARK Has Associational Standing Under Article III and Prudential Standing to Assert Its Claims

A. USARK Has Prudential Standing Under NEPA and the Lacey Act

USARK easily meets the test for prudential standing in order to raise its NEPA and Lacey Act claims. The Supreme Court has "interpreted section 10(a) of the APA to impose a prudential standing requirement in addition to the requirement, imposed by Article III of the Constitution, that a plaintiff have suffered a sufficient injury in fact." *Nat'l Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 488 (1998) (citing *Ass'n of Data Processing Service Orgs, Inc. v. Camp,* 397 U.S. 150, 152 (1970)). For a plaintiff to have prudential standing under the APA, "the interest sought to be protected by the complainant [must be] arguably within the zone of interests to be protected or regulated by the statute ... in question." *Id.* at 934.

"In applying the 'zone of interests' test, we do not ask whether, in enacting the statutory provision at issue, Congress specifically intended to benefit the plaintiff. Instead, we first discern the interests 'arguably ... to be protected' by the statutory provision at issue; we then inquire whether the plaintiff's interests affected by the agency action in question are among them." *Id.*, 522 U.S. at 489 (citations omitted). The prudential standing test "is not meant to be

especially demanding." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, __ U.S. __, 132 S.Ct. 2199, 2210 (2012). "In enforcing this lenient requirement, a court must apply the test in keeping with Congress' evident intent when enacting the APA to make agency action presumptively reviewable." *City of Duluth v. Nat'l Indian Gaming Comm'n*, CV 13-246 (CKK), 2013 WL 6654079 (D.D.C. Dec. 18, 2013).

1. Plaintiff's Conservation Fall with Within NEPA's Zone of Interests

"NEPA has twin aims." *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983). The law imposes on a federal agency "the obligation to consider every significant aspect of the environmental impact of a proposed action" and "it ensures the agency will inform the public that it has indeed considered environmental concerns in its decision making process." *Id.* (internal quotes and citation omitted). However, the D.C. Circuit court has "often observed that a party is not precluded from asserting cognizable injury to environmental values because his 'real' or 'obvious' interest may be viewed as monetary or 'disqualified' from asserting a legal claim under NEPA because the 'impetus' behind the NEPA claim may be economic." *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1288 (D.C. Cir. 2005) (quoting *Realty Income Trust v. Eckerd*, 564 F.2d 447, 452 (D.C. Cir. 1977)) (internal quotes omitted).

USARK and its members easily pass this low bar. According to its president, Phillip Goss, "USARK is, as our website states, 'An Education, Conservation and Advocacy Organization for Herpetofauna… Promoting Awareness, Responsible Care & Professional Unity.'" (Decl. of Phillip Goss ("Goss Decl."), ¶ 4 (Exh. 1).) The organization "is dedicated to conservation through captive propagation, and espouses the ideal of "Preserving Reptiles & Amphibians for Our Future," supporting programs that ensure the preservation of threatened and

endangered species around the world. (*Id.* ¶ 14; *see also id.* ¶ 17 (discussing and excerpting USARK's "longstanding position statement" on conservation).) Both the organization and its members engage in public education and outreach, focusing on teaching the importance of these species and "fostering a conservation ethos." (*Id.* ¶ 18.) Trade shows, which in addition to being an important economic driver for the industry, are also "an integral part of USARK's conservation education mission" as these events afford the public the opportunity to see and learn about these species. (*Id.* ¶ 19.)

These and other conservation efforts are echoed and supported by USARK's members. Many breeders also are engaged in conservation education the local level. (*See, e.g.,* Decl. of Lindsey Lopez ("Lopez Decl."), ¶ 5 (Exh. 2); Decl. of Keith Gisser ("Gisser Decl."), ¶ 4 (Exh. 3); (Decl. of Kristofer F Swanson ("Swanson Decl."), ¶ 2 (Exh 4).) USARK's members and supporters include academic professionals engaged in biomedical research, (Decl. of Dr. Raul E. Diaz, Jr. (Diaz Decl.") (Exh. 5)), the National Geographic Society's Resident Herpetologist, Dr. Brady Barr, host of the National Geographic channel's Python Hunters, Shawn Helflick. (Goss Decl. ¶ 16.) Collectively, these and many other members engage in important conservation education and activities.

