UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAFARI CLUB INTERNATIONAL, Plaintiff, v. KEN SALAZAR, *et al.*, Defendants.	
TERRY OWEN, *et al.*, Plaintiffs, v. U.S. DEPARTMENT OF THE INTERIOR, *et al.*, Defendants.	1:11-cv-01564-BAH (consolidated with cases 1:12-cv-00194-BAH and 1:12-cv-00340-BAH)
EXOTIC WILDLIFE ASSOCIATION, *et al.*, Plaintiffs, v. U.S. DEPARTMENT OF THE INTERIOR, *et al.*, Defendants.	

PLAINTIFF EXOTIC WILDLIFE ASSOCIATION'S
MOTION FOR SUMMARY JUDGMENT

Plaintiffs, the Exotic Wildlife Association, Charly Seale, Eddy Blassingame, Terry Caffey, Ray Dockery, Joe Green, Nancy Green, Roy Leifester, Thomas Oates, and Ed Valicek

(collectively, the Exotic Wildlife Ranchers), ask this Court to grant this motion for summary judgment that the Final Rule promulgated by the U.S. Fish and Wildlife Service on January 5, 2012, violates the Administrative Procedure Act, the National Environmental Policy Act, and the Endangered Species Act.

The Final Rule, which became effective on April 4, 2012, imposes a costly and cumbersome permitting process on the Exotic Wildlife Ranchers and three species of endangered antelope.[1] These animals were never intended to be subject to the general, one-size fits all permitting scheme.

For all the reasons set forth in the accompanying memorandum, the Exotic Wildlife Ranchers ask this Court to hold that the Final Rule is arbitrary, capricious, and contrary to law, vacate the rule, and remand to the agency with instruction that FWS promulgate a rule that allows the Exotic Wildlife Ranchers to continue their operations in a manner that protects the three antelope species and complies with Judge Kennedy's ruling in *Friends of Animals v. Salazar*.[2]

Respectfully submitted,

/s/ Nancie G. Marzulla
Nancie G. Marzulla
D.C. Bar No. 400985
Roger J. Marzulla
D.C. Bar No. 394907
MARZULLA LAW
1150 Connecticut Avenue, NW
Suite 1050
Washington, D.C. 20036
(202) 822-6760 (telephone)
(202) 822-6774 (facsimile)

[1] The scimitar-horned oryx (*Oryx dammah*), the addax (*Addax nasomaculatus*), and the dama gazelle (*Gazella dama*).
[2] 626 F. Supp. 2d 102 (D.D.C. 2009).

Nancie@marzulla.com
Roger@marzulla.com

Dated: May 4, 2012

Counsel for Plaintiffs

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PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT-INTERVENOR'S MOTION TO DISMISS

This lawsuit is brought by the Exotic Wildlife Association, Charly Seale, Eddy Blassingame, Terry Caffey, Ray Dockery, Joe Green, Nancy Green, Roy Leifester, Thomas Oates, and Ed Valicek (collectively, the Exotic Wildlife Ranchers) to vacate and set aside a final agency action. The challenged action is a January 5, 2012 Final Rule promulgated by Defendants, the United States Department of the Interior; Secretary Ken Salazar; the United States Fish and Wildlife Service; and Director Daniel Ashe, (collectively "FWS").

The challenged Rule perversely subjects highly successful captive breeding operations to an unworkable permitting scheme, thus undermining all the progress that the Exotic Wildlife Ranchers have achieved in bringing back from the brink of extinction three magnificent antelope species—the scimitar-horned oryx, the dama gazelle, and the addax. That the permitting regime should not be applied to these three species was so well known to FWS when the antelope were listed as endangered in 2005 that FWS itself decided they must be exempted from the permitting requirements. Neither FWS nor (for that matter) the environmental Defendants (Intervenor-Defendants) nor Judge Kennedy has ever suggested that this Rule will benefit the species.

And now, the permitting scheme adopted by FWS in the Final Rule will harm these endangered species—precisely the opposite of what the Endangered Species Act is intended to accomplish. FWS nevertheless adopted it and now attempts to avoid all responsibility for its arbitrary and capricious action by blaming it on Judge Kennedy. But Judge Kennedy never told FWS it had to subject these species to the permitting requirement in order to comply with the Endangered Species Act—it was FWS that made that decision, and must now justify it.

This Final Rule cannot withstand scrutiny under the Administrative Procedure Act (APA).[1] In promulgating the challenged Rule, FWS ignored the administrative record for both

[1] 5 U.S.C. §§ 551–808.

this Rule and the tandem (and inseverable) 2005 listing rule, refused to exercise agency discretion to consider alternatives that would not damage the three species, ignored its own agency rules and regulations requiring National Environmental Policy Act compliance, and contradicted the clear mandate in the Endangered Species Act that federal agencies—most especially FWS—must not take actions that impair the continued existence of endangered species. The Exotic Wildlife Ranchers therefore ask this Court to grant their Motion for Summary Judgment and hold that the Final Rule is arbitrary and capricious and contrary to the Endangered Species Act (ESA), and the National Environmental Policy Act (NEPA), and thus invalid under the APA.

Finally, the Exotic Wildlife Ranchers also ask this Court to deny the Defendant-Intervenor's motion to dismiss this lawsuit for failure to state a claim on which relief can be granted. Defendant-Intervenor's arguments in support of its motion are not designed to test the sufficiency of the allegations of the complaint, but instead go to the merits of this case. Regardless of whether the Defendant-Intervenor agrees with the merits of these claims, the Complaint plainly states a claim for relief based on alleged violations of the APA, NEPA, and the ESA. And even on the merits, the Defendant-Intervenor's argument is fundamentally flawed because it is based on its misreading of Judge Kennedy's 2009 decision, FWS's regulations, and the administrative record.

