UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE EXOTIC WILDLIFE ASSOCIATION, CHARLY SEALE, EDDY BLASSINGAME, TERRY CAFEY, RAY DOCKER, JOE GREEN, NANCY GREEN, ROY LEIFESTER, THOMAS OATES, and ED VALICEK, Plaintiff, v. KEN SALAZAR, in his official capacity as Secretary of the U.S. Department of the Interior; DANIEL ASHE, in his official capacity as Director of the U.S. Fish and Wildlife Service; and U.S. FISH AND WILDLIFE SERVICE, Defendants.	Civil Action No. 1:12-cv-00340-BAH (consolidated with 11-cv-01564 and 12-cv-00194)

MOTION TO INTERVENE AS DEFENDANT AND MEMORANDUM IN SUPPORT

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INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 24 and Local Civil Rule 7(j), Friends of Animals ("FoA") hereby moves this Court to intervene as of right as Defendants in the above-captioned matter, or, in the alternative, for permissive intervention. FoA meets the four-part test for intervention as of right in this action and should be granted intervention to protect its interests in the survival and conservation of the scimitar-horned oryx, addax, and dama gazelle

[1] Proposed defendant-intervenors have also filed a motion to intervene in 1:11-cv-01564 on November 22, 2011.

(collectively "antelope species"). If Plaintiffs, Exotic Wildlife Association, et al. (collectively "Exotic Wildlife"), are successful in this litigation, the Sport-Hunting Rule that the Honorable Judge Kennedy, formerly of this Court, held to be illegal, will continue to be in affect; further delaying protections to the three antelope species, resulting in direct impact to FoA and the decades long work of its members to protect these species in the wild. Additionally, if Exotic Wildlife succeeds in this case, it will be contrary to Judge Kennedy's opinion in *Friends of Animals v. Salazar*, 626 F. Supp. 2d 102 (D.D.C. 2009) *appeal dismissed*, 09-5292, 2010 WL 286806 (D.C. Cir. Jan. 4, 2010). There, Judge Kennedy found that the Sport-Hunting Rule would harm FoA's informational interest because FoA would not be able to receive information with regard to the permitees, and FoA would not be able to participate in public comments with regard to the hunting permits. 626 F.Supp. at 118.

FoA contacted both the defendant and plaintiff in this case to inquire whether they would oppose this Motion to Intervene. The Department of Justice takes no position on this motion. Counsel for Exotic Wildlife, Nancie Marzulla and Roger Marzulla, oppose FoA's motion to intervene.

Applicant respectfully refers this Court to the arguments below in support of this motion and the accompanying declaration of Priscilla Feral ("Feral Decl.", attached hereto as Exhibit A). FoA further requests that the Court file applicant's Motion to Dismiss (attached hereto as Exhibit B), which is also lodged with this motion.

BACKGROUND

A. The Movant FoA

FoA is a non-profit, animal advocacy organization which maintains offices in Connecticut, New York, and Washington, D.C., and regularly consults and communicates with experts, scientists, and government agencies worldwide. Feral Decl. ¶ 3. FoA has

approximately 200,000 members and journal subscribers in the United States and internationally. *Id*. FoA, its members, and staff value the ways that humans and nonhuman species benefit from protecting native biological diversity. *Id.* FoA's mission is to cultivate a respectful view of nonhuman animals, free-living and domestic. *Id.* Its goal is to free animals from cruelty and institutionalized exploitation around the world. *Id.* FoA uses the best available science to forward its mission through active participation in international and national policy and law formation, including law and policy involving the Convention on International Trade in Endangered Species of Wild Fauna and Flora, ratified by the United States in September 1973, and implemented through the Endangered Species Act ("ESA"); and through national administrative processes, legal action, public outreach, and education. *Id*. FoA often participates in public processes involving endangered species and seeks to influence legislation regarding endangered and other protected species. *Id*. FoA has a limited number of resources, both in terms of staff and financial resources, to use in furthering its mission. *Id*.

B. The scimitar-horned oryx, addax, and dama gazelle

The road to protect these rare and beautiful North African antelope species has been a long one, and FoA has been there for every step of the journey. The scimitar-horned oryx, addax, and, dama gazelle once thrived in the deserts of northern Africa. Today, the scimitar-horned oryx is extinct in the wild, and only very small numbers of addax and dama gazelle remain in their native ranges. *Final Rule to List the Scimitar-Horned Oryx, Addax, and Dama Gazelle as Endangered*, 70 Fed. Reg. 52,319 (Sept. 2, 2005). Poaching, civil war, and habitat destruction have led to the demise of these three antelope species. *Id*. The countries where these species live have few, if any, effective methods to protect the three antelope species from these continuing threats.

U.S. Fish and Wildlife Service ("Service") recognized the imperiled status of the three antelope species, and on November 5, 1991, published in the Federal Register a proposed rule to list the three antelope species as "endangered" under the ESA. *Proposed Endangered Status for Scimitar-horned Oryx, Addax, and Dama Gazelle*, 56 Fed. Reg. 56,491, 56, 491-95 (Nov. 5, 1991). The proposed rule indicated that the Service might treat captive antelope differently than wild antelope and requested information about the status of captive populations. *Id*. at 56,491. The Service never finalized this proposed rule.

It was not until 2005, following a lawsuit by FoA, that the Service listed the antelope species as endangered. *See* 70 Fed. Reg. at 52,319. After decade-long delays by the Department of Interior, the Service, and officials of these agencies in listing these three antelope species, the Service finally listed all populations of the scimitar-horned oryx, addax, and dama gazelle on September 2, 2005. *Id*. The Service found that, due to these threats, the scimitar-horned oryx is likely extinct in the wild and that the addax and the dama gazelle are near-extinct in the wild. *Id*. Concurrently with the final listing rule, the Service unfortunately issued *Exclusion of U.S. Captive-Bred Scimitar-Horned Oryx, Addax, and Dama Gazelle From Certain Prohibitions*. 70 Fed. Reg. 52,310 (Sept. 2, 2005) (hereinafter the "Sport-Hunting Rule"). While the species suffered at the hands of poachers in the wild, private hunting ranches in the United States - mainly in Texas - breed the three antelope species solely to sell fenced-in "hunts" of these rare species. For a hefty price, ranging from $1,800 to over $5,000, these sport hunting operations guarantee success and a mounted trophy. Declaration of Priscilla Feral ("Feral Decl.") ¶ 25.

Under the Sport-Hunting Rule, any person could:

> Take; export or re-import; deliver, receive, carry, transport or ship in interstate or foreign commerce, in the course of a commercial activity; or sell or offer for sale in interstate or foreign commerce live wildlife . . . and sport-hunted trophies of scimitar-horned oryx (Oryx dammah), addax

(Addax nasomaculatus), and dama gazelle (Gazella dama).

50 C.F.R. § 17.21(h). To qualify under the rule, the activity must be "associated with the management or transfer of live wildlife . . . or sport hunting in a manner that contributes to increasing or sustaining captive numbers or to potential reintroduction to range countries." *Id.* § 17.21(h)(1). A person claiming the benefit of this exception "must maintain accurate written records of activities, including births, deaths, and transfers of specimens, and make those records accessible to Service officials for inspection." *Id.* § 17.21(h)(7). Therefore, a hunting facility must demonstrate only that it is "sustaining" numbers of any of the three antelope species to allow sport hunting and the associated commerce in trophies. *Id.* § 17.21(h)(1). The rule does not require any current or future plans to assist in conservation or reintroduction efforts of the antelope species, or engage in scientific study regarding the "sustaining" effect of the practice.

Without the illegal Sport-Hunting Rule, ranchers will be required to submit permit applications under section 10 of the ESA. 16 U.S.C.A. § 1539(a)(1). Under which,

> [t]he Secretary may permit . . . any act otherwise prohibited by section 1538 of this title for scientific purposes or to enhance the propagation or survival of the affected species. . . . No permit may be issued . . . unless **the applicant therefor submits to the Secretary a conservation plan** . . . . If the Secretary finds, after opportunity for public comment, with respect to a permit application and the related conservation plan that. . . **the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild** . . .the Secretary shall issue the permit. . . .

16 U.S.C.A. § 1539 (emphasis added). While the Sport-Hunting Rule unduly focuses on only captive numbers, section 10 of the ESA insures that permitees seek to conserve the species as a whole, both captive and wild.

FoA filed a lawsuit in 2008 to compel the Service to comply with the ESA and to withdraw the Sport-Hunting Rule. *Friends of Animals v. Salazar*, 626 F. Supp. 2d 102 (D.D.C. 2009) *appeal dismissed*, 09-5292, 2010 WL 286806 (D.C. Cir. Jan. 4, 2010). In that case, Judge

Kennedy agreed with FoA that the Sport-Hunting Rule violated the ESA because it permitted the continued killing of the antelope without the required case-by-case showing that each proposed take will enhance the survival of the species. 626 F. Supp. 2d at 120. The plain language of subsection 10(c) of the ESA demands that permits be issued on a case-by-case basis and not as a blanket exception: "The Secretary shall publish notice in the Federal Register of **each** application for an exemption or permit which is made under this section." 16 U.S.C. § 1539(c) (emphasis added). "[T]he text, context, purpose and history of section 10 show a clear Congressional intent that permits must be considered on a case-by-case basis, the court grant[ed] summary judgment to plaintiffs with respect to their claim that the Service violated subsection 10(c) when it promulgated the [Sport-Hunting] Rule." *Friends of Animals*, 626 F. Supp. 2d at 120. The court remanded to the Service for further proceedings consistent with its opinion. *Id.*

As a result of that court's decision, the Service proposed to rescind the Sport-Hunting Rule in July 2011. 76 Fed. Reg. 39,804 (July 7, 2011). In direct response to a court order, and after the appropriate notice and comment process, the Service published the final rule *Removal of the Regulation That Excludes U.S. Captive-Bred Scimitar-Horned Oryx, Addax, and Dama Gazelle From Certain Prohibitions*. 77 Fed. Reg. 431 (Jan. 5, 2012) (hereinafter "Final Rule"). This lead to the current action by Exotic Wildlife in this case.

ARGUMENT

I. FOA IS ENTITLED TO INTERVENE AS OF RIGHT

By the plain language of Rule 24(a)(2) of the Federal Rules of Civil Procedure, FoA is entitled to intervene. That rule provides that

> [o]n timely motion, the court must permit anyone to intervene who claims an interest relating . . . the subject of the action, and is so situated that disposing of the action may as a practical matter impair . . . the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2). To intervene as of right: "(1) the application to intervene must be timely; (2) the applicant must demonstrate a legally protected interest in the action; (3) the action must threaten to impair that interest; and (4) no party to the action can be an adequate representative of the applicant's interests." *S.E.C. v. Prudential Sec., Inc.*, 136 F.3d 153, 156 (D.C. Cir. 1998). Rule 24(a) is construed liberally in favor of granting intervention. *Nuesse v. Camp*, 385 F.2d 694, 702 (D.C. Cir. 1967); *see also The Wilderness Soc'y v. Babbitt*, 104 F. Supp. 2d 10, 18 (D.D.C. 2000) ("the D.C. Circuit has taken a liberal approach to intervention") (citing *NRDC v. Costle*, 561 F.2d 904, 910-911 (D.C. Cir. 1977)). Following the D.C. Circuit's liberal application of Rule 24, this Court routinely grants conservation organizations' motions to intervene where they have an interest in pending litigation.[2]

A. The Motion to Intervene is Timely

The timeliness of a motion to intervene depends on "consideration of all of the circumstances, especially weighing the factors of time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties to the case." *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1295 (D.C. Cir. 1980).