USARK and its members are also engaged in efforts to eradicate invasive Burmese pythons and other species in the Everglades. For example, Michael Cole initiated Florida's python removal program and works with the Everglades National Park personnel. (Decl. of Michael Cole ("Cole Decl."), ¶¶ 6-7 (Exh. 6).) Kristofer Swanson is licensed by the State of Florida's Fish and Wildlife Conservation Commission as a "python remover," although he lives in Texas and travels at his own expense. (Swanson Decl. ¶ 6.) USARK supports these efforts.

(Goss Decl. ¶ 23.) All these and other allegations were fairly encompassed in USARK's Complaint.

Defendants, however, deride USARK's perfectly adequate allegations, asserting USARK's "primary concern is economic." (Def.'s Mot. at 9.) The government, however, conflates allegations of injuries caused by the listing—which are "primarily economic" for many members in the trade, but as demonstrated herein, fall everywhere from primarily environmental to somewhere in between for most USARK members—with the "not demanding" test for prudential standing. "[P]arties motivated by *purely* commercial interests routinely satisfy the zone of interests test," we have said, as "[c]ongruence of interests, rather than identity of interests, is the benchmark." *National Ass'n of Home Builders*, 417 F.3d at 1288 (quoting *Amgen, Inc. v. Smith*, 357 F.3d 103, 109 (D.C. Cir. 2004)) (emphasis added).[1] There is nothing pretextual about the environmental interests USARK asserts in this case.

2. USARK Has Prudential Standing Under the Lacey Act

Unlike reams of decisions arising under NEPA, there is no case law which explores and explains the Lacey Act's "aim." This matter is literally a case of first impression. The likely reason no party has heretofore challenged an FWS decision to list a species as injurious is that this listing is 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

[1] *See also Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior*, 731 F. Supp. 2d 15, 20-21 (D.D.C. 2010) (association with commercial fishing, tourism dependent business, and motorized beach vehicle enthusiasts had prudential standing under NEPA); *The Consolidated Delta Smelt Cases*, 717 F. Supp. 2d 1021, 1057-58 (E.D. Cal. 2010) (agribusinesses among others asserting injuries such as "increased groundwater consumption; land subsidence; reduction of air quality; destruction of family and entity farming businesses; and social disruption and dislocation" had standing).

the United States as pets." (Compl. ¶ 10). Lacking any authority to cite, the Government characterizes the law's interests in the narrowest possible terms: "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." (Defs. Mot. at 12 (citations omitted).)

Defendant's characterization is not inaccurate, just as the Endangered Species Act ("ESA") protects the species from extinction and NEPA's purpose is to "encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation." 42 U.S.C. § 4321. Each is true as far as they go, but courts do not define the interests protected by the ESA and NEPA as narrowly as the Government would the Lacey Act for prudential standing purposes, as the NEPA discussion above shows.

For example, *Bennett v. Spear* discusses the zone of interest test in a case where the key question was "whether the petitioners, who have competing economic and other interests in Klamath Project water, have standing to seek judicial review of the biological opinion under the citizen-suit provision of the ESA and the Administrative Procedure Act." 520 U.S. at 157 (citations omitted). As part of its discussion of the evolution of the prudential standing test into a general requirement, the Court stated: "We have made clear … that the breadth of the zone of interests varies according to the provisions of law at issue, so that what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the 'generous review provisions' of the APA may not do so for other purposes." *Id.* at 164 (quoting

Clarke v. Securities Industry Assn., 479 U.S. 388, 400 n.16 (1987)). This is, of course, a case which falls under these "generous review provisions."