ISSUES PRESENTED

1. The APA requires an agency to hear comments on any proposed rule, and requires that any Final Rule issued by the agency be fashioned in light of those comments so as to not be arbitrary or capricious. But despite the overwhelming number of comments opposing the Final Rule's permitting process, FWS issued the Rule unchanged, simply ignoring the public's comments. Is this rulemaking arbitrary, capricious, and contrary to law under the Administrative Procedure Act?

2. Under the ESA, FWS is obliged to conserve and prevent species from becoming extinct, "whatever the cost." Here, FWS has promulgated a rule that removes the economic incentive from private conservation efforts that prior to the new Rule had resulted in thriving populations of three endangered antelope species in the United States. The effect will ultimately be the precipitous decline of these rare antelope. Does the Rule violate the Endangered Species Act?

3. FWS contends that NEPA does not apply to this Rule because the rulemaking is administrative and legal in nature. But FWS's regulations specifically state that its exemptions to NEPA do not apply if the rulemaking will "[h]ave a significant impact on species listed" as endangered. Did this Rule, which destroys any incentive to raise these species, require NEPA review?

4. In deciding a motion to dismiss under Rule 12(b)(6) testing the sufficiency of the allegations in a complaint, the Court presumes that all well-pleaded allegations are true. Defendant-Intervenor's motion to dismiss does not even attempt to show how the allegations in this Complaint fail to state a claim for which relief can be granted, but instead focuses on this merits of this case. Should the motion to dismiss be denied?

FACTUAL BACKGROUND

Decades ago the scimitar-horned oryx, addax, and dama gazelle were extirpated from their natural ranges in North Africa by wars, poaching, and population pressures. Fortunately, a few foresighted livestock ranchers (primarily in Texas where the terrain and climate resemble North Africa) collected some of the remaining animals and began breeding them. The animals thrived: populations of Texas-raised scimitar-horned oryx exploded from 32 in 1979 to 11,032 in 2010; addax from 2 specimens in 1971 to 5,112 in 2010; and dama gazelle from 9 individuals in 1979 to 894 in 2010.[2]

[2] *E.g.*, Comments of Exotic Wildlife Association, Administrative Record ("A.R.") at 446.

Today, Texas has more exotic wildlife than any other place on earth—animals from Africa, India, Asia, and beyond.[3] The majority of these animals are raised on private property owned by Exotic Wildlife Ranchers. When FWS listed these antelope as endangered in 2005, it specifically recognized that captive breeding on private ranches, free of government regulation, has saved these three species from near extinction:

> Captive breeding in the United States has enhanced the propagation or survival of the scimitar-horned oryx, addax, and dama gazelle worldwide by rescuing these species from near extinction and providing the founder stock necessary for reintroduction. The scimitar-horned oryx is possibly extinct in the wild; therefore, but for captive breeding, the species might be extinct. Addax and dama gazelle occur in very low numbers in the wild, and a significant percentage of remaining specimens survive only in captivity (71% and 48%, respectively).[4]

Recognizing the unique circumstances involved in ranching these three species, in 2005 FWS adopted two interlocking and inseverable agency rules. One added these three species to the endangered species list,[5] while the other exempted them from the unworkable permit scheme governing treatment of most other captive endangered species (a scheme that was not developed for ranches).[6] FWS explained why this exemption was critical to the survival of these species: "It was critical that development of a rule that provides an incentive to continue captive breeding of these species proceed concurrently with the determination of their legal status under the Act to ensure that no breeding programs would be disrupted by a final listing determination."[7]

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[3] *See* E-mail from M. McClellen, CBS News, to C. Rieben, FWS (July 30, 2010), A.R. at 165.
[4] Exclusion of U.S. Captive-Bred Scimitar-Horned Oryx, Addax, and Dama Gazelle From Certain Prohibitions, 70 Fed. Reg. 52,310, 52,310 (Sept. 2, 2005) (codified at 50 C.F.R. Part 17), A.R. at 1.
[5] Final Rule To List the Scimitar-Horned Oryx, Addax, and Dama Gazelle as Endangered, 70 Fed. Reg. 52,319 (Sept. 2, 2005) (codified at 50 C.F.R. Part 17), A.R. at 10. This is the only page of the listing rule currently in the administrative record; the complete rule is part of the materials that the Exotic Wildlife Ranchers have moved to be added to the administrative record.
[6] 70 Fed. Reg. 52,310, A.R. at 1.
[7] 70 Fed. Reg. 52,313, A.R. at 4.

Several environmental groups challenged FWS's tandem decisions. Rejecting their standing on all grounds except their right to information, Judge Kennedy declared that "[a]fter examining the text, context, purpose and legislative history of section 10 [of the ESA], the court concludes that subsection 10(c) requires case-by-case consideration before the FWS may permit otherwise prohibited acts to enhance the propagation or survival of endangered species."[8]

Judge Kennedy also issued an order remanding the matter to FWS for further proceedings:

> Pursuant to Fed. R. Civ. P. 58 and for the reasons stated by the court in its memorandum opinion docketed this same day, it is this 22nd day of June 2009, hereby ORDERED that these cases are remanded to the United States Fish and Wildlife Service of the Department of Interior for further proceedings consistent with the memorandum opinion.[9]

Importantly, nothing in the memorandum opinion nor the remand order of Judge Kennedy compelled FWS to take any particular action—specifically, Judge Kennedy did not compel FWS to subject Exotic Wildlife Ranchers to this unworkable permit system (as FWS and the Defendant-Intervenor assert), nor did he vacate the exemption.