Here, Exotic Wildlife filed its complaint on March 2, 2012 in the United States District

[2] *See, e.g. George E. Warren Corp. v. EPA*, 159 F.3d 616 (D.C. Cir. 1998), *amended by* 164 F.3d 676 (D.C. Cir. 1999) (three environmental groups authorized to intervene on EPA's behalf in industry challenge to EPA air rules); *Wilderness Soc'y v. Morton*, 463 F.2d 1261 (D.C. Cir. 1972) (Canadian environmental group allowed to intervene in U.S. environmental group's challenge to Interior Department's compliance with environmental procedures); *Nat'l Coal Ass'n v. Uram*, 39 Env't Rep. Cas. (BNA) 1624 & n.2, 1994 U.S. Dist. LEXIS 16404, * 1 & n.2 (D.D.C. 1994) (environmental group authorized to intervene in industry challenge to environmental rules, and to act as plaintiff in challenging other aspects of those rules); *Kerr-McGee Corp. v. Hodel*, 630 F. Supp. 621 (D.D.C. 1986), *vacated on other grounds* 840 F.2d 68 (D.C. Cir. 1988) (environmental group authorized to intervene in industry litigation challenged alleged government inaction on mining leases).

Court for the District of Columbia. Federal Defendants filed a Notice of Related Case[3] on March 9, 2012 and an Opposition to Plaintiff's Motion for Preliminary Injunction on March 13, 2012. This case was reassigned on March 14, 2012 from Judge Reggie B. Walton to Judge Beryl A. Howell. No dispositive motions have yet been filed, and no discovery has been taken. Because FoA filed less then a month following the inception of this case, its motion is timely. *See Fund for Animals*, 322 F.3d at 735 (finding motion timely where it was filed "less than two months after plaintiffs filed their complaint and before the defendant's answer was filed").

B. FoA Has a Significant Protected Interest in the Subject Matter of This Action

FoA satisfies the second requirement of Rule 24(a) because it has a significant, legally protected interest in access to information pertaining to any person applying for a takings permit under section 10 (c) of the ESA, and the continued conservation of the three species of antelope. Rule 24 requires that an intervenor have an interest that is related "to the property or transaction which is the subject of the action." Fed. R. Civ. P. 24(a)(2). When assessing the interest requirement, the D.C. Circuit has adopted a liberal approach, looking to the "policies behind the 'interest' requirement" in the rule, and viewing the rule as a "practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Nuesse v. Camp*, 385 F.2d at 700; *see also Friends of Animals*, 452 F. Supp. 2d 64, 69 (D.C. Cir. 2006) ("proposed intervenors of right 'need only an interest in the litigation-not a cause of action or permission to sue'"); *Hodgson v. United Mine Workers of Am.*, 473 F.2d 118, 130 (D.C. Cir. 1972) ("the interest of justice is best served when all parties with a real stake in a controversy are afforded an opportunity to be heard").

FoA has a statutory right to information regarding individual hunting ranches under

[3] Notice of Related Case for cases 1:11-cv-01564-BAH and 1:12-cv-00194-BAH.

Section 10(c) of the ESA. That section requires the Service to publish "each application for an exemption or permit" in the Federal Register. 16 U.S.C. § 1539(c). Additionally, the Service must ask for public comments and make publicly available all information received as part of each application. *Id.* Under Section 10(d), the Service must publish a finding in the Federal Register that an application: (1) was applied for in good faith; (2) will not operate to the disadvantage of the endangered species; and (3) is consistent with the purposes and policies of the ESA. *Id.* § 1539(d). These public participation requirements are mandatory. *See Gerber v. Norton*, 294 F.3d 173, 185-86 (D.C. Cir. 2002).

In *Friends of Animals*, Judge Kennedy agreed that FoA had an interest in the information provided by the public participation requirement in section 10(c) and had an informational injury based on the implementation of the Sport-Hunting Rule. 626 F. Supp. 2d at 120. The court further remanded the rule back to the Service to be handled in a manner consistent with its order. *Id*. FoA's mission suffers because of its inability to get permitee's application information. FoA is unable to attempt to persuade the Service to disallow sport hunting of endangered species through the permitting process, and is also unable to publicize this material to its members and the public through its magazine, on-line action alerts, and other media in an effort to encourage them to oppose canned hunting. Most importantly, FoA cannot use the information to challenge individual permitting decisions in the courts, when individual permitting decisions are not being made. As such, FoA has a continued interest in the information, and an interest in ensuring that Exotic Wildlife is not permitted to undo the significant progress made by FoA through *Friends of Animals* and Judge Kennedy's decision.

Further, FoA has a protectable interest in these species, living in the wild in Northern Africa, which is affected by the prolonged operation of the illegal Sport-Hunting Rule. FoA's

mission encompasses the protection of imperiled species, and its members have a specific interest in the survival and conservation of the three antelope species. FoA "works to cultivate a respectful view of nonhuman animals, free-living and domestic. [FoA'] goal is to free animals from cruelty and institutionalized exploitation around the world." Feral Decl. ¶ 3. The organizational purpose of FoA is to raise public awareness of animal rights issues and promote changes that are essential to a peaceful future where animals are free from human dominion and abuse. *Id*. Moreover, individual members of FoA have diverse personal and professional interests in the protection of the three antelope species. *Id*. FoA and its members have ties with on-the-ground conservation organizations in Africa related to these species. *Id.* at ¶¶ 5-7. FoA's President regularly visits Northern Africa to study, participate in, and report on conservation efforts to protect these animals. *Id.* at ¶¶ 10-13. The information gathered by FoA on the three antelope, through the permitting process and other avenues, is used directly to benefit FoA members' interests in learning about the status, health, and protection of these animals in the wild. *Id.* at ¶¶ 15-16.

In sum, FoA and its members have demonstrated a long-standing interest in the protection of the three antelope species, which provides a basis for intervention in this case. *See, e.g., Idaho Farm Bureau Fed'n. v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) ("[a] public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it had supported"); *Coal. of Ariz./N.M. Cntys. for Stable Econ. Growth v. Dep't of the Interior*, 100 F.3d 837, 841-44 (10th Cir. 1996) (individual's involvement with a species through his activities as a photographer, amateur biologist, naturalist, and conservation advocate amounted to sufficient interest for purpose of intervention in litigation covering the species' listing under the ESA); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 526 (9th Cir. 1983)

(environmental groups' "environmental, conservation and wildlife interests" were sufficient for intervention as a matter of right).

C. This Action Threatens to Impair FoA's Interests

Rule 24(a)'s "impairment" requirement concerns whether, as a practical matter, the denial of intervention will impede the prospective intervenor's ability to protect its interests in the subject of the action. As the Advisory Committee Notes for the 1966 amendments to Rule 24(a) explain, "[i]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene." Fed. R. Civ. P. 24(a) advisory comm. 1966 amendments (West 2011). The rule's emphasis on "practical disadvantage" was "designed to liberalize the right to intervene in federal actions." *Nuesse*, 385 F.2d at 701-02.

This case is a plain facial challenge of the Service's final rule rescinding the Sport-Hunting Rule, an act in direct response to a court order finding that the Sport-Hunting Rule violated section 10(c) of the ESA. A ruling in favor of Exotic Wildlife would prolong the harm to FoA because the longer the rule stands, the longer FoA is deprived of access to permitting information. Judge Kennedy agreed that the Sport-Hunting Rule "...hinders the ability of individuals and groups to participate in the meaningful way contemplated by the ESA because, without this information, it is impossible to evaluate whether each permitted act will enhance the propagation or survival of the species." *Friends of Animals*, 626 F. Supp. 2d at 118.

Any delay in rescinding the Sport-Hunting Rule continues to harm FoA's interest as FoA continues to be unable to access and publicize any material regarding permitting to its members and the public through its magazine, on-line action alerts, and other media. Nor does FoA continue to have access to use the information to try and influence legislation and administrative

policy. Finally, FoA continues to no longer have access to use this information to challenge individual permitting decisions in the courts.

Resolution of this case in favor of Exotic Wildlife could, as a practical matter, impair FoA's interest in the wild population of these species. *See Fund for Animals v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003) (stating that a party has the right to intervene under Fed.R.Civ.P 24(a) where it is "so situated that the disposition of the action may as a practical matter impair or impede [its] ability to protect [its] interest."); *see also*, *B. Fernandez & Hnos v. Kellogg USA*, 440 F.3d 541, 545-46 (1st Cir. 2006) (holding that there is a right to intervene where "the intervenor's [] rights may be affected by a proposed remedy."). Here, Section 706 of the Administrative Procedure Act ("APA"), which sets forth the appropriate standard of review in this action: "the reviewing court shall . . . hold unlawful and set aside agency action found to be arbitrary, capricious, or otherwise not in accordance with the law . . . [or] without observance of procedure required by law . . . ." 5 U.S.C. § 706. In this case, the Service's compliance with a court order cannot amount to actions that were arbitrary and capricious. The court remanded the Sport-Hunting Rule back to the Service for failure to comply with section 10 of the ESA. Accordingly, the Service rescinded the illegal rule. Granting a preliminary injunction and/or ruling in favor of Exotic Wildlife would result in setting aside former Judge Kennedy, of this Court's, earlier judgment, and extending illegal hunting of these antelope species.

In addition, FoA's interest in wild antelope could be impaired by any settlement reached between Exotic Wildlife and the Service, such as a decision to stay the Final Rule for further rulemaking proceedings. Moreover, even a narrow settlement or decision, if even possible under the APA, to prolong unlimited hunting for only the U.S. populations of these species would impair FoA's interest. Given the antelope's current imperiled status, the Service correctly

determined that the domestic herds are necessary for the survival and recovery of the antelope. *See* 70 Fed. Reg. 52,319. In addition, continued sport hunting in the U.S. undermines recovery efforts because it creates an international market for trophies. *See* Feral Decl. ¶ 15. As long as some trophies can be obtained legally in the U.S., there will be a continued economic incentive to poach the antelope in Africa. *See id.* Setting aside the Final Rule or granting of a preliminary injunction declaring the removal of the exclusion of the captive-bred antelope herds as arbitrary and capricious will contribute to the continued decline of all these antelope populations and impede FoA's members and others from observing wild herds in Africa. The individual permitting process ensures that these ranches are also contributing to the conservation of the species as a whole. 16 U.S.C.A. § 1539. Resolution of this case in favor of Exotic Wildlife could, as a practical matter, impair FoA's interest in the wild population of these species.

D. FoA's Interests Are Not Adequately Represented by the Existing Parties

The "inadequate representation" requirement of Rule 24(a) "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of Am.,* 404 U.S. 528, 538 n.10 and acc. text (1972) (citation omitted). Under this lenient approach, representation may be inadequate where the interests of the party seeking intervention and those of the existing party are "different," even if they are not "wholly 'adverse,'" *Nuesse*, 385 F.2d at 703, or where they are "similar but not identical." *Am. Tel. & Tel.*, 642 F.2d at 1293. Indeed, "the [D.C. Circuit] Court of Appeals has stated that 'the burden is on those opposing intervention to show that representation for the absentee will be adequate.'" *Alexander v. FBI,* 186 F.R.D. 21, 31 (D.D.C. 1998) (quoting *Am. Tel. & Tel.*, 642 F.2d at 1293).