Of course, in *Bennett*, the Court found that petitioners had prudential standing to challenge the biological opinion, even though they had commercial interests and the relief sought was arguably adverse to the species the law was designed to protect. *See id.* at 175 (ascribing error to the circuit court's denial of standing on the grounds that "petitioners are neither directly regulated by the ESA nor seek to vindicate its overarching purpose of species preservation"). "Petitioners contend that the available scientific and commercial data show that the continued operation of the Klamath Project will not have a detrimental impact on the endangered suckers, that the imposition of minimum lake levels is not necessary to protect the fish, and that by issuing a Biological Opinion which makes unsubstantiated findings to the contrary the defendants have acted arbitrarily and in violation of § 1536(a)(2)." *Id.* at 176. The Court agreed, finding indicia of Congress' concern for "economic consequences" in the ESA's "best scientific and commercial data" standard and other provisions. *Id.* at 176-77.

As perhaps the Nation's oldest environmental laws, the Lacey Act's injurious species provision has none of the substantive and procedural trappings of modern conservation laws such as ESA or the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801, *et seq.* However, there are similar indicia of economic concerns in the law. For example, the Lacey Act evinces an intent to protect commercial interests, including "agriculture, horticulture, [and] forestry." 18 U.S.C. § 42(a)(1). These interests are more similar than not to herpetoculture, except that forestry and agriculture are far more damaging to the natural environment. Furthermore, the Lacey Act explicitly carves non-native pet species such as "domesticated canaries, parrots (including all other species of psittacine birds), or such other

cage birds as the Secretary of the Interior may designate." *Id.*§ (4). Perhaps most importantly, as an entity with actual "skin in the game," USARK is the only party that has the interest and the standing to ensure Defendants' determination that the four species of constricting snakes are, in fact, "injurious to" the values the law protects. While the Lacey Act vests an unusual amount of discretion in the Secretary, Congress did not grant her unbridled authority to ban importation of any species for any reason. If USARK does not fall within the Lacey Act's zone of interests in this case and under the facts it presents, then no party will ever be able meet the threshold and Defendants' authority under the law will go unchecked.

Finally, USARK is not willing to concede that its members are not the "target" of this regulation. The activity in which its members have engaged for decades has been criminalized solely by virtue of this regulation.

B. USARK Has Constitutional Standing

USARK meets the associational standing requirements of Article III. At least one of its members would have standing to sue in his or her own right on each claim made; the interests USARK seeks to protect are germane to its purpose; and neither the claim asserted nor the relief requested requires that an individual member participate in this action. *See Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002). An "association has an obvious interest in challenging [agency] rulemaking that directly—and negatively—impacts its ... members." *American Trucking Ass'ns, Inc. v. Federal Motor Carrier Safety Admin.*, 724 F.3d 243, 247 (D.C. Cir. 2013). Association members have Article III standing to bring this case in its own right if they: (1) suffer or will suffer an "injury in fact" that is concrete and particularized and actual or imminent, as opposed to conjectural or hypothetical; (2) the injury is fairly traceable to the

challenged action; and (3) the injury will likely be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

The evidence USARK provides clearly shows that the Plaintiff meets every prong of the test for each claim asserted. As described above, USARK's members have strong conservation interests, and those interests are germane to Plaintiff's purpose. Moreover, those interests are injured by the agency action complained of here. Defendants' misconceived interpretation of the Lacey Act as banning interstate commerce and transportation of listed species, *see infra* at Part II, means that owners of Burmese python can no longer participate with their animals in out-of-state educational activities. (*See, e.g.,* Cole Decl. ¶ 15; Goss Decl. ¶ 19.) The listing has also harmed USARK's and its members' aesthetic interests. For example Lindsey Lopez's Burmese python died for lack of medical care because the nearest herpetological veterinarian was located across a state line. (Lopez Decl. ¶¶ 16-18.) Research is not being conducted due to Defendants' actions. (*See, e.g.,* Diaz Decl. ¶¶ 10-12.)