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

The three antelope species are not native to the United States. They were introduced into this country from their native ranges in North Africa. All three species are extinct or near extinction in their home ranges:

> The best available information indicates that the causes of decline of these antelopes are (1) habitat loss through desertification, permanent human settlement, and competition with domestic livestock, and (2) regional military activity and uncontrolled killing. These threats have caused the possible extinction in the wild of the scimitar-horned oryx and the near-extinction of the addax in the wild. All three species are in danger of extinction throughout their

[8] *Friends of Animals v. Salazar*, 626 F. Supp. 2d 102, 116 (D.D.C. 2009).
[9] Order remanding cases to United States Fish and Wildlife Service, *Friends of Animals v. Salazar*, No. 04-01660 (D.D.C. Jun. 22, 2009) Doc. 85-1.

ranges. Accordingly, we are listing these three antelopes as endangered.[10]

1. The scimitar-horned oryx

Believed to be the source of the unicorn myth, the scimitar-horned oryx (*Oryx dammah*) was historically found in the wild throughout "an extensive range in North Africa throughout the semi-deserts and steppes north of the Sahara, from Morocco to Egypt."[11] The scimitar-horned oryx stands about 47 inches (119 centimeters) tall and weighs around 450 pounds (204 kilograms).[12] It is generally pale in color, but the neck and chest are dark reddish brown.[13] Adult scimitar-horned oryxes possess a pair of horns curving back in an arc up to 50 in (127 cm) long.[14] Scimitar-horned oryx have all but disappeared from the wild.[15] There were an estimated 500 scimitar-horned oryx in Chad and Niger until about 1985, but by 1988, only a few dozen individuals survived in their native range.[16] Since then there have been no confirmed sightings in the wild.[17]

2. The addax

The addax (*Addax nasomaculatus*) is generally about 42 inches (106 cm) tall at the shoulder and weighs around 220 pounds (100 kg).[18] The addax has a grayish white coat and its horns twist in a spiral up to 43 inches (109 cm) long.[19] It was originally found in the wild in the

[10] Final Rule To List the Scimitar-Horned Oryx, Addax, and Dama Gazelle as Endangered, 70 Fed. Reg. at 52,319, A.R. at 10.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *See id.*
[18] *Id.*
[19] *Id.*

desert or semi-desert habitats of the Sahara and the Sahel regions of North Africa.[20] The addax was also originally found in Chad, Mauritania, Niger, Algeria, Egypt, Libyan Arab Jamahiriya, Sudan, and Western Sahara. In fact, there were reports of "immense herds" of addax north of Lake Chad in the 1920s.[21]

These populations dramatically declined after World War II in their native range. Drought and destruction of their native habitat contributed significantly to the sharp decline of the addax.

3. The dama gazelle

The dama gazelle (*Gazella dama*) stands about 39 inches (99 cm) tall at the shoulder and weighs around 160 pounds (72 kg).[22] The dama gazelle's upper body is mostly reddish brown, and its head, rump, and under parts are white.[23] Its horns curve back and up, but are generally less than half the length of those of the scimitar-horned oryx.[24] The largest of the gazelles, the dama was once "common and widespread" throughout the Sahara.[25] They are believed to have disappeared from North Africa but some remain in Mali, Chad, and Niger.[26] Some dama gazelle are living in enclosed facilities in their home ranges in Morocco, Tunisia, and Senegal.[27]

B. The decision to list the three antelope species as endangered included a decision to exempt U.S. captive-bred populations from ESA requirements

The 2005 rule listing the three antelope species as endangered identified no danger to the captive-bred U.S. populations of the three antelopes. To the contrary, FWS stated that just the

[20] Final Rule To List the Scimitar-Horned Oryx, Addax, and Dama Gazelle as Endangered, 70 Fed. Reg. at 52,319, A.R. at 10.
[21] *Id.* at 52,321.
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.* at 52,319, A.R. at 10.
[26] *Id.* at 52,321.

opposite is true—that U.S. captive breeding of the species has stemmed the decline of the species and provided founder stock for eventual reintroduction:

> Captive breeding is a manmade factor that has stemmed the decline of the three species. It has provided the founder stock necessary for reintroduction, maintenance of otherwise potentially lost bloodlines, and opportunities for research. The scimitar-horned oryx is possibly extinct in the wild and therefore, but for captive breeding, the species might be extinct. For addax and dama gazelle, they occur in very low numbers in the wild, and a significant percentage of remaining specimens survive only in captivity.[28]

Therefore, in recognition of the fact that U.S. captive-breeding represents the last, best hope for preventing these antelope species from becoming extinct, FWS exempted bona fide captive breeding programs from the cumbersome permit program applicable to other endangered species (most of which live in the wild and not on ranches), stating, the Service may authorize otherwise prohibited activities that enhance the propagation or survival of the species, such as captive breeding to increase the population size or improve the gene pool, under section 10(a)(1)(A) of the Act.[29]

There is no question that FWS would have declined in 2005 to list the U.S. captive-bred populations of these three antelope species as endangered had it not believed that it had the authority to adopt a tandem rule treating those populations differently. For FWS understood that it was crucial that the listing of these three species not occur without providing a partial take exemption to provide incentives for the continued propagation and enhancement of the species:

> It was critical that development of a rule that provides an incentive to continue captive breeding of these species proceed concurrently with the determination of their legal status under the Act to ensure that no breeding programs would be disrupted by a final listing determination.[30]

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[27] 70 Fed. Reg. at 52,321.
[28] *Id.* at 52,322.
[29] *Id.* at 52,320.
[30] *Id.* at 52,313, A.R. at 3.