This standard is met here because the Service does not represent FoA's interests in this

case. The D.C. Circuit has frequently recognized that governmental representation of private intervenors may be inadequate, particularly where the private intervenors can be expected to make different arguments from their governmental counter-parts. *Fund for Animals*, 322 F.3d at 736; *Dimond v. Dist. of Columbia*, 792 F.2d 179, 193 (D.C. Cir. 1986). In this case, FoA is legitimately concerned that the Service will not adequately represent its interests by vigorously defending the Final Rule because the Service was ordered to rescind its own rule and given the past litigation between FoA and the Service over the listing of the three antelope species and the Sport-Hunting Rule. *See, e.g.*, *Idaho Farm Bureau Fed'n*, 58 F.3d at 1398 (noting that the Service was unlikely to adequately represent Conservation Groups who had "compelled Service to make a final decision by filing a lawsuit").

Although the Service is the defendant here, and Exotic Wildlife the plaintiff, their general interests aligned until FoA forced the Service to obey the ESA and protect the captive herds through regulated, individual permitting procedures. See *Friends of Animals*, 626 F. Supp. 2d at 115; Complaint Dkt. # 1, ¶¶ 1-19. From the outset, the Service sought to exclude the captive herds from ESA protection by enacting the Sport-Hunting Rule. 70 Fed. Reg. 52,310. The Service only rescinded the Sport-Hunting Rule because the court forced it to do so. 77 Fed. Reg. 431. The complaint here makes it very clear that Exotic Wildlife only filed suit when the Service refused to continue its unlawful course of conduct. Exotic Wildlife's Complaint ¶¶ 46-48. Given this history, FoA has a reasonable fear that the Service will not adequately represent its interests.

E. FoA has Standing to Intervene as of Right

In addition to establishing its qualification for intervention under Rule 24(a)(2), a party seeking to intervene as of right must generally demonstrate that it has standing under Article III

of the U.S. Constitution. *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731-32 (D.C. Cir. 2003). The D.C. Circuit explained that "because a Rule 24 intervenor seeks to participate on an equal footing with the original parties to the suit, he must satisfy the standing requirements imposed on those parties." *Id. (*quoting *City of Cleveland v. NRC*, 17 F.3d 1515, 1517 (D.C. Cir. 1994). With that said, it is unclear to FoA why a proposed **defendant**-intervenor must demonstrate standing normally required of a plaintiff. *See Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003) ("Requiring standing of someone who seeks to intervene as a defendant . . . runs into the doctrine that the standing inquiry is directed at those who invoke the court's jurisdiction.") (citing *Virginia v. Hicks*, 539 U.S. 113 (2003)).

Regardless, FoA meets the standing required for intervention here for three reasons. First, Article III standing is satisfied as long as one party, currently in the case on the same side, has standing. *Roeder*, 333 F.3d at 233 (citing *Watt v. Energy Action Fund*, 454 U.S. 151, 160 (1981); *Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 317 F.3d 334, 338 (D.C. Cir. 2003). Here, the Service is a proper party to this action, presumably with standing as a defendant.

Second, there is a presumption that "any person who satisfies Rule 24(a) will also meet Article III's standing requirement." *See Roeder*, 333 F.3d at 233 (citing *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 946 (7th Cir. 2000). Here, FoA has a concrete and particularized interest in the access to information under section 10(c) of the ESA and in the wild antelope that remain unprotected until the Service's Final Rule, which is under attack in this action, goes into effect. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). It is certainly not speculative—indeed given the remedy set forth in the APAAdministrative Procedures Act, it is

highly likely—that that interest would be impaired in the event Exotic Wildlife prevailed in this action. *See id.*

Finally, even on Constitutional grounds, FoA has the requisite standing to be a party to this case. Specifically, FoA and their members can demonstrate injury-in-fact, causation, and redressability. *See Fund for Animals,* 322 F.3d at 733 (requiring that prospective intervenors demonstrate standing). A party "suffers an 'injury in fact' when the [party] fails to obtain information which must be publicly disclosed pursuant to a statute." *FEC v. Akins,* 524 U.S. 11, 21, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998); *see Ethyl Corp. v. EPA,* 306 F.3d 1144, 1148 (D.C.Cir.2002) ("a denial of access to information can work an 'injury in fact' for standing purposes, at least where a statute (on the claimant's reading) requires that the information 'be publicly disclosed' and there 'is no reason to doubt their claim that the information would help them' " (quoting *Akins,* 524 U.S. at 21, 118 S.Ct. 1777)). The harm to a party may be widely shared, but must be concrete and specific. *Akins,* 524 U.S. at 25, 118 S.Ct. 1777. "Allegations of injury to an organization's ability to disseminate information may be deemed sufficiently particular for standing purposes where that information is essential to the injured organization's activities." *Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.*, 901 F.2d 107, 122 (D.C.Cir.1990).

FoA is an environmental organization with a mission that includes the protection of imperiled species; therefore, its members have significant professional and personal interests in the three antelope species, habitats, and protection. Feral Decl. ¶ 3. More importantly, because the Sport-Hunting Rule does not allow public participation, its continual existence is the direct cause of FoA's informational injury. This injury can be redressed by this Court by refusing to delay the Final Rule's implementation and would mean the Service would only be able to

provide permits to hunting ranches on a case-by-case basis. But first, the Service would have to provide notice of the application, make the application materials available to interested parties "at every stage of the proceeding," and provide notice that a particular permit has been issued, along with the "findings" that the Service is required to make under the statute. 16 U.S.C. § 1539(c), (d).

> subsection 10(c) of the Act creates a right to information sufficient to support standing, and that "[b]y alleging that the challenged regulation effectively denies [a party] information required to be made publicly available under § 10(c) so that [a party] can meaningfully participate in the § 10 permit process, [a party] has alleged a concrete injury that comes within the zone of interests protected by § 10(c)."

Friends of Animals, 626 F. Supp. 2d at 111 (citing *Cary v. Hall*, C 05-4363 VRW, 2006 WL 6198320, at * 10 (N.D. Cal. Sept. 30, 2006).

Moreover, FoA has a concrete and particularized interest in further protecting the antelope through the enactment of the Service's Final Rule that is under attack by Exotic Wildlife in this action. *See Lujan*, 504 U.S. at 560. Exotic Wildlife's case threatens to harm FoA's interest by seeking to remove public oversight of rancher's conservation efforts, afforded to these gravely imperiled species by the Final Rule. If Exotic Wildlife is successful, the three antelope species will no longer be provided the protections of section 10(a) of the ESA, even as they continue to face threats to their survival. Without individual permitting, the public has no way of insuring that permitees are in fact contributing to the conservation of the three antelope species. This makes it far more likely that the three antelope species will continue to decline and become extinct, harming FoA's interest in the survival and recovery of the species. The harm FoA faces can be redressed by a decision that does not compromise the protections currently afforded to the three antelope species and the hard-fought victory by former Judge Kennedy in this Court to rescind the Sport-Hunting Rule. Accordingly, FoA has standing in this case.

In short, FoA's interest is among those interests that the Supreme Court has found

sufficient to establish standing. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181-82 (2000) (holding that harm to recreation opportunities constitutes injury in fact for purposes of standing); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-63 (1992) (holding that "desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for purposes of standing").

For these reasons, this Court should not hesitate to grant intervention as of right pursuant Rule 24(a).

II. IN THE ALTERNATIVE TO INTERVENTION OF RIGHT, PERMISSIVE INTERVENTION IS WARRANTED

Should this Court find that FoA is not entitled to intervene as of right under Rule 24(a), FoA moves that this Court grant permissive intervention pursuant to Federal Rule of Civil Procedure 24(b). Rule 24(b) provides that:

> On timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed. R. Civ. P. 24(b)(1)-(3).

Permissive intervention may be granted in the court's discretion if the proposed intervenor presents "(1) an independent ground for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action." *E.E.O.C. v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998). Like intervention of right, permissive intervention is to be granted liberally. *E.E.O.C.*, 146 F.3d at 1045 (permissive intervention granted where intervenor has substantial interest at stake even if no common claim or defense claimed; "flexible interpretations" of rule appropriate in favor of intervention); *Nuesse*, 385 F.2d at 704-06 (D.C. Circuit eschews strict reading of rules to

advance policy favoring liberal allowance of permissive intervention).

FoA easily meets all of these requirements. As discussed above in the context of intervention as of right, FoA's motion is timely and existing parties will not be prejudiced. The Court has jurisdiction over FoA and its defenses, as they all involve issues of federal law in defending against Exotic Wildlife's claims under federal law.

Lastly, FoA's defenses are in common with Exotic Wildlife's claims both in law and fact, as they address the exact matters raised by Exotic Wildlife – the legality of the Final Rule rescinding the Sport Hunting Rule and the implications of continued illegal blanket rule for sport hunting of the three antelope species. *See, e.g., In re Polar Bear Endangered Species Act Listing & 4(d) Rule Litig.*, 09-245, 2011 WL 2601604 (D.D.C. June 30, 2011) (Center for Biological Diversity had been involved in ongoing litigation regarding polar bear protection and its general mission was the protection of imperiled species and their habitats; granted permissive intervention as a defendant in the challenges to the Polar Bear Final Listing Rule).

Additionally, permissive intervention must not "delay or prejudice the adjudication of the rights of the original parties." Fed. R. Civ. P. 24(b)(3). Unlike in other D.C. Circuit cases denying permissive intervention, here permissive intervention will not delay or prejudice the adjudication of the rights of Exotic Wildlife or the Service and is appropriate in this case because there is no settlement agreement pending, nor any other alternative dispute resolutions in consideration. *See In re Endangered Species Act Section 4 Deadline Litig.*, 10-377 (D.D.C. Sept. 9, 2011) (denying Safari Club International's motion to intervene as a right, also denying permissive intervention because intervention would cause undue delay in already-existing settlement agreements between conservation groups and Service at the time permissive intervention was requested).

CONCLUSION

FoA respectfully requests that this Court grant its motion to intervene for the above stated reasons.

Dated this 16th day of March, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 16, 2012, I electronically filed the foregoing **MOTION TO INTERVENE AS DEFENDANT AND MEMORANDUM IN SUPPORT** with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following attorneys of record:

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE EXOTIC WILDLIFE ASSOCIATION, CHARLY SEALE, EDDY BLASSINGAME, TERRY CAFEY, RAY DOCKER, JOE GREEN, NANCY GREEN, ROY LEIFESTER, THOMAS OATES, and ED VALICEK, Plaintiff, v. KEN SALAZAR, in his official capacity as Secretary of the U.S. Department of the Interior; DANIEL ASHE, in his official capacity as Director of the U.S. Fish and Wildlife Service; and U.S. FISH AND WILDLIFE SERVICE, 1849 "C" Street, NW Washington, DC 20240 Defendants.	Civil Action No. 1:12-cv-00340-BAH (consolidated with cases 11-cv-01564 and 12-cv-00194)

DECLARATION OF PRISCILLA FERAL

I, Priscilla Feral, declare as follows:

1. The facts set forth in this declaration are based upon my personal knowledge. If called as a witness, I could and would testify to these facts. As to those matters which reflect an opinion, they reflect my personal opinion and judgment on the matter.