The Government's cavil that USARK lacks constitutional standing is utterly misplaced, failing to recognize the varying levels of proof required at different litigation stages. "As the Supreme Court explained in *Defenders of Wildlife*, the burden of production a plaintiff must bear in order to show it has standing to invoke the jurisdiction of the district court varies with the procedural context of the case." *Sierra Club v. E.P.A.*, 292 F.3d 895, 898 (D.C. Cir. 2002). "Thus, while a plaintiff must 'set forth' by affidavit or other evidence 'specific facts,' to survive a motion for summary judgment …, 'at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presume that general allegations embrace those specific facts that are necessary to support the claim.'" *Bennett v. Spear*, 520 U.S. 154, 167-68 (1997) (citations omitted); *see also Rainbow/PUSH*

Coal. v. F.C.C., 396 F.3d 1235, 1239 (D.C. Cir. 2005) (quoting *Sierra Club*, 292 F.3d at 900) (emphasis added) (petitioners must submit "any affidavits or other evidence appurtenant thereto *at the first appropriate point in the review proceeding*'—either 'in response to a motion to dismiss for want of standing'" or with an opening brief).

Despite this clear authority, Defendants insist USARK's Complaint must be dismissed "because it does not identify a single individual or business that is a member of its organization and that has suffered the alleged injuries." (Defs. Mot. at 14.) At the pleading stage, however, that is not USARK's burden. The "general factual allegations," as the Supreme Court put it, or "vague categories of people," as Defendants would have it, is entirely sufficient for a pleading. As the D.C. Circuit noted in *Rainbow/PUSH*, the Government's Motion to Dismiss makes this the "first appropriate point" for USARK to come forward with "affidavits or other evidence" to support the allegations. 396 F.3d at 1239 (internal quotes and citation omitted). Accordingly, Plaintiff has produced six Declarations supporting its claim of Article III and prudential standing.

Furthermore, not a single case cited by Defendants stands for the proposition that a case brought by a plaintiff asserting associational standing should be dismissed under Fed. R. Civ. P. 12(b)(1) for failure to identify specific members *in a complaint.* Three of these cases—*Public Citizen, Inc. v. National Highway Traffic Safety Administration*, 489 F.3d 1279 (D.C. Cir. 2007); *Chamber of Commerce of U.S. v. E.P.A.*, 642 F.3d 192 (D.C. Cir. 2011); and *Center for Biological Diversity v. U.S. Department of Interior*, 563 F.3d 466 (D.C. Cir. 2009)[2]—involved petitions for review filed in the circuit court. (*See* Defs. Mot. at 14-15.) In a petition for review

[2] The Government string cites *Center for Biological Diversity* as a "see also" for the proposition USARK lacks standing for failing "to identify even one member who has been or will be harmed by the Rule." (Defs. Mot. at 15.) For clarity, in that case, petitioners filed affidavits and were not denied standing on this ground. *See* 563 F.3d at 479. Rather, and somewhat consistent with Defendants' parenthetical, petitioners' "substantive theory of standing" based on climate change was found wanting because they failed to establish injury or causation. *Id.* at 478.

"[t]he petitioner's burden of production in the court of appeals is … the same as that of a plaintiff moving for summary judgment in the district court …." *Sierra Club*, 292 F.3d at 899 (citing *Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). For its part, in *Summers v. Earth Island Institute*, 555 U.S. 488 (2009), the plaintiffs did not file affidavits until after a merits decision and the government had noticed its appeal. *Id.* at 495 n.*. In short, USARK has met its burden and has done so at the appropriate time.