Thus, to allow the private conservation ranches to continue their success with the species, and to prevent the impending harm that would arise from the listing, on the same date that it listed the species as endangered FWS adopted a regulation that excluded U.S. captive-bred populations of the scimitar-horned oryx, dama gazelle, and addax from certain ESA take prohibitions:

> We are amending 50 CFR § 17.21 by adding a new paragraph (h), which will apply to U.S. captive-bred scimitar-horned oryx, addax, and dama gazelle. The provision allows for the take; export or re-import; delivery, receipt, carrying, transport or shipment in interstate or foreign commerce, in the course of a commercial activity; or sale or offering for sale in interstate or foreign commerce of U.S. captive-bred live scimitar-horned oryx, addax, or dama gazelle, including embryos and gametes, and sport-hunted trophies, as long as certain criteria are met.[31]

C. Prior to the promulgation of the challenged rule in January 2012, the U.S. captive-bred populations of the three antelope were thriving and increasing in numbers

In 2004, Dr. Elizabeth Cary Mungall conducted research for the Exotic Wildlife Association to assess population numbers and habitat conditions for U.S. captive-bred populations of the three antelope species. Dr. Mungall reviewed a series of statewide censuses and collected data in a survey of Exotic Wildlife members who owned herds of one or more of the three species. Her research not only revealed significant numbers of each species on the ranches owned by Exotic Wildlife members, but also demonstrated remarkable increases in the populations of these three species on these ranches over a relatively short period of time:

> As shown by a series of statewide censuses (1966, 1971, 1974, 1979, 1984, 1988, 1994) in Texas done by the Texas Parks and Wildlife Department, the state wildlife agency, numbers of the three subject species kept in private ownership have been increasing. This census series is further discussed in Mungall and Sheffield (1994). To confirm the situation, a further census was done in 1996 at the request of the Exotic Wildlife Association (EWA) by the Texas Agricultural

[31] *Id.* at 52,317, A.R. at 8.

> Statistics FWS. Dama gazelle numbers were checked again in an October 2003 phone census done by the author for EWA as described in the next section.[32]

In summary, starting with the first census in which the species appeared:

- Scimitar-horned oryx: 32 in 1979 to 1,006 in 1994 to 2,145 in 1996.
- Dama gazelle: 9 in 1979 to 149 in 1994 to 91 in 1996 to 369 in 2003.
- Addax: 2 in 1971 to 587 in 1994 to 1,824 in 1996.[33]

Exotic Wildlife conducted an informal survey of its members in 2010 to update the data for the U.S. captive-bred populations of the three antelope species. Exotic Wildlife's survey reveals a several-fold increase in the populations of each of the three antelope species, including a 500% increase in scimitar-horned oryx:

- Scimitar-horned oryx: 11,032.
- Dama gazelle: 894.
- Addax: 5,112.[34]

D. Litigation that resulted in the invalidation of the exemption rule

Certain conservation organizations challenged the tandem exemption rule for the three antelope species, and Exotic Wildlife intervened to assist FWS's defense of the rule in federal district courts in California and the District of Columbia.[35] On June 22, 2009, the U.S. District Court for the District of Columbia ruled that the regulation violated the ESA because it allowed the take of species listed as endangered without the requirement for case-by-case permit

[32] Dr. Elizabeth Cary Mungall, SUBMISSION FOR THE COMMENT PERIOD ON PROPOSED LISTING OF SCIMITAR-HORNED ORYX, ADDAX, AND DAMA GAZELLE UNDER THE ENDANGERED SPECIES ACT: A TECHNICAL REPORT FOR THE EXOTIC WILDLIFE ASSOCIATION 2 (2004). This document is part of the administrative record for the exemption rule, which the Exotic Wildlife Ranchers have moved to be included in the administrative record of this case.
[33] *Id.*
[34] Comments of Exotic Wildlife Association, A.R. at 446.

applications and the commensurate public notice and comment opportunities.[36] The court remanded the matter to FWS for further proceedings consistent with the ruling, leaving it to FWS to promulgate new regulations that would not violate the ESA.[37]

E. FWS's final rule causes decline of the three African antelope species

On remand, FWS chose to simply revoke the exemption, subjecting the Exotic Wildlife Ranchers to the full force of a regulatory program that was never designed for the hoofstock that roamed and thrived on their private ranches, and that robs them of any economic incentive to continue to breed, feed, and care for these animals. The regulation reads:

> A person wishing to get a permit for an activity prohibited by § 17.21 submits an application for activities under this paragraph. The Service provides Form 3–200 for the application to which all of the following must be attained:
>
> (i) The common and scientific names of the species sought to the covered by the permit, as well as the number, age, and sex of such species, and the activity sought to be authorized (such as taking, exporting, selling in interstate commerce);
>
> (ii) A statement as to whether, at the time of application, the wildlife sought to be covered by the permit (A) is still in the wild, (B) has already been removed from the wild, or (C) was born in captivity;
>
> (iii) A resume of the applicant's attempts to obtain the wildlife sought to be covered by the permit in a manner which would not cause the death or removal from the wild of such wildlife;
>
> (iv) If the wildlife sought to be covered by the permit has already been removed from the wild, the country and place where such removal occurred; if the wildlife sought to be covered by the permit was born in captivity, the country and place where such wildlife was born;
>
> (v) A complete description and address of the institution or other facility where the wildlife sought to be covered by the permit will be used, displayed, or maintained;