2. I am president of Friends of Animals ("FoA"). In my capacity as President of FoA, I have led recovery efforts for African antelopes as described below. Mindful of the interconnections between and among animals and their habitat, I also educate the public about the need to preserve the health of biocommunities in which these antelopes live. FoA recognizes the importance of this goal and work to support the recovery of the antelopes' native habitat.

3. FoA is a non-profit animal advocacy organization which maintains offices in Connecticut, New York, and Washington, D.C. and regularly consults and communicates with experts, scientists, and government agencies worldwide. FoA has approximately 200,000 journal subscribers and members in the United States and internationally. FoA and its members and staff value the ways that humans and nonhuman species benefit from protecting native biological diversity. FoA's mission is to cultivate a respectful view of nonhuman animals, free-living and domestic. Our goal is to free animals from cruelty and institutionalized exploitation around the world. FoA uses the best available science to forward its mission through active participation in international and national policy and law formation, including law and policy involving the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"), ratified by the United States in September 1973 and implemented through the Endangered Species Act ("ESA"); and through national administrative processes, legal action, public outreach, and education.

4. Since 1991, FOA has been closely involved in species conservation projects in the United States and Africa. We shipped excess Department of Defense vehicles to Africa to aid in anti-poaching effots. We funded ranger salaries, motorbikes, field equipment, and training in Senegal. Furthermore, FOA funded airplanes to African wildlife services, trained pilots to fly the planes, and funded airport surveillance for illegal wildlife trade. We funded African chimpanzee surveys, and were integral to the scimitar-horned oryx reintroduction efforts in Senegal. In the United States, FOA regularly participates in public processes involving endangered species and seeks to influence legislation regarding endangered and other protected species. FoA has limited resources, both in terms of staff and financial resources, to use furthering its mission.

5. FoA and its staff have conducted extensive research on the status of the Addax, Scimitar-horned Oryx, and Dama Gazelle. All three species are imperiled due to the misuse of land through ranching and other threats, including hunting. The Scimitar-horned Oryx, for example, once inhabited more than one million square miles of the Sahel from Senegal in West Africa to Egypt and Sudan; but recent biological surveys showed that, notwithstanding the survival of a few Oryx in semi-confinement as discussed below, all truly free-living populations have been wiped out. The last free Oryx was chased to exhaustion by hunters and died in 1973. At one point, the survival of the species rested on 7 captive animals. After learning this information, I decided that FoA should become instrumental in re-introduction efforts for these species.

6. To this end, FoA has been instrumental in establishing and maintaining a recovery program for the Scimitar-horned Oryx and Dama Gazelle in Senegal. FoA has worked with the *Direction des Parcs Nationaux* (Senegal's National Park Agency) to restore the Scimitar-horned Oryx and Dama Gazelle to two reserves managed by the Agency. In 1993, *Direction des Parcs Nationaux* established this protected habitat of approximately 1,250 acres within 1,500 square miles Ferlo National Park, which is a range located in the heart of the Sahel and covering much of the northern quarter of Senegal. FoA and the *Direction des Parcs Nationaux* are working to improve the habitat conditions within Ferlo National Park so that the Scimitar-horned Oryxes and Dama Gazelles can eventually be released from the fenced area into the entire National Park. In 1999, FoA funded and assisted in the delivery of eight Scimitar-horned Oryxes to the Guembeul Fauna Reserve in northwestern Senegal. In 2002, FoA funded and facilitated the delivery of two more Scimitar-horned Oryxes from Paris to the Guembeul Fauna Reserve in Senegal. In January 2003, FoA funded and facilitated efforts to move Scimitar-horned Oryxes

and Dama Gazelles from the Guembeul Fanua Reserve to a fenced area within Ferlo National Park in northeastern Senegal. Due to successful breeding efforts, as of June 2011 there were 157 Scimitar-horned Oryxes, 31 Dama Gazelles, and 6 Addax in semi-captivity within the two reserves. FoA is currently speaking with other African countries about establishing captive antelope populations on habitat reserves, with hopes that the populations will expand, become self-sufficient, and someday be re-introduced into the wild.

7. As a consequence of our efforts to stabilize the soil and to provide natural food for the antelopes, Ferlo National Park is being restored from and area damaged by animal agriculture into a biosphere reserve, able to support the needs of the Scimitar-horned Oryx and the Dama Gazelle. As part of these efforts, FoA has raised and donated substantial funds to recovery efforts in Senegal. For example, in November 2000, FoA donated $25,000 to *Direction Des Parcs Nationaux* for habitat rehabilitation efforts in the Ferlo National Park. In June 2001, FoA contributed $1,250 for recovery efforts in the Ferlo. In August 2001, FoA provided more than $18,000 to *Direction Des Parcs Nationaux* for fencing in the Ferlo, construction of a ranger post, and supplementary feed and assistance to the Scimitar-horned Oryxes and Dama Gazelles. In February 2002, FoA provided $6,200 for rehabilitation of a pond area within the Ferlo. In July 2002, FoA sent *Direction Des Parcs Nationaux* $11,250 for restoration of vegetation with the Ferlo and to build a cistern. Also in 2002, FoA provided a directional radio receiver, transmitters, and veterinary supplies for the Scimitar-horned Oryx recovery project. In February 2003, FoA provided $1,236.50 to help maintain Scimitar-horned Oryxes moved from the Guembuel Reserve to Ferlo.

8. FoA has also provided substantial personal effort as well. As part of our recovery efforts, I also ensured FoA employees have traveled to Africa to see the species, including those

in recovery areas, and their historic habitats. Then FoA employee, Bill Clark, visited Senegal and participated in recovery efforts multiple times between 1999 and 2002. Mr. Clark was instrumental in organizing both the initial and subsequent deliveries of Scimitar-horned Oryxes to Senegal, as well as the transfer of Scimitar-horned Oryxes and Dama Gazelles from the Guembuel Reserve to Ferlo National Park. He also visited the historic habitat of the Scimitar-horned Oryx and Dama Gazelle.

9. FoA also funded trips for both Bill Clark and the Director of the *Direction Des Parcs Nationaux* to attend the Second Annual Meeting of the Sahelo-Saharan Interest Group ("SSIG") in Almeria, Spain in May 2001. FoA also funded Bill Clark's trip to the Third Meeting of the SSIG in Slovakia in May of 2002. At both meetings, the participants discussed FoA's recovery efforts for the Scimitar Horned Oryx and Dama Gazelle in Senegal.

10. In 2005, I traveled to Senegal to monitor FoA's recovery efforts. On December 26, 2005, I flew to Dakar, Senegal where we were met at the airport by Souleye Ndiaye, who in February 1999, worked as the Director of National Parks in Senegal when FoA delivered the first eight Scimitar-horned Oryxes to Senegal. Souleye now works for the Minister of the Environment as Inspector of Financial and Administrative Issues. On December 27, 2005, I had lunch with Col. Mame Balla Gueye, Director of Senegal National Parks to discuss FoA's recovery efforts for Scimitar-horned Oryx and Dama Gazelle and our field assistance for Niokolo-Koba National Park's rangers. I also had an introductory meeting with Thierno Lo, Minist`ere de l'Environment et de la Protection de la Nature in Dakar, to assure the Minister that FoA's cooperative work would continue in Senegal under my direction. Souleye Ndiaye arranged and accompanied me to both meetings.

11. On December 27, 2005, after meeting Souleye in Dakar, Souleye drove us north about five hours to St. Louis where we stayed overnight, and drove the next day to the 2,000-acre Guembeul Fauna Reserve in the northwest part of Senegal. On foot we joined several Park rangers and traveled through the Reserve. We saw about 20 Oryxes grazing and a dozen or more Dama Gazelles within this closely protected, fenced habitat. As we drove through the Ferlo region, I viewed the land outside the fenced Guembeul Reserve and saw the erosion and serious damage from cattle grazing land that the Oryx once occupied. Not only did the sight fill me with a sense of urgency regarding the continued need to supply materials for fencing and protection, but it also impressed upon me the importance of thinking and working holistically, to ensure our investments in these animals' future really do last.

12. During my stay in Senegal I put emphasis on the importance of cultivating and eating crops directly, in order to circumvent this reliance on grazing that devastates the land. People I met were happy to treat me to vegetarian meals; they understood that I, as a westerner, did not expect them to provide me with food that contributed to the problems we're working together to solve. And together we talked, whenever the opportunity arose, of the essential links between preserving habitat in its natural state and respect for interconnected life in the continent's biocommunity. With the big picture always in mind, and the seriousness of the work ahead influencing our everyday interactions, FoA's work restores these critically endangered antelopes to their native landscape, and works with the Senegalese parks people to restore a large part of that degraded habitat to its natural conditions.

13. On my trip to Senegal, I was able to observe the positive impact on the Scimitar-horned Oryx and Dama Gazelle as result of FoA's efforts and programs. While currently there are no Scimitar-horned Oryx in the wild, FoA has ensured at least they are beginning to thrive in

captivity. Thanks to FOA's efforts, the captive herds are completely self sufficient, and no longer need supplemental feed or financial assistance from FOA. As soon as the African political situation stabilizes, and the antelope have sufficient habitat, they will be re-introduced into the wild. Additionally, as long as it is safe to travel in Africa, I intend to ensure that a member of the FoA staff or I continue our regular travels to Africa to see all species our members support and protect, including the antelopes at Ferlo National Park**.** I have concrete plans to travel to Senegal to see the antelopes in the Ferlo Reserve on December 26, 2011. During this trip I plan to continue working on FoA's plans to release 6 of the Ferlo Rerves' oryxes outside of Ferlo National Park next year.

14. The U.S. Fish and Wildlife Service's ("FWS") decision in 2005 to allow hunting and transport of sport-hunted trophies of Scimiatar-horned Oryx, Dama Gazelle, and Addax harmed FoA's efforts to recover these species. FWS allowed activities that were prohibited under the ESA without any showing that hunting ranches were working towards recovery of species in the wild, like FoA is doing in Senegal. Because FoA has limited resources, if more was being done to promote the recovery of the antelope in the wild, FoA could use its resources to provide even greater protections and recovery of the antelope, or to work on other animal protection issues.

15. FoA and its members and staff, including myself, have a long-standing institutional, informational, personal, and philosophical interest in the future of the Scimitar-horned Oryx, Addax, and Dama Gazelle anywhere they live. Our public education and outreach efforts have pointed out that, although it is now possible that rare specimens can be collected from all over the world to satisfy the human yearning for novelty, the rarity of a species should not be exploited for profit and amusement. Yet people have started capturing and flying these

animals around the world as collectors' items, exploiting their rarity for commercial gain. This they do to the animals' severe detriment. Collectors who breed them in captivity are exploiting them for profit, and the propagation of these animals for trophy hunting, while self-serving to entrepreneurs, does not confer a benefit on the antelopes. Nor does the practice further the protection and rehabilitation of these animals in their native range. Moreover, long-distance travel, whether it is to and from hunting ranges in the U.S. or between Africa and other countries, presents grave dangers to these animals. It can and does kill individual animals. Claims by those who purport to rehabilitate these rare species outside of Africa should be treated with the most exacting scrutiny, and should never be accepted from those who also use the animals in commerce. Life outside of their native territory can mean loss of ability to cope with predators, genetic aberration, loss of immunity to the pathogens and nuisances that naturally exist in Africa, and a complex loss for the biocommunity of which the antelopes are a natural part. In short, if the antelopes are not interacting in their natural habitat, they become functionally extinct. If critically endangered antelopes have a serious chance of thriving again in freedom, it will be within their natural habitat. Thus, FoA works to educate the public about the reasons why the theory put forth by some, that captivity for profit helps, is false. It works to the animals' direct detriment by shifting the focus away from the urgent need to protect the natural habitat of the species. In short, FoA firmly opposes the commercial exploitation of these species in any form. No incentive should be extended to those who hold the Addax, Scimitar-horned Oryx, or Dama Gazelle in captivity for profit.