Substantively, the Government argues USARK's "allegations are too conclusory and speculative to support standing." (Defs. Mot. at 15.) Relying on *Public Citizen*, Defendants state "[p]otential 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." (Defs. Mot. at 15 (quoting 489 F.3d at 1295).) Again, however, this is a standard the D.C. Circuit has applied to case brought directly before it on a petition for review,[3] in which the first opportunity to a detailed theory of standing comes in an opening brief. For administrative challenges in federal district court, "[a]t the pleading stage, general factual allegations ... may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (citation omitted). Beyond this, USARK has come forward with specific evidence of injury, causation, and redressability, which it will have the opportunity

[3] Furthermore, the court was evaluating the standing of a citizen watchdog organization claiming standing based on a theory of "increased risk of harm" emanating from an allegedly insufficiently protective regulation on auto manufacturers. 489 F.3d at 1293-95. While, as explained below, USARK and the Government may disagree on the extent to which the reptile community is "regulated" by the Lacey Act listing, there is no question but that the rule at issue criminalizes activities in which heretofore USARK's members had lawfully engaged. This harm is orders of magnitude more certain than the potential that a citizen of the U.S. might be killed or injured in an auto accident caused by the Government's failure to set a sufficiently stringent tire pressure standard.

to supplement once the Government produces the administrative record and the case proceeds to summary judgment.

Curiously, Defendants maintain the economic harm stemming from FWS' decision to list only four of the nine species of constricting snakes originally proposed is not sufficient to convey USARK constitutional standing. (*See* Defs. Mot. at 15 (contending that Burmese python "accounts for only 7.9% of live constrictor snake imports and U.S. bred snakes"). The Government apparently conflates the inapt "substantially increase risk of harm" and "substantial probability of harm" formulation in *Public Citizen* with a "substantial *amount*" of harm. The test for standing, however, is whether Plaintiff has suffered injury; whether action complained of is the cause of that injury; and whether that injury can be redressed by a favorable decision. *Defenders of Wildlife*, 504 U.S. at 560-61. Notably, Defendants do not deny that Plaintiff's members have suffered injury. The only contention is that the harm may not be great enough.[4]

With respect to USARK's and its members' conservation interests, the Government proposes an absurd pleading standard for which no citation is provided. It is contended that the Complaint is insufficient because Plaintiff has "provide[d] 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." (Defs. Mot. at 16.) Federal rules require only that a complaint "contain … a short

[4] Defendants also engage in a logical fallacy when they assert that the "rule is [not] substantially likely to harm [USARK's] members in light of the fact that Final Rule affects a relatively small proportion of large constrictor snakes in the U.S. …." (Defs. Mot. at 15-16.) As USARK has shown herein, this "relatively small" portion of the overall market is a large percentage of particular member's business. *See generally* Cole Decl. The law does not countenance redressable injury caused by the Government because the harm is not experienced by a "significant" portion of the population.

plain statement of the claim showing the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "Rule 8 does not require 'detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.'" *Doe v. Rumsfeld*, 800 F. Supp. 2d 94, 103 (D.D.C. 2011) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009)).

Under Fed. R. Civ. P. 12(b)(1), courts reviewing a motion to dismiss are instructed to "construe the complaint 'liberally,' granting the plaintiff 'the benefit of all inferences that can be derived from the facts alleged.'" *Barr v. Clinton*, 370 F.3d 1196, 1199 (D.C. Cir. 2004) (citing *Kowal v. MCI Communications* Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994). Here USARK has alleged that its members who deal "with the species at issue" are "entirely dependent on interstate transportation and commerce among the continental states." (Compl. ¶ 5.) Further, that it represents "conservation biologists and research scientists" that "fund their research and conservation efforts through the breeding and sales of" listed species. (*Id.* ¶ 7.) It is a reasonable inference that both economic harm and adverse impacts to conservation research and efforts flow from FWS' decision to list these four species at issue as injurious and, further, to prohibit interstate transportation and commerce, save for narrow exceptions subject to a new and burdensome permitting process "for bona fide scientific, medical, educational, or zoological purposes." (Defs. Mot. at 2 (citing 18 U.S.C. § 42(a)(3); 50 C.F.R. §§ 16.11-16.15).) Finally, USARK alleged that all these purposes are germane to its purpose. (Compl. ¶ 19.) Now, finally, Plaintiff has come forward with evidence and affidavits to support these claims. In short, USARK has standing.