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[35] *Friends of Animals v. Salazar*, 626 F. Supp. 2d 102 (D.D.C. 2009); *Cary v. Hall*, 2006 U.S. Dist. LEXIS 78573 (N.D. Cal. Sept. 30, 2006). These cases were consolidated.
[36] *Friends of Animals*, 626 F. Supp. 2d at 120.
[37] *Id.*

(vi) If the applicant seeks to have live wildlife covered by the permit, a complete description, including photographs or diagrams, of the facilities to house and/or care for the wildlife and a resume of the experience of those person who will be caring for the wildlife;

(vii) A full statement of the reasons why the applicant is justified in obtaining a permit including the details of the activities sought to be authorized by the permit;

(viii) If the application is for the purpose of enhancement of propagation, a statement of the applicant's willingness to participate in a cooperative breeding program and to maintain or contribute data to a studbook;

(2) Issuance criteria. Upon receiving an application completed in accordance with paragraph (a)(1) of this section, the Director will decide whether or not a permit should be issued. In making this decision, the Director shall consider, in addition to the general criteria in § 13.21(b) of this subchapter, the following factors:

(i) Whether the purpose for which the permit is required is adequate to justify removing from the wild or otherwise changing the status of the wildlife sought to be covered by the permit;

(ii) The probable direct and indirect effect which issuing the permit would have on the wild populations of the wildlife sought to be covered by the permit;

(iii) Whether the permit, if issued, would in any way, directly or indirectly, conflict with any known program intended to enhance the survival probabilities of the population from which the wildlife sought to be covered by the permit was or would be removed;

(iv) Whether the purpose for which the permit is required would be likely to reduce the threat of extinction facing the species of wildlife sought to be covered by the permit;

(v) The opinions or views of scientists or other persons or organizations having expertise concerning the wildlife or other matters germane to the application; and

(vi) Whether the expertise, facilities, or other resources available to the applicant appear adequate to successfully accomplish the objectives stated in the application.

(3) Permit conditions. In addition to the general conditions set forth in Part 13 of this subchapter, every permit issued under this paragraph shall be subject to the special condition that the escape of living wildlife covered by the permit shall be immediately reported to the Service office designated in the permit.

> (4) Duration of permits. The duration of permits issued under this paragraph shall be designated on the face of the permit.[38]

PROCEDURAL BACKGROUND

The Complaint in this lawsuit was filed on March 3, 2012.[39] Because the challenged Rule became effective on April 4, 2012, the Exotic Wildlife Ranchers asked this Court to enjoin enforcement of the Rule on March 6, 2012, thus maintaining the status quo, until after the Court ruled on the merits of this case.[40] That motion was denied on April 3, 2012.[41] Therefore, in accordance with the Court's scheduling order issued on March 29, 2012, the Exotic Wildlife Ranchers timely submit this motion for summary judgment and respond to the Defendant-Intervenor's motion to dismiss for failure to state a claim on which relief can be granted.

ARGUMENT

I. STANDARD OF REVIEW

A. Standard of Review under the APA

The standards for review of an agency action under the Administrative Procedure Act are set forth in 5 U.S.C. § 706(2). Courts should reverse agency action where the action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[42] In addition, courts should overturn any agency action which is: (1) contrary to constitutional right, power, privilege or immunity;[43] (2) in excess or short of statutory jurisdiction and authority;[44] or, (3) without

[38] 50 C.F.R. § 17.22.
[39] Compl., Doc. 1 (Mar. 3, 2012).
[40] Mot. for Prelim. Inj., Doc. 3 (Mar. 6, 2012).
[41] *Safari Club Int'l,* No. 11-cv-01564 (D.D.C. April 3, 2012) (Mem. Op. and Order Denying Motions for Prelim. Inj.), Docs. 61, 62.
[42] 5 U.S.C. § 706(2)(A).
[43] *Id.* § 706(2)(B).
[44] *Id.* § 706(2)(C).

observance of procedure required by law.[45] This Court should thus decide all relevant questions of law, interpret all material statutory provisions, and determine the meaning of all agency action.[46]

"In exercising its defined duty under the APA, a court must consider whether the agency acted within the scope of its legal authority, whether the agency adequately explained its decision, whether the agency based its decision on the facts in the record, and whether the agency considered other relevant factors."[47] Although FWS is entitled to deference in its actions, "[t]he deference a court must accord an agency's scientific or technical expertise is not unlimited . . . ."[48] Indeed, the reviewing court should not simply "rubber-stamp" the agency decision.[49] Rather, the reviewing court must decide, "as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review,"[50] and to "hold unlawful and set aside agency action [that is] not in accordance with law . . . ."[51]

B. Standard of Review under Rule 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) sets forth a number of defenses to pending claims, including "failure to state a claim upon which relief may be granted . . . ."[52] A motion to dismiss under Rule 12(b)(6) tests the sufficiency of the complaint.[53] When a claim is challenged

[45] *Id.* § 706(2)(D).
[46] *Id.* § 706.
[47] *Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670, 679 (D.D.C. 1997).
[48] *Id.*
[49] *See Ethyl Corp. v. EPA*, 541 F.2d 1, 34 (D.C. Cir. 1976).
[50] *N.C. Fisheries Ass'n, Inc. v. Gutierrez*, 518 F. Supp. 2d 62, 79 (D.D.C. 2007).
[51] 5 U.S.C. § 706(2).
[52] Fed. R. Civ. P. 12(b)(6).
[53] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007).