16. FoA regularly publicizes our efforts to recover Scimitar-horned Oryxes and Dama Gazelles to our members and subscribers as well as other members of the public. FoA publishes articles and on-the-spot photography in our quarterly journal *Act·ionLine* (e.g., "Friends of

Animals Win: African Antelope Shielded From Safari Club and Trophy Tourists," Summer 2009; "Milestones in Senegal," Fall 2001). FoA also ran public service ad in Business 2.0 in December 2005 urging support for protection of the Scimitar-horned Oryx. I also wrote an editorial in the Spring 2006 detailing my visit to see the Scimitar-horned Oryx and Dama Gazelle recovery efforts in Senegal, the work and progress being made, as well as the significant impact the visit had on me. FoA's members understand the importance of biodiversity and have financially supported FoA's efforts over the years to protect and preserve the natural habitats of the Scimitar-horned Oryx and the Dama Gazelle. I also gave an interview to Lara Logan for 60 Minutes in 2011; the segment is expected to air before the end of December 2011. This involved actual travel to D.C. on the part of the film crew and Priscilla. It was entirely devoted to our lawsuit and efforts to halt the hunting of oryxes in hunting ranches.

17. FoA has extensively researched the issue of the connection between zoos and hunting facilities. FoA published articles about this connection in the November/December 1991 ("Exposing the Zoo-Hunting Ranch Connection," pp. 5-9) and April/May 1992 ("On the Trail of the 'Ranch Connection'," pp. 15-17) editions of *Act·ionLine*. In New York City, on July 9 and 10, 2005, FoA hosted an animal rights conference with participants that discussed the connection between zoos and hunting ranches in Texas. FoA published a summary of the conference on their website.

18. In 1991, I learned that the San Diego Zoo had sold two Dybowski's Sika deer to Priour Brother's Ranch in Ingraham, Texas, as breeding stock for the ranch's hunting operations. In the fall of 1991, I flew to Texas to investigate the Priour Ranch. While driving through West Kerr County and Ingram, Texas, I spoke with taxidermists, hunting guides and "Buck Corn" feed store operators about Priour. Although it was too late in the day to find the

Priour Ranch after learning where the Priour Ranch was located, I saw other hunting ranches in West Kerr County, and took a photo of the entrance of one that appears in the *Act·ionLine* article. I viewed antelope and deer from outside the fence, but am unsure what species the captive animals were. I noticed that antelopes and deer stared at me when I approached the iron fence, rather than fleeing. I also watched ranch operators drive up in pick-up trucks to ring a bell for these animals to come to feed on buck corn. I was deeply saddened; these animals were utterly dependent and trusting, and it was obvious to me that this kind of activity is completely disconnected from the ideal of antelopes experiencing free and independent lives as part of a thriving biocommunity. I found it disheartening that animals who exhibited no fear of humans were incapable of fleeing successfully from the fenced estates to escape from a hunter, and their trust in humans allowed them to be easily killed in hunts.

19. FoA has also invested substantial time and resources in opposing trophy hunting of the critically endangered African antelopes and other species, as well any trade or transport of sport-hunted trophies. In the fall of 2005, I assigned two employees to research Texas hunting ranches to determine the acreage involved, numbers and species of animals traded, and to identify what activities make an exotic ranch operation profitable. Such research came from the Texas Agricultural Statistics Service, the Texas Parks and Wildlife Department, and a hunt trade publication, the Ingram, Texas-based Exotic Wildlife Association ("EWA") – whose 2005 Game Ranch Directory, Volume 14, lists many hundreds of the 8,274 hunting operations in Texas who hold hunting lease licenses. The directory listed EWA members who responded to a survey, and included a full page ad on the Y.O. Ranch in Mountain Home, Texas, along with Y.O. Ranch Exotic Game Sales & Game Ranching Seminars. There was also an ad to promote the Exotic Wildlife Association's Annual Membership Meeting on March 3 -5, 2006, and the Trophy Game

Records of the World Awards Weekend on July 7-8, 2006, both at the Y.O. Ranch Resort Hotel & Conference Center, in Kerrville, Texas. FoA's research revealed 2,437 ranches with more than 1,000 acres who qualified for a 2005 Texas Hunting Lease License.

20. In the Spring 2005 edition of *Act·ionLine*, based on this research, I wrote an editorial about hunting ranches in Texas. The article documents hunts at the Y.O. Ranch, including Scimitar-horned Oryx for $3,750, Dama Gazelle for $5,250, and Addax for about $500 more. An *Act·ionLine* article from November/December 1989 titled "Hunting 'Tony the Tiger' on the Texas Prairie" included a caption describing Barbary sheep on a hunting ranch in Texas, stating, "Many of the prey are so tame a hunter can pet his target before killing it." FWS's exemption of hunting ranches from the ESA requires FoA to spend more of its time and resources educating the public about hunting of the endangered antelope and encouraging people not to hunt the antelope in captivity, as well as efforts to influence legislation to prohibit hunting. Without the exemption, hunting of the antelope would be illegal, and there would be no need to expend these resources with respect to those species.

21. FoA regularly urges its members and the public to take positions on legislative proposals that support or harm our animal protection goals. For example, FoA used its resources to urge people to oppose the Sportsmanship in Hunting Act of 2005 because it would allow hunting. "Can It! Say NO to The Sportsmanship in Hunting Act of 2005," *Act·ionLine* November 2005. That is, the proposed legislation would allow hunting of captive animals such as the endangered antelopes, even though it would, perhaps, rule out some of the smallest enterprises. It is important to us that we model in North America the same respect for antelopes that we expect to see in North Africa.

22. On April 1, 2005, FoA provided comments on the regulation exempting the three antelope from ESA protections and allowing hunting and the draft Environmental Assessment ("EA"). We objected to the regulation based on violations of the ESA and National Environmental Policy Act ("NEPA"). Since the Scimitar-horned Oryx was listed in September 2005, FoA has monitored the Federal Register for actions regarding these species. FoA has commented on four separate requests to import Oryx trophies that were sport-hunting in South Africa to the United States. FoA requested that FWS deny those permits because they did nothing to enhance the survival or propagation of the Oryx as required by the ESA. FoA has used and will continue to use all legal means at its disposal to further and protect its interests in preserving these species and inculcating the international respect for these species that is necessary to do so.

23. After the U.S. Fish and Wildlife Service exempted captive Scimitar-horned Oryxes, Addax, and Dama Gazelles from the ESA, I received a brochure from the Exotic Wildlife Association containing a message from its Executive Director. That message stated: "This association, with its allied groups such as SCI and the AZA, has been successful obtaining a new policy, which basically exempts U.S. captive bred Scimitar-horned Oryx, Dama Gazelle, and Addax antelope from the Endangered Species Act. Hopefully in the near future, we will be able to report that all U.S. captive bred species currently listed as endangered will fall under the same policy." I was alarmed by the fact that this Association hopes to extend the Service's bad decision to other species. Even though the exemption rule was rescinded by the U.S. Fish and Wildlife, FoA is greatly concerned by Safari Club International's effort to de-list the U.S. populations of these antelope, which in effect is the same policy as the exemption rule. Without

all populations listed, the three antelope species as a whole will be irreparably harmed by the de-listing of U.S. populations of the antelope.

24. Because the Service based its decision to exempt the antelope from sport hunting on alleged benefits that hunting ranches were purported to provide to recovery of the species, I decided to investigate further whether this was true. My previous research on hunting ranches had not revealed any efforts by these facilities to recover species, unlike the efforts of FoA. I chose the Y. O. Ranch to visit because it's one of the oldest and largest hunting ranches, with 40,000 acres, in addition to having Scimitar-horned Oryxes, Dama Gazelles, and Addax available to hunters. I also wanted to visit the Bamberger Ranch because I had heard that they had a large number of the antelope.

25. On May 17, 2006, I went on a 90-minute truck tour of the 5,500 acre Selah Bamberger Ranch Preserve in Johnson City, Texas with Ranch Operations Manager Scott Grote. According to Mr. Grote, the ranch houses 50 female Oryxes and 11 males. We went to a field and viewed a grouping of 3 dozen or so female Oryxes. One female was crippled, but still used for breeding. We viewed a male Oryx outside the fenced area trying to find an opening in the gate to get inside. We drove into another pasture with female Oryxes, grouped together, who appeared unafraid of the truck.

26. Mr. Grote told me he organized hunting programs for native deer on the Bamberger Ranch, but not exotics. He said, "We don't hunt any Oryxes here," and added, "but I don't necessarily think it's a bad thing." I learned that the Ranch sells both male and female Oryxes from $650.00 to $1250.00 depending on the sex and age. Mr. Grote admitted to me that while the Ranch doesn’t sell to hunting ranches, it does knowingly sell to brokers who then sell them to hunting ranches. Clearly, hunting ranches depend on Bamberger's to supply their

hunter-customers with easy living targets – a thought I found most discouraging. He also told me that individuals with broken horns are not commercially profitable because hunters only want individuals with decorative horns.

27. Mr. Grote further informed me that the Ranch had provided some Scimitar-horned Oryxes to the Smithsonian, and there were plans for a reintroduction program in Tunisia. Finally, he told me that the Ranch had provided Scimitar-horned Oryx DNA to an unnamed zoo. My impression is that this ranch sees antelopes as commodities that must be subject to quality control, not as individuals with an interest in being in place in a natural biocommunity. Indeed, the rarity of these animals is something from which this ranch benefits financially.

28. On May 18, 2006, I toured the Y.O. Ranch, a 40,000 acre sport-hunting ranch near Mountain Home, Texas. The Y.O. maintains Scimitar-horned Oryxes and, before I was taken on the "Africa in Texas" exotic game tour, I observed pictures of hunters posing with animals they had killed at the Y.O. The pictures contained not only dead Scimitar-horned Oryxes, but a dead Addax and Dama Gazelle as well. On the tour, I was informed that hunting was the main source of income for the Y.O. and that it allows sport-hunting year-round. Hunters purchase the right to hunt Scimitar-horned Oryxes for $3,750.00, while Dama Gazelles can be hunted for $5,250.00. The tour guide informed me that the Y.O. auctions its own animals and buys others at auction as well. The property includes an auction building and a trophy room.

29. As part of the tour, I was taken to "Deer Park" where I observed several different species inside a high fenced park. The park included fallow deer, a blackbuck antelope, axis deer, waterbuck, an eland with a calf, white-tailed deer, bison, and an ostrich, among others. "Deer Park" also contained more than 20 Scimitar-horned Oryxes, including a calf. The deer and exotic animals I viewed along the bus tour were unafraid of the vehicle and passengers, and

remained close to the dirt road among trees and other vegetation as we drove slowly through the breeding park. A brochure that advertised the tour called the breeding park "an exotic game pasture."

30. The tour guide told us that exotics are not hunted in the Deer Park, but that they use a helicopter and have a net gunner capture them and put them in a trailer for transfer to other areas of the park where they are hunted. I found it disgusting to imagine these unsuspecting animals shot with arrows or bullets after they were netted, transported from their breeding area, and dropped on the land provided to hunters on the other side of the fence. I was also offended by the notion that these essentially tame animals would be subject to an unfair chase.