In any event, even if the Court were to agree with the Government that USARK need to identify specific of its members harmed by the listing of these four species, it should dismiss the Complaint without prejudice with leave to amend.

II. USARK's Count One *Ultra Vires* Claim is Justiciable

In its first count, USARK alleges the putative ban on interstate commerce and transportation of the four listed species among the continental states is not authorized by the Lacey Act. The Lacey Act only bars "[t]he importation into the United States, or 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" enumerated species or others the Secretary of Interior determines to be injurious. 18 U.S.C. § 42(a)(1). Count One's gravamen is Defendants' unlawful reading of "between" and "continental United States" out of the statute, as well as expanding the word "shipment" well beyond its commonly understood legal meaning, arrogating to itself a power Congress did not grant.

Plaintiffs are reluctant to get deep into the merits at this stage of litigation. In its Complaint, however, USARK explains that the Lacey Act originally had an express prohibition on, *inter alia*, delivery to a "common carrier" or for a "common carrier to transport from one State or Territory to another State or Territory" of an species listed as injurious. (Compl. ¶ 30 (citing 18 U.S.C. § 43 (1976 ed.).) That provision was struck from the law in 1981. (*Id.* ¶ 32 (citing 16 U.S.C. § 3378(b)(2).) There is a stark difference in meaning between "transport from" one state to another and "between the continental United States" and other places.

In support of its contention that USARK's claims in the first Count are untimely, the Government points to 50 C.F.R. § 16.3, "General Restrictions," (Defs. Mot. at 16-17), which was apparently first adopted in in 1965. *See* 30 Fed. Reg. 9640, 9641 (Aug. 3, 1965) (codified at 50 C.F.R. Part 13 (1966 Cum. Sup.). It would be generous to call this provision an "interpretation"

of congressional intent. This nearly incomprehensible provision provides no explanation or rationale for FWS' decision to substitute "transportation" for "shipment," and none is provided in the seven paragraph preamble to the final 1965 rule. Indeed, what this section actually says is: "*Any* importation or transportation of live wildlife … into the United States or its territories or possessions is deemed to be injurious or potentially injurious to the health and welfare of human beings." 50 C.F.R. § 16.3 (emphasis added). Plaintiffs are unable to discern what this language is meant to convey, but this is not the regulation USARK is challenging.

Rather, the final rule at issue in this case amends section 16.15, "Importation of live reptiles or their eggs." *See* 77 Fed. Reg. 3330, 3366 (Jan. 23, 2012) (codified at 50 C.F.R. § 16.15. Specifically, the regulation at issue provides: "The importation, transportation, or acquisition of any live specimen, gamete, viable egg, or hybrid of the [four species at issue] is prohibited except as provided under the terms and conditions set forth in § 16.22."[5] *Id.* As the challenged regulation was adopted in 2012, USARK is well with the six year statute of limitations. *See* 28 U.S.C. § 2401(a).

Further, whatever its relevance, section 16.3 does not address USARK's contention that the Lacey Act does not prohibit interstate commerce within and among the continental states. In relevant part, the regulatory language merely parrots the statute, providing "any such 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

[5] Having reviewed the regulatory language, USARK would be inclined to amend this count, provided this Court does not, as it should not, dismiss it with prejudice, to include a challenge to the inclusion of "acquisition" in this section. While the words "shipment" and "transportation" at least convey a similar concept at the broader level, purporting to ban acquiring a species listed under the Lacey Act criminalizes an activity of fundamental importance USARK and its members and which even FWS appears to concede is permissible. *See, e.g.*, 77 Fed. Reg. at 3349 ("Family businesses will still be able to operate, provided they either sell within their State or have a port of export directly from their State.")

possession of the United States by any means whatsoever, is prohibited ….” 50 C.F.R. § 16.3. The Government does not contend the agency adopted an interpretative regulation at any time that addresses this question. Rather, as the “regulation” and the statute use the language, this is purely an issue of statutory interpretation the Court is fully capable of deciding.