under Rule 12(b)(6), the court construes the pleading liberally in the pleader's favor.[54] The court presumes that all well-pleaded allegations are true, resolves all reasonable doubts and inferences in the pleader's favor, and views the pleading in the light most favorable to the non-moving party.[55] No claim will be dismissed merely because the trial judge disbelieves the allegations or feels that recovery is remote or unlikely.[56]

In order "[t]o survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a plaintiff need only plead 'enough facts to state a claim to relief that is plausible on its face' and to 'nudge[ ] [his or her] claims across the line from conceivable to plausible.'"[57] And consistent with Federal Rule of Civil Procedure 8, a plaintiff need only give "a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."[58]

II. THE FINAL RULE VIOLATES THE ADMINISTRATIVE PROCEDURE ACT

The Supreme Court has summarized the APA standard applicable to this Court's review of FWS's final agency action:

> [A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[59]

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[54] *Smalls v. Emanuel*, No. 09-cv-2313, 2012 WL 11623 at *2 (D.D.C. Jan. 4, 2012) ("It is well established that, in deciding a motion to dismiss for lack of subject matter jurisdiction, a court must construe the allegations in the Complaint liberally . . . .").
[55] *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 249 (2009).
[56] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007).
[57] *Mobley v. Dep't of Justice*, No. 11-cv-1437, 2012 WL 604153 at *3 (D.D.C. Feb. 27, 2012).
[58] *Twombly*, 550 U.S. at 555.
[59] *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Review under the arbitrary and capricious standard is "narrow," but "searching and careful."[60] The "review must not rubber-stamp . . . administrative decisions that [the court deems] inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute."[61]

A. There is no support in the administrative record for FWS's erroneous factual finding that ranchers will not be forced to reduce or eliminate their herds

An agency decision will be set aside as arbitrary and capricious under the APA if the agency "offered an explanation for its decision that runs counter to the evidence before the agency . . . ."[62] In *Otay Mesa Property, L.P. v. United States Department of Interior*,[63] for instance, the D.C. Circuit recently set aside as arbitrary and capricious FWS's designation of land as critical habitat for an endangered fairy shrimp where the record failed to demonstrate that the species was actually present on the property.

Here, FWS supports its rule by boldly asserting that it "does not believe that ranchers or other holders of these species that are working for the conservation of the species will reduce or eliminate their herds just because a permit or other authorization will now be required."[64] FWS further states—again without citing to any support for this proposition in the record—that "[t]here should be no reduction in herds that were actually being used for conservation purposes."[65]

But the record here is chockfull of comments submitted by the Exotic Wildlife Ranchers and other members of Exotic Wildlife who conserve the animals on their ranches, and other

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[60] *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989).
[61] *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 361 F.3d 1108, 1119 (9th Cir. 2004).
[62] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).
[63] *Otay Mesa Property, L.P. v. U.S. Dep't of Interior*, 646 F.3d 914 (D.C. Cir. 2011).
[64] Removal of the Regulation That Excludes U.S. Captive-Bred Scimitar-Horned Oryx, Addax, and Dama Gazelle From Certain Prohibitions,77 Fed. Reg. 433, 433 (Jan. 5, 2012), A.R. at 840.

entities and individuals involved in the conservation of the animals, all stating the same thing: That these three species will soon disappear from the face of the earth if the permitting scheme in the Rule is imposed on the ranchers. The Final Rule states that 32 commenters "pointed out that intensive wildlife management by U.S. ranchers is the reason the species exist today."[66] The commenters expressed concern that "removal of the exclusion that allows breeding and hunting of these animals without a permit would impede private captive propagation of these species."[67] Commenters further expressed their belief that "[c]aptive groups of these species would shrink, and, potentially, the species would be allowed to go extinct."[68] Finally, the commenters noted that the larger herds of the antelope that currently exist today on the privately owned ranches provide "a larger and more diverse gene pool, which allows some ranchers to contribute selected animals for possible reintroduction to their natural environment."[69]

In fact, FWS undermined its own position when it acknowledged that, well "[i]t is possible, however, that the number of ranches or private individuals that currently maintain these species could reduce the size of their herds or remove them from their property under the belief that maintaining them would be an economic burden."[70] Given that 32 commenters have told the Agency that this is precisely what will happen, it is not only "possible," it is inevitable. That FWS simply ignored this evidence and promulgated the rule anyway is plainly arbitrary and capricious.

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[65] 77 Fed. Reg. at 433, A.R. at 840.
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*

B. FWS failed to consider alternatives to the permitting scheme

An agency decision will be set aside as arbitrary and capricious where the agency "entirely failed to consider an important aspect of the problem . . . ."[71] For example, in *Otay Mesa Property*, the D.C. Circuit set aside as arbitrary and capricious FWS's critical habitat designation in part because it was based on the presence of fairy shrimp in a vernal pool outside the critical habitat designated.[72]

Not only did FWS impose an arbitrary, one-size-fits-all Rule never meant to apply to these three antelope species, FWS also completely failed to consider any alternative to the permitting scheme it announced in the proposed rule and adopted in the Final Rule. In so doing, FWS simply ignored (or explicitly refused to consider) all other methods of complying with Judge Kennedy's decision—a blatant violation of the APA. As FWS admits:

> [FWS] considered whether there were alternative means to comply with the Court's ruling without requiring ranches or other facilities holding these species to obtain a permit or other authorization. However, [FWS] was unable to identify an alternative other than the currently established regulations at 50 CFR 17.21(g) and 17.22—providing for the registration of captive-bred wildlife or issuance of a permit—that would provide the public an opportunity to comment on proposed activities being carried out with these species. In addition, the Service did not receive any comments or suggestions from the public that presented a viable alternative.[73]

The truth is that FWS received many suggestions for alternative methods of complying with Judge Kennedy's decision—and simply refused to consider any of them—often saying they were "outside the scope of this rulemaking,"[74] and so never considered them. It was obvious to everyone (including FWS) that, since the listing decision would not have been made without the

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[70] 77 Fed. Reg. at 433, A.R. at 840.
[71] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43.
[72] *Otay Mesa Property, L.P. v. U.S. Dep't of Interior*, 646 F.3d 914, 918 (D.C. Cir. 2011).
[73] 77 Fed. Reg. at 432, A.R. at 834.
[74] *E.g.*, 77 Fed. Reg. at 436, A.R. at 851.

exemption rule, that it could simply reverse the process and remove the three species from the endangered species list as a means of complying with Judge Kennedy's order. Instead of thoughtfully considering that option (as required by the APA), FWS simply said it was "outside the scope of this rulemaking,"[75] and so never considered it.

Another means of complying with Judge Kennedy's order would have been to craft a permit scheme that would take account of the specific circumstances of the Exotic Wildlife Ranchers. Such a permit scheme would not have required the ranchers to provide information on dates of birth, death and circumstances of each and every animal (information frequently not known), instead perhaps requiring a periodic count of the herd. As Exotic Wildlife Rancher Kathryn Kyle told FWS in her comments, "we are ranches not Zoo pens . . . [h]ow many births and deaths have occurred we can only guess, as the animals are not seen daily and certainly, addax can die without us finding them."[76]

Still a third alternative would have been for FWS to require ranchers to submit to FWS the records they were already required to keep, and for FWS to make those records available to the public. Judge Kennedy held that the sole legal problem with the existing system was that it did not make public the information ranchers kept on their herd:

> The FWS argues that the Rule ensures that the exception will enhance the propagation or survival of the antelope species by requiring that those taking advantage of the exception maintain the antelope species in a manner that contributes to increasing or sustaining captive numbers or to potential reintroduction to range countries and manage the species in a manner that maintains genetic diversity. *See* 70 Fed. Reg. at 52319. The information necessary to determine whether those taking advantage of the exception are actually doing so, however, need only be maintained and made accessible to the FWS for inspection. *See id.* Thus, plaintiffs are deprived of the information they would otherwise be provided to assess whether individual facilities will or are in

[75] 77 Fed. Reg. at 436, A.R. at 851.
[76] Comments of Kathryn Kyle, A.R. at 391.

> fact maintaining the antelope species in a manner that contributes to their propagation or survival and thus are entitled to the exception.[77]

Had FWS simply made these records public, it would have complied with Judge Kennedy's order.

FWS's assertion that it "did not receive any comments or suggestions from the public that presented a viable alternative"[78] is flatly contradicted by the administrative record (and so arbitrary and capricious). For example, one commenter, Conservation Force, provided FWS with extensive and detailed suggestions for modification of the permit process that should apply to the three antelope species that were also entirely consistent with Judge Kennedy's ruling. Among Conservation Force's suggestions:

> **Joint Applications and Permits:**
>
> Both captive-bred and cull applications and permits should be combined (consolidated or merged into one) as one application and one permit. One joint application and one permit would reduce the cost, confusion, duplicative information, etc. Perhaps it could be titled "Captive Game Ranching and Culling Permit *for* ...." Most of the information in the two applications is the same. Tracking the renewal of two different permits with different renewal dates commonly causes permits to lapse. One permit can and should serve both purposes, particularly since the FWS previously determined no application or permit was required. The informational notice and opportunity for public comment would be the same.
>
> **Create Grace Period:**
>
> A grace period of 60 days should be created to reduce the threat of unintended permit expirations. Renewal applications should be considered 60 days after permits expire, i.e. the existing permit or permits should continue in effect if a renewal is filed within 60 days of the expiration of the permit or permits. There are few things more onerous than having to start the renewal process all over again because a permit has expired. Sending notice of expiration on or before expiration would also support the enhancement.

[77] *Friends of Animals v. Salazar*, 626 F. Supp. 2d. at 118.
[78] 77 Fed. Reg. at 432, A.R. at 834.

Explicit Purpose Permit Applications:

Captive-bred and cull permits should be made specific for this type of exotic game ranching and be plainly titled. The current application forms are confusing and unnecessarily complex because many of the questions don't relate to the type and kind of ranching/exotic captive breeding in issue. It is common for applicants to complete sections not relevant or to respond "not applicable" to questions the FWS intended to be answered. The forms are tedious, duplicative and confusing to professionals, much less lay ranchers.

Real-Time Application Process:

Permit application procedures need to be available for completion in real-time on the internet.

State Management:

These species can have a huge impact on habitat and compete with native wildlife. Allowance has to be made for State authorities to manage and control the three antelope on public land and throughout the state. Perhaps the whole process needs to be delegated to responsible State authorities on an elective basis.