31. At no time did the tour operator discuss any efforts by the Y.O. Ranch to engage in scientific studies or provide endangered species for recovery efforts in the wild. Several times the tour operator described the animals in comical terms, as if it were humorous to know that the animals we were seeing would soon be killed in an inhumane fashion. The entire display was deeply offensive, both in knowing the manner in which these animals were to be hunted as well as knowing that these practices are apparently condoned by the FWS, despite the fact that no scientific study or enhancement of the species activities were going on. I will certainly continue to monitor the Y.O. Ranch and other sport-hunting facilities as well as those that breed Scimitar-horned Oryxes, Dama Gazelles, and Addax to determine and assess whether these ranches are promoting the survival and enhancement of the species.

32. Based on scientific research on the status and threats to the Addax, Scimitar-horned Oryx, and Dama Gazelle, the government agreed that the species need the fullest protection under the Endangered Species Act to avoid extinction. The government’s original

regulation exempting captive-bred antelope from the ESA harmed FoA's and its supporters' interests, as well as my own personal interest for these animals addressed. The regulation harmed our work to protect the antelopes wherever they may be found. De-listing the captive-bred antelope herds in the U.S. will equally harm our work and undermine our past successful efforts to obtain protection for all populations of these antelope. Lack of the fullest protection for all members of the endangered species under the ESA imperils them in Africa, undermines their protection under CITES, and allows them to be treated as a commodity, all of which adversely affected FoA's and its members' interests in these species as it facilitates their decline. I and FoA, its staff, and its members have serious and long-term educational, scientific, and moral interest in the antelopes discussed herein, which would incur future harm by the lack of full protection for all members of the endangered species under the ESA if the listing was changed to exclude U.S. populations of these antelope. In accordance with 28 U.S.C. § 1746 and under penalty of perjury, I swear that the foregoing is true and correct.

_____

Priscilla Feral

Executed on 14 February 2012

at 777 Post Road, Darien, Connecticut

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE EXOTIC WILDLIFE ASSOCIATION, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants, and FRIENDS OF ANIMALS, Defendant-Intervenor.	Civ. No. 1:12-cv-00340-BAH (consolidated with 11-cv-01564 and 12-cv-00194)

DEFENDANT-INTERVENOR'S [PROPOSED] MOTION TO DISMISS AND MEMORANDUM IN SUPPORT

Introduction

This is a case about whether an agency can repeal a regulation that violates a statute. The answer to that question must be "yes." Judge Kennedy of this Court already ruled that the regulation at issue in this case ("the Sport-Hunting Rule") violated the Endangered Species Act ("ESA"), and so the U.S. Fish and Wildlife Service ("the Service") acted properly in repealing that regulation. Indeed, the Service had no choice but to repeal the Sport-Hunting Rule.

Each of Exotic Wildlife Association's ("EWA") causes of actions fails to state a claim, and therefore should be dismissed. First, the Service provided a more than adequate rationale for this action—it was required by court order—and therefore the action was not arbitrary or

capricious. Any other assertions by EWA are simply irrelevant to whether the Sport-Hunting Rule should have been repealed.

Second, in responding to comments, an agency is not required to consider actions outside the scope of the rule as it was proposed in the Notice of Proposed Rulemaking. This is particularly true where, as in this situation, such changes can and will be considered in other administrative proceedings. Specifically, the Service might consider whether to remove the antelope species from the endangered species list,[1] although Friends of Animals ("FoA") would strongly oppose such action, but nothing in the Administrative Procedure Act ("APA") requires the Service to consider such action when repealing the Sport-Hunting Rule. Removal of the species from the endangered species list is also outside the limited scope of this rulemaking. Further, the Service is not required to modify its permitting system, which applies to every listed species, just because that system must be used if any ranches want authorization to allow hunting of endangered antelopes. This system represents the default if any species is listed as endangered, and nothing about complying with this Court's order requires the Service to change the system which already applies to similarly situated species.

Third, repealing a regulation that violates the ESA cannot itself violate the ESA. Rather, as this Court previously found, it is the continued existence of the Sport-Hunting Rule that would violate the ESA, not its repeal. EWA's argument to the contrary really amounts to nothing more than a complaint that the antelope species should not be listed as endangered, and that issue is properly addressed through a petition to the Service to remove the species from the list (and indeed such a petition is currently before the Service).

Finally, the National Environmental Policy Act ("NEPA") does not apply where the Service is simply repealing a rule as required by court order. NEPA does not apply in situations

[1] As discussed below, the Sport-Hunting Rule was promulgated at the same time that three species of antelope were listed as endangered under the ESA. The Sport-Hunting Rule allows any ranches in the United States to sell the right to hunt the antelope without obtaining a case-by-case authorization from the Service.

where an agency lacks any discretion whatsoever, and here the Service was required to repeal the illegal regulation. Thus, no NEPA claim exists in this case.

Because EWA has failed to state a claim for which relief may be granted, the entire case should be dismissed under Fed. R. Civ. P. 12(b)(6). FoA requests oral argument on this motion.

Background

I. Legal Background.

A. Endangered Species Act.

The ESA is the "most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *TVA v. Hill*, 437 U.S. 153, 180 (1978). Through the ESA, Congress sought to "reverse the trend toward extinction, whatever the cost." *Id.* at 184. The ESA accomplishes this goal by providing protections necessary to both prevent extinction and recover imperiled species. 16 U.S.C. §§ 1531(b), 1532(3).

Under ESA Section 4, the Service must list all species that are either "threatened" or "endangered." *Id.* § 1533. An endangered species is one that is "in danger of extinction throughout all or a significant portion of its range." *Id.* § 1532(6). A threatened species is "likely to become an endangered species within the foreseeable future." *Id.* § 1532(20). The Service must determine whether a species is threatened or endangered "solely on the basis of the best scientific and commercial data available." *Id.* § 1533(b)(1)(A). Once the Service lists a species as endangered or threatened, the ESA provides substantial protections.

Section 7 protects species from the actions of federal agencies. Under Section 7, every federal agency must "consult" with the Service to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical habitat]." 16 U.S.C. § 1536(a)(2). Section 7 consultation is required for any action that "may affect listed species." 50 C.F.R. § 402.14.

Section 9 prohibits any person from "taking" an endangered species. *Id.* § 1538(a)(1)(b). "Take" is defined broadly to include "harass, harm, pursue, hunt, shoot, would, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1532(19). Section 9 also makes it illegal for any person to "import," "export," or "possess, sell, deliver, carry, transport or ship in interstate or foreign commerce . . . in the course of a commercial activity" any endangered species. *Id.* § 1538(a)(1). Section 9 protections apply equally to captive or wild endangered animals. 50 C.F.R. § 10.12; H.R. Rep. No. 93-412, at 10 (1973); *Cayman Turtle Farm, Ltd. v. Andrus*, 478 F. Supp. 125, 129-30 (D.D.C. 1979).

Section 10 provides the Service with flexibility to grant limited exceptions to Section 9's prohibitions, even for endangered species. For example, Congress recognized it would be necessary to take actions that would otherwise violate Section 9 in order to aid in the recovery of species. Accordingly, Section 10(a)(1)(A) allows the Service to permit "any act otherwise prohibited by [Section 9] for scientific purposes or to enhance the propagation or survival of the affected species." 16 U.S.C. § 1539(a)(1)(A). The Service uses Section 10(a)(1)(A) to authorize captive breeding and reintroduction programs. For example, the Service has a permit allowing it to handle endangered Mexican wolves as part of an effort to reintroduce the species in the southwestern U.S. 70 Fed. Reg. 71554 (Nov. 29, 2005). Similarly, the National Marine Fisheries Service, the Service's counterpart for marine species, issues permits for hatchery operations involving endangered salmon. 68 Fed. Reg. 1826 (Jan. 14, 2003).

Moreover, the plain language of subsection 10(c) demands that exemption permits be issued on a case-by-case basis and not as a blanket exception: "The Secretary shall publish notice in the Federal Register of *each* application for an exemption or permit which is made under this section." 16 U.S.C. § 1539(c) (emphasis added). "[T]he text, context, purpose and history of section 10 show a clear Congressional intent that permits must be considered on a case-by-case basis . . . ." *Friends of Animals v. Salazar*, 626 F. Supp. 2d 102, 120 (D.D.C. 2009), *appeal dismissed*, 09-5292, 2010 WL 286806 (D.C. Cir. Jan. 4, 2010).

B. Administrative Procedure Act.

Courts review agency decisions under the ESA according to the Administrative Procedure Act ("APA"). *American Wildlands v. Norton*, 193 F.Supp.2d 244, 251 (D.D.C. 2002) (*citing City of Las Vegas v. Lujan*, 891 F.2d 927, 932 (D.C. Cir. 1989)). Under the APA, the reviewing court may set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A), (C).

The APA only requires the Court to decide whether the agency "articulated a rational connection between the facts found and the choice made." *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 105 (1983).

C. National Environmental Policy Act.

Congress enacted NEPA to ensure that agencies consider the environmental consequences of proposed major federal actions. 42 U.S.C. § 4321; 40 C.F.R. § 1500.1(c). NEPA is a procedural statute; it does not mandate particular substantive results. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-228 (1980). It requires an agency to prepare a detailed environmental impact statement ("EIS") only if a proposal is a "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). NEPA is inapplicable to situations where "the agency does not have sufficient discretion to affect the outcome of its actions." *Citizens Against Rails-to-Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1151-53 (D.C. Cir. 2001).

II. Factual Background.

The Service has laid out the history of the three antelope species at issue in this case, Federal Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction at 8-9, (ECF No. 7) ("Gov't Opposition to Prelim. Inj."), and so FoA will not repeat that information here. FoA agrees that the antelope are imperiled and belong on the list of endangered species, subject to the full protections of the ESA. Those protections include that any ranch wishing to allow hunting

of endangered antelope must obtain a case-by-case permit from the Service, which is the result of the repeal challenged in this case.

The Service first proposed listing the antelope species over twenty years ago. 56 Fed. Reg. 56,491 (Nov. 5, 1991). The antelope were finally, following a lawsuit, listed as endangered over six years ago. Final Rule to List the Scimitar-Horned Oryx, Addax, and Dama Gazelle as Endangered, 70 Fed. Reg. 52,319 (Sept. 2, 2005). An Environmental Assessment was prepared at the time pursuant to NEPA. *Id.* at 52,310. Due to the listing of those species, the ESA should have required any ranchers to obtain case-by-case permits before authorizing hunting or any other prohibited actions in regards to the antelope. 16 U.S.C. § 1539; *Friends of Animals*, 626 F. Supp. 2d 102, 102 (D.D.C. 2009). However, at the same time the species were listed as endangered, the Service also issued the Sport-Hunting Rule that exempted captive-bred antelope, such as those on the ranches of EWA members. Exclusion of U.S. Captive-Bred Scimitar-Horned Oryx, Addax, and Dama Gazelle From Certain Prohibitions, 70 Fed. Reg. 52,310 (Sept. 2, 2005).