Finally, the Government asserts USARK cannot avail itself of either of the two doctrines this Circuit recognizes for challenging a regulation for which the statute of limitations has otherwise run. While it is moot point as this case involves a regulation adopted in 2012, the government’s reasoning is not persuasive. (*See* Defs. Mot. at 18 (citing cases).) The so-called “reopening” doctrine may be a stretch, given that FWS promulgated an entirely new regulation. However, the D.C. Circuit has stated that its

> long-standing rule that although a statutory review period permanently limits the time within which a petitioner may claim that an agency action was procedurally defective, a claim that agency action was violative of statute may be raised outside a statutory limitations period, by filing a petition for amendment or rescission of the agency’s regulations, and challenging the denial of that petition…. We believe the law to be that where an agency reiterates a rule or policy in such a way as to render the rule or policy subject to renewed challenge on any substantive grounds, a coordinate challenge that the rule or policy is contrary to law will not be held untimely because of a limited statutory review period.

Pub. Citizen v. Nuclear Regulatory Comm’n, 901 F.2d 147, 152-53 (D.C. Cir. 1990) (footnotes and citations omitted); *Cf. NW. Envtl. Advocates v. EPA*, 537 F.3d 1006, 1019 (9th Cir. 2005) (denial of petition renews untimely as-applied challenged).

Defendants claim it would be “futile” to allow USARK to amend its Complaint to an “as applied” challenge “because such a challenge is only available to ‘a party against whom a rule is applied.’” (Defs. Mot. at 18 (quoting *Indep. Bankers of Am. v. Bd. of Governors of Fed. Reserve Syst*., 195 F.3d 28, 34 (D.C. Cir. 1999)).) That simply begs the question of against whom a regulation promulgated under a criminal statute that prohibits a formerly lawful activity is

applied and who would have the right to challenge on the basis it exceeds agency authority? If, under the facts of this case and the allegations made, USARK cannot raise this claim, then Defendants have essentially granted themselves legislative authority.

III. Count Four States a Viable Claim

The Lacey Act provides that importation into and shipment between the places named, of certain species and categories of wild animals that "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) (emphasis added). As such, Defendants' decision to designate a species as injurious is substantively constrained (albeit lightly) by the Lacey Act's terms. For example, the creature must be "wild" and belong to listed type; the Secretary must find it to be injurious to at least one of the listed categories; and the listing must be conducted via informal rulemaking under the APA. All these things come with a body of law that can be summed up as requiring that the Secretary's determination be "the product of reasoned decisionmaking." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983).

Count Four alleges that the regulation at issue here was not the product of reasoned decisionmaking for reasons partially explained in the Complaint. Plaintiff acknowledges that Count Four should have been stated to have been raised under the Lacey Act via the APA, and not the APA alone. The Government's assertion that this claim is "duplicative of Counts One, Two, and Three," however, is simply wrong. (Defs. Mot. at 18-19.) The *ultra vires* Count is a specific claim about Defendant's authority under the law, and Counts Two and Three relate to NEPA. Count Four alleges that the justifications provided and decisions made, based on the

administrative record, for listing these four species of constricting snake do not meet legal standards.

Rule 8(e) of the Federal Rules of Civil Procedure provides that "Pleadings must be construed so as to do justice." The claim that, "[a]mong 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," (Compl. ¶93), coupled with the allegations made such as those in paragraphs 42 to 65, is certainly sufficient to put on notice. Certainly, the addition of a citation to the Lacey Act in an amended complaint as a matter of course under Fed. R. Civ. P. 15(a)(a)(B) would rectify any error.

CONCLUSION

For the reasons stated above, USARK respectfully urges this Court to deny Defendants' Motion to Dimiss.

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Respectfully submitted,

/s/ Shaun M. Gehan

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