Longer Term Permits:

Current captive-bred permits are three years in duration but cull permits must be renewed annually. This has proven to be confusing and hard to track and administer by ranchers. It can take six or more months to get a cull permit, then a renewal application must be received by the Service more than 30 days before expiration. That means the renewal application must be prepared in the 11th month to file before the 11h month commences, even though the rancher did not receive it until the 6th or 7th month after it was effective. Additionally, an Annual Report must be filed. All could and should be lengthened. The term of duration of the cull permits should be no less than those for captive breeding, three years, and both could be five years. That alternative would procedurally satisfy the Court (contrary to no permit or publication at all) reduce the burden and encourage the captive ranching. It would be fully consistent with the prior rule and its rationale, which is unchanged. ("[t]he rule provides an incentive to continue captive breeding" pg. 52316). It has already been soundly determined that the object should be to reduce the burden of permitting on the rancher breeders. The new regulation, as proposed, does not accomplish that purpose. It is a return in total to a system that is in and of itself a disincentive. It is inconsistent with the sound reasoning expressed in the initial exemption rule.

Renewal:

> There is confusion whether an existing permit stays in effect if a renewal for a permit is filed before the passage of its stated termination date or does so only if received by FWS 30 or more days before the stated expiration. This needs to be unambiguously clarified and uniformly represented. Second, sending a notice of expiration 15 days in advance would help maintain communications, alert the permit holder and help maintain the permits that have been determined to be of benefit. Since the ranching enhances the three species, the result warrants the warning notice.[79]

For FWS to claim that it did not receive any comments or suggestions from the public that presented a viable alternative to the one-size-fits-all permit scheme raises questions as to whether FWS has acted in good faith in promulgating this rule—or whether FWS had its mind made up long before the rule was ever finalized.

Likewise, Kathryn Kyle, who is a rancher and member of the Exotic Wildlife Association, also submitted in her comments the following specific alternatives:

- The turnaround time for initial permits must be reduced. The permits must be no more than a 90-day turnaround time, not the current close to a year or better turn-around time;

- The issuance of a permit needs to become a "rubber stamp" process. If an application is received and is in order, the permit should be issued;

* * *

- The cull and take permits for these three species must be for either sex as both sexes can be and are taken as trophies;

- The permits both the captive breeder and cull and take need to be for at least 3 years, 5 would be better;

- The turn-around time for renewal of both permits should be less than 45 days from receipt of the renewal application in the FWS office, not the several months that is currently the case;

- The current percentage of money received from taking of the animals must be eliminated, as it is the ranches whose pocket the money comes out of

[79] Comments of Conservation Force, A.R. at 432–33.

> that are propagating the species not programs, if there are any in their native country;
>
> - Understand that ranches are not zoos, and there is no way that ranchers can know the exact number of births and deaths or the cause of death of every animal. For example, her herd of addax lives in a 2,200-acre pasture of varied terrain typical of the Texas Hill country. How many births and deaths have occurred since they last counted the animals can only be estimated, since the animals are not seen daily and certainly, addax can die without the ranchers finding them. If we see a young calf, we record that and if we find one dead, we record that.[80]

FWS did not explain why none of these suggestions were "viable alternatives"—nor provide any response to her concerns or suggestions at all. There is no indication that FWS even read them.

A third commenter, the Texas Wildlife Association, urged FWS in its comments to adopt a stream-lined permit procedure in the Final Rule, pointing out that if the permit were tailored to the specific realities of the ranchers, the permit process could work and satisfy notice and comment requirements of ESA Section 10(c) in compliance with Judge Kennedy's ruling:

> TWA strongly supports the rapid development and use of reasonable, real-time (or nearly so) electronic internet-based application, approval and permitting processes for these and other species, allowing real time management options for landowners and hunters that do have to deal with these species, and the native wildlife and habitat interactions. Real-time electronic internet-based permitting for individual animals under the proposed rule-making, especially with suggested recommendations, would enhance the situation for the Service, the landowner and the hunters. . . . We also recommend that when properties enter severe, extreme or exceptional drought that additional harvest protocols and emergency response be addressed and enacted for harvest response within plans on specific sites. In addition, both captive-bred and cull applications and permits should be combined (consolidated or merged into one) as one permit. Conservation Force suggests one joint application and one permit would reduce the cost, confusion, duplicative information, etc. Most of the information in the two applications is the same. Tracking the renewal of two different permits with different renewal dates commonly causes permits to lapse. One permit can and should serve both purposes, particularly since the FWS previously determined no application or permit was required. The informational notice and opportunity for public comment would be the same. Finally, current captive-bred permits are three years in duration but cull permits must be renewed annually. Additionally, an Annual

[80] Comments of Kathryn Kyle, A.R. at 391–92.

> Report must be filed. All could and should be lengthened. The term of duration of the cull permits should be no less than those for captive breeding, three years, and both could be five years.
>
> * * *
>
> TWA opposes the reassessment of the *in situ* funding requirement for ranches outside of the direction of the [American Zoological Association]. The previous permit had eliminated the need to annually contribute and document five percent (5%) or more of the gross revenue to acceptable *in situ* projects. It is our understanding that the District Court dismissed all claims that the ranching constitutes enhancement of both the survival and propagation of the three species without the additional *in situ* project finding. Thus the *in situ* funding should not be implemented in the rule.[81]

In a fourth comment, Exotic Wildlife Association member, Michael Simpson, also proposed a streamlined permit process that could be acceptable to the ranchers and consistent with Judge Kennedy's ruling: "If a very simple permit "was" designed with ease of applications and in effect for minimum of five year this might possibly be accepted by the industry."[82]

A fifth commenter, Safari Club International, explained in their comments that the rancher is a business owner, and the permitting scheme must allow for prompt review of the permit applications, a point totally ignored by FWS. In addition, the Safari