FoA filed a lawsuit in 2008 to compel the Service's compliance with the ESA and to withdraw the Sport-Hunting Rule. *Friends of Animals*, 626 F. Supp. 2d at 102. The court in *Friends of Animals* agreed with FoA that the sport-hunting rule violated the ESA because it permitted the continued killing of the antelope without the required case-by-case showing that each proposed take will enhance the survival of the species. *Id*. at 120. The plain language of subsection 10(c) of the ESA demands that permits be issued on a case-by-case basis and not as a blanket exception, therefore the court remanded to the Service for further proceedings consistent with its opinion. *Id.*

As the Service lays out in its Opposition to Plaintiff's Motion for Preliminary Injunction, the Service received in June 2010 two petitions, one from Safari Club International and one from EWA, to delist the U.S. captive-bred herds of the three antelope species. Gov't Opposition to Prelim. Inj. at 12. The Service has yet to complete a 90-day finding on either petition. *Id.* Safari

Club International sued the Service on August 31, 2011 in the United States District Court for the District of Columbia. No. 1:11-cv-01564-BAH (D.D.C. filed Aug. 31, 2011) ("*Safari Club*"). SCI's challenge currently consists of three claims alleging that the listing of the captive-bred antelope populations as endangered violates the procedural and substantive mandates of the ESA and the APA, and that the Service failed to complete the 90-day finding. Complaint, Dkt. # 1, *Safari Club*. FoA seeks to intervene as a defendant in *Safari Club*, but the court has yet to rule on its motion. This case was consolidated with the *Safari Club* case on March 16, 2012.

As a result of the court's decision in *Friends of Animals*, in July 2011, the Service proposed to rescind the Sport-Hunting Rule. 76 Fed. Reg. 39,804 (July 7, 2011). In direct response to a court order and after the appropriate notice and comment process, the Service published the final rule repealing the Sport-Hunting Rule. 77 Fed. Reg. 431 (Jan. 5, 2012). This led to the current action by Exotic Wildlife in this case.

EWA and its members have made clear that some number of these endangered antelopes are being hunted and killed[2] on ranches that have not obtained a permit. Compl. ¶¶ 17, 21, 22 ("[p]rior to FWS's publication of the permit rule, they had about 80 scimitar horned oryx on their ranch. The rule has already forced them to cut that number in half, and they do not know if they will be able to keep any after the rule comes into effect. . . ."; "[p]rior to FWS's proposed permit rule, he had about 23 oryx, but the rule has forced him to reduce his herd to 5. . . ."; "[p]rior to FWS's proposed permit rule, he had close to 100 addax and oryx on his ranch. After FWS announced the permit rule, he has had to cut his herds in half."). Indeed, only one of the plaintiffs has obtained a permit. Federal Defendants' Declaration of Timothy J. Van Norman at

[2] Although the complaint only states that "adoption of this rule causes Exotic Wildlife ranches to reduce or eliminate their herds of African antelope," EWA's Motion for Preliminary Injunction states that ranches have been selling more rights to hunt the three antelope species. CITE TO MEMO IN SUPPORT OF PI, TO SPECIFIC PAGES OR EXHIBITS. These statements from EWA indicate that antelope have continued to be hunted without ranchers obtaining case-by-case permission from the Service, in violation of Section 10 of the ESA. This highlights the importance of the repeal of the Sport-Hunting Rule and the dismissal of this case.

¶ 7, (ECF No. 7-1) (Plaintiff Eddy Blassingame, operator of The Diamond J Ranch, applied for a permit and the Service issued the permit on March 12, 2012).

Standard of Review

A motion to dismiss for failure to state a claim, pursuant to Fed. R. Civ. P. 12(b)(6), is reviewed to ensure that "the pleadings … suggest a plausible scenario that sho[ws] that the pleader is entitled to relief." *Jones v. Horne*, 634 F.3d 588, 595 (D.C. Cir. 2011) (internal quotations and citations omitted). The court reviews such motions pursuant to the recent standard laid out by the Supreme Court: "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*, 129 S.Ct. 1937, 1949 (2009).

Discussion

This is a simple case regarding administrative law and procedure. The Service initially promulgated a regulation that this Court determined violates Section 10(c) of the ESA. Because the regulation violated the ESA, the Service had no choice but to repeal it. Thus the Service proposed to repeal the regulation, engaged in notice and comment, and ultimately repealed the regulation. Any claim that the Service somehow violated the APA must fail because complying with a court order cannot amount to action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. Instead, the court order provided the agency with an adequate basis for the repeal in this case. FoA has searched for, but not found, any case where the repeal of a regulation required by court order was found to be arbitrary or capricious. EWA has also not cited to any precedent for its extraordinary claim.

Furthermore, this challenge by EWA to the repeal of a regulation in this case is only possible because Judge Kennedy decided to remand the regulation to the Service without vacating it immediately.[3] As a result, the illegal exemption has been in effect from the date it

[3] FoA believes that Judge Kennedy should have vacated the unlawful regulation back in 2009. Remand without vacatur is only appropriate in a limited subset of cases where the agency might be able to remedy the deficiency in its rule, such as by more adequately explaining the basis for

was ruled to violate the ESA (June 22, 2009) up until the date that the repeal will become effective (April 4, 2012). This nearly three-year delay is long enough. If this Court does not dismiss this case now, then endangered antelope species will continue to be denied the protections of the ESA. Judge Kennedy did not explain why he did not vacate the illegal rule immediately, but certainly the nearly three years that have elapsed since his ruling have provided ample time for the Service to repeal the rule and for the affected ranchers to prepare applications[4] for authorization to continue their actions which violate the ESA. FoA and other members of the public have the right to comment upon proposed "hunting" of endangered antelope species to enable a transparent public process that will ensure that ranches can backup assertions that their actions actually benefit the antelope. FoA therefore respectfully requests this Court to dismiss EWA's complaint and allow the repeal of the illegal blanket exemption to take effect on April 4, 2012.

III. The Repeal of a Rule Required by Court Order Cannot Be Arbitrary or Capricious.

EWA's first and second causes of action argue that the repeal amounts to arbitrary and capricious action that must be invalidated under the APA. These claims fail to state a cause of action because the Service was simply responding to a court decision that required it to repeal the Sport-Hunting Rule. Responding in the only way allowed by a court order cannot be said to be

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the rule. *Checkosky v. S.E.C.*, 23 F.3d 452, 462-66 (D.C. Cir. 1994). In this case, as the Service now recognizes, the only option for the agency is to repeal the regulation. Furthermore, leaving the rule in place has actually led to irreparable harm, as EWA now admits that some of its members have authorized the hunting of endangered antelope without obtaining a permit. CITE TO BACKGROUND. Remand without vacatur is not appropriate when the failure to vacate the regulation would result in significant harm. *Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77, 80 (D.D.C. 2010). Thus the sport-hunting rule should have been vacated initially by Judge Kennedy, as he made no finding of harm.

[4] Despite EWA's repeated assertions that allowing hunting of endangered antelope on ranches in the U.S. actually benefits the antelope species, apparently only one ranch has actually submitted an application for authorization to the Service. CITE TO BACKGROUND. Rather than subject these assertions to public comment and scrutiny by the Service, every other rancher and the EWA simply assert in this litigation, without support, that hunting on their ranches will somehow enhance the survival of the species.

arbitrary and capricious. EWA attempts to get around this by quibbling over irrelevant factual issues and by faulting the Service for not taking additional regulatory actions beyond repealing the unlawful regulation. Yet the only basis required for the repeal of the Sport-Hunting Rule is that it was required by court order. EWA nowhere challenges that basic fact. Whether the Service might have taken additional actions at the same time it repealed the Sport-Hunting Rule is not relevant for deciding whether the sport-hunting rule itself should be repealed. FoA therefore urges this Court to reject these claims and dismiss this action.

A. The Service made no unsupported findings of fact that were relevant to the repeal.

The only finding of fact necessary to support the repeal in this case is that repeal would enable the public to comment on individual applications for exemptions from ESA prohibitions related to the endangered antelope. The Service made that finding of fact, 77 Fed. Reg. at 432, and EWA does not argue that it was inadequately supported. Instead EWA attempts to bootstrap numerous irrelevant and extraneous factual issues into this case by submitting the issues as comments to the proposed repeal. The Service responded to those comments when issuing its final rule, and now EWA argues that those responses somehow make the Service's action arbitrary and capricious. Because none of these issues are relevant to the legal question at issue (public participation under Section 10(c)), EWA cannot support a claim that the repeal is arbitrary or capricious.

When Judge Kennedy invalidated the regulation at 50 C.F.R. § 17.21(h), he considered only whether an exemption for ranches from the requirement to obtain a case-by-case permit for their operations regarding endangered antelope violated Section 10(c) of the ESA. *Friends of Animals*, 626 F. Supp. 2d at 111-13. Case-by-case determinations are required so that the public has an opportunity to consider the applications. *Id.* Judge Kennedy did not need to make any factual findings regarding the impacts of such an exemption because he found that the exemption

violated the ESA. Thus, any factual "findings" that EWA asserts were inadequately supported[5] are irrelevant to the challenged action of the Service – the repeal of the Sport-Hunting Rule found by this Court to violate the ESA. Thus, even if EWA was correct (which it is not) that the findings of fact were not adequately supported, such findings would not be necessary for the Service to repeal the Sport-Hunting Rule. Therefore, EWA's first cause of action must be dismissed for failure to state a claim.

Comparison of the "findings of fact" listed in EWA's first cause of action to the Service's explanation of its action in repealing the Sport-Hunting Rule further illustrates the irrelevance of EWA's "facts." Every quotation provided in the first cause of action is actually contained in the section on "Summary of Comments and Our Responses" provided by the Service, rather than in the sections on the background of the issue or the repeal of the regulation itself. What the Service actually found, in support of its action, was that repeal of the Sport-Hunting Rule was required to comply with Judge Kennedy's order to ensure the opportunity for public comment on activities that would otherwise be prohibited by the ESA, such as shooting endangered antelope species. *See* 77 Fed. Reg. at 432 ("By eliminating the regulation … and requiring individuals to submit an application … requesting authorization to carry out an otherwise prohibited activity, the Service can provide the public a 30-day period to comment on any proposed activity."). The requirement for public comment in Section 10(c) of the ESA was precisely the concern of Judge Kennedy when he ruled that the regulation violated the ESA. Thus, any other issues raised by the commenters, EWA included, are irrelevant and cannot make the Service's action arbitrary and capricious.

A closer examination of the "findings of fact" in EWA's first cause of action also reveals that they all involve irrelevant issues. The first quote from EWA was in response to comments that said the repeal would result in one of two outcomes: "either the species is allowed to go

[5] FoA notes that EWA has not challenged the Service's action as being "unsupported by substantial evidence" under

extinct or the U.S. Government provides subsidies for a mandated conservation plan." 77 Fed. Reg. at 433. The Service's disagreement with this comment is irrelevant to whether repealing the Sport-Hunting Rule would allow the public to comment on proposed hunting of endangered antelope. Intentional release of endangered antelope (the fourth quote in EWA's first cause of action) is similarly irrelevant to the public's right to comment on hunting of antelope. The second quote was about the economic incentives provided by the exemption or lack thereof, which again is not relevant to the issue of public review of case-by-case applications. Furthermore, the Service actually acknowledged that some people may believe, erroneously, that the removal of the exemption changes what activities may be authorized with respect to endangered antelope,[6] and that this might have economic impacts. 77 Fed. Reg. at 433. Additionally, although the Service did express disagreement with comments that private ranchers will reduce or eliminate their herds rather than seek a permit, it did acknowledge that possibility yet state that concerns over such reductions would not significantly impact the antelope as a whole. 77 Fed. Reg. at 433. Finally, the fifth quote[7] from EWA's first cause of action is not contained anywhere in the notice of the final rule.

B. The Service had no obligation to consider additional actions outside the scope of the proposed rule.

The scope of the rulemaking at issue in this case is narrow – the Service proposed to eliminate (and ultimately decided to eliminate) the sport-hunting rule. 76 Fed. Reg. at 39,804. This rulemaking was in direct response to this Court's earlier decision finding that this rule

[6] To the extent that ranchers were previously engaging in activities for which they cannot obtain case-by-case authorization, the Service rightly points out that such activities were illegal even under the blanket exemption. 77 Fed. Reg. at 433. Thus any ranches that were violating the ESA previously cannot object simply because the repeal of the blanket exemption will shed light on those violations.

[7] EWA asserts that the Service "accepted and stated as true" a factual assertion that "[t]he rule will not result in negative impacts on the genetic diversity." Compl. ¶ 51. This language is not contained on the cited page of the Federal Register or anywhere else in the notice of the final rule. However, even where the Service does address comments regarding genetic diversity of endangered antelope herds, those responses are not relevant to the issue of whether the public has access to case-by-case applications for exemptions from the ESA.

violated the ESA. *Id.* at 39,805. The Service did not propose to modify the existing case-by-case permitting system, nor did the Service propose to remove the antelope from the list of endangered species. *Id.* EWA now faults the Service for not taking these additional actions, yet this challenge must fail because nothing in this Court's June 22, 2009 decision requires the Service to take those actions. If EWA or any other interested party wishes for the Service to take those actions, the proper procedure is to submit a rulemaking petition to the Service, not to challenge the repeal of an illegal regulation. Furthermore, even if the Service had been persuaded by the comments on its proposed repeal, it could neither have delisted the antelope species or modified its existing permitting system without providing notice of those proposed changes. Therefore, EWA's second cause of action must be dismissed for failure to state a claim for relief.

The scope of the rulemaking in this case was narrow, and it does not include any of the "alternatives" urged by EWA:

> To comply with the Court's order, the Service proposes to remove the regulation at 50 CFR 17.21(h) and eliminate the exemption for U.S. captive-bred scimitar-horned oryx, addax, and dama gazelle from certain prohibitions under the Act. Any person who wishes to conduct an otherwise prohibited activity with U.S. captivebred scimitar-horned oryx, addax, or dama gazelle would need to qualify for an exemption or obtain authorization for such activity under the current statutes or regulations.

76 Fed. Reg. at 39,805. Nothing in this proposal contemplates removing the antelope from the endangered species list, and to the contrary the proposal expressly anticipates that they would remain listed. Similarly, the proposal expressly contemplates that ranches would need to obtain an exemption under the current statutes and regulations, not a new or modified permitting scheme. Thus, none of the "alternatives" urged by EWA in this case fit within the scope of the rulemaking.

An agency is not required to respond to every comment or consider every alternative action urged by commenters. *American Mining Congress v. EPA*, 907 F.2d 1179, 1187-1188

(D.C. Cir. 1990). Instead, an agency must only respond to comments which, if true, would require the agency to change its proposed rule. *Id.* In this case, the alternatives urged by EWA and other commenters would not require the Service to change the repeal, because the Service had no choice but to repeal the illegal regulation. Rather, the comments would have required the Service to take an additional regulatory action outside the scope of its proposal, and thus no part of the proposal would have had to be changed.

Furthermore, the Service did actually consider the suggested changes to the permitting system. The Service stated that it "appreciates the comments [regarding the current permitting process] and will consider them as [it] develop[s] ways to improve the efficiency and effectiveness of our permitting process." 77 Fed. Reg. at 436. However, ultimately neither the Service nor the commenters could come up with any alternative other than the current regulations "that would provide the public an opportunity to comment on proposed activities being carried out with these [antelope] species." *Id.* at 432.

If the Service had chosen to implement any of the alternatives urged by the commenters on the proposed repeal in this case, it would have been required to provide notice of those changes to the proposed action and therefore could not have implemented them without significantly delaying the repeal of the illegal exemption at issue in this case. The Service correctly noted that these comments were "outside the scope of this rulemaking" 77 Fed. Reg. at 434, 436. Changes may only be made to the proposed rulemaking without triggering a new round of comments if the changes are a "logical outgrowth" of the proposal and previous comments. *City of Stoughton v. EPA*, 858 F.2d 747, 751 (D.C. Cir. 1988). For the changes to be a "logical outgrowth," the agency must have "alerted interested parties to the possibility of adopting a rule different than the one proposed." *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994). In this case, the Service proposed only to remove the exemption for the antelope species, and did not mention delisting those species or modifying the general permitting scheme for issuing exemptions for any species listed as threatened or endangered. 76 Fed. Reg. 39,804

(July 7, 2011). Either of those additional actions would represent a dramatically different outcome than simply repealing the illegal exemption and applying the existing permitting scheme to the endangered antelope, and so neither represents a "logical outgrowth." Therefore, failure to consider those supposed "alternatives" does not make the repeal of the Sport-Hunting Rule arbitrary or capricious, and EWA's second cause of action must be dismissed.

IV. Repeal of a rule that violates the ESA cannot be said to itself violate the ESA.

EWA takes the remarkable position in this case that the action of repealing a rule found to violate the ESA itself violates the ESA. Compl. ¶ 59. The illogic of this position reveals again that EWA is not concerned with the repeal of the Sport-Hunting Rule itself so much as it is concerned by the listing of the antelope species as endangered in the first place. This case is not, however, the appropriate vehicle for courts to review the Service's action or inaction on any additional rulemaking activities, and therefore EWA's third cause of action must be dismissed. Additionally, EWA failed to provide the proper notice required before challenging the Service's action in this regard.

The argument that the repeal violates the ESA rests upon the assumption that listing of the antelope species as endangered will "jeopardize the continued existence" of those species. Compl. ¶ 59. Repeal of the Sport-Hunting Rule simply means that the antelope species are listed as endangered, and that if any ranches want to sell the right to "hunt" those species, they must first obtain a case-by-case exemption under Section 10 of the ESA, thus providing the public an opportunity to comment on the proposed activities. This represents the default system when a species is listed as endangered under the ESA. Therefore, any argument that repeal of the exemption will jeopardize the species really is an argument that listing the species as endangered will somehow harm the species more than it will help. While FoA strongly disagrees that listing the antelope species will counter-intuitively harm them, resolution of that issue is not relevant to the disposition of this case. Instead, that question is only properly raised on a challenge to the

original listing decision itself. And just such a case exists, in fact. *Safari Club International v. Salazar*, 1:11-cv-01564-BAH (D.D.C. filed Aug. 31, 2011).

Even if EWA were correct that repeal of the Sport-Hunting Rule jeopardized the antelope species' continued survival, the third cause of action must be dismissed for failure to provide notice to the Service under the ESA's citizen suit provision. As the Service properly points out, Section 7(a)(2) claims that agency action puts species in jeopardy are subject to the jurisdictional notice requirements of the citizen suit provision. Gov't Opposition to Prelim. Inj. at 24-25; *Bennett v. Spear*, 520 U.S. 154, 173-175 (1997). The Service's arguments that EWA is unlikely to succeed on the merits also indicates that EWA's case must be dismissed for lack of jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).

Because EWA's third cause of action was not properly noticed under the ESA, and because it amounts to nothing more than a challenge to the initial listing of the antelope species, it should be dismissed. The objections of EWA or any other groups to the listing of the species should be addressed in the case directly challenging that action by the Service.

V. No NEPA Analysis Was Required in This Case.

EWA's fourth cause of action must be rejected because the repeal of the Sport-Hunting Rule does not implicate NEPA for two reasons. First, NEPA does not apply to situations where an agency lacks any discretion whatsoever, such as this case. Second, in any event the agency already considered the environmental impacts at issue in this case, and EWA has presented no reason why that analysis should be supplemented at this time.

A. NEPA is not implicated when an agency has no discretion

The same basic argument that requires dismissal of the first three causes of action also requires dismissal of the fourth—the Service had no choice but to repeal the Sport-Hunting Rule after it was found to violate the ESA. With regards to the NEPA claim, the D.C. Circuit has held that NEPA is inapplicable to situations where "the agency does not have sufficient discretion to affect the outcome of its actions." *Citizens Against Rails-to-Trails v. Surface Transp. Bd.*, 267

F.3d 1144, 1151-53 (D.C. Cir. 2001). Furthermore, many other circuits have held that an agency is not required to comply with NEPA when the agency has little to no discretion on the issue. *See Sac and Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1262-63 (10th Cir. 2001) (citing cases in the First, Fourth, Eighth, and Ninth Circuits). This supports the Service's conclusion in this case that NEPA analysis was not required because the repeal was "administrative and legal" in nature. 77 Fed. Reg. at 437. Because the agency had no choice but to repeal the illegal regulation, NEPA analysis was not required.

EWA cited no authority, in either the complaint or the Memorandum in Support of a Preliminary Injunction, that has required a NEPA analysis before an agency could complete a nondiscretionary action. Instead, EWA cites *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F.Supp.2d 1 (D.D.C. 2009), which is a case where Department of the Interior made a 180 degree change to a twenty-five year rule it had had in place regarding firearms in national parks without performing an environmental assessment or environmental impact statement. In another case cited by EWA, the court found fault with the failure of agencies to prepare a NEPA analysis before issuing oil and gas leases. *Sierra Club v. Peterson*, 717 F.3d 1409 (D.C. Cir. 1983). None of the cases cited by EWA involve an agency responding to a court order or other situations where an agency lacks discretion.

Here, the Service is not repealing the Sport-Hunting Rule of its own choice, but because it was ordered to do so by this Court. Therefore, no NEPA analysis is required and thus the fourth cause of action must be dismissed.

B. The Service Already Considered the Environmental Impacts of Alternatives When the Antelope Species Were Listed as Endangered.

The Service already considered the environmental impacts of listing the antelope species, 70 Fed. Reg. at 52,310, and no supplementation of that NEPA process is needed here, nor is a new EA required. As the Service correctly points out, any activity that was lawful under the exemption would also be eligible to receive a case-by-case permit or authorization. Even if the Service somehow has some discretion in this matter (which it does not), still there is no

justification for supplementing the existing EA or creating a new EA to analyze basically the same situation. When the Sport-Hunting Rule was first promulgated, the alternative was to not issue the exemption and require case-by-case permits under the existing permitting system. That is precisely the result of the repeal in this case. Thus, no different outcomes are legal under the repeal and so the existing NEPA documents do not need to be supplemented. Not only has EWA not even argued that the existing EA should be supplemented, it does not even acknowledge that the EA exists.

EWA's fourth cause of action should be dismissed because NEPA is not implicated where the Service was required by court order to take the challenged action, and regardless the Service already considered the impacts and alternatives when it prepared an EA before promulgating the illegal rule.

Conclusion

U.S. ranches that contain endangered antelope species have already had nearly three years to prepare for the repeal of the illegal regulation at issue in this case. Any further delay cannot be tolerated. The Service's action of repealing an illegal regulation was not arbitrary or capricious, was not contrary to the ESA, and did not require the preparation of an EIS. Therefore, FoA respectfully requests this court to dismiss each of EWA's four causes of action for failure to state a claim.

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Respectfully Submitted,

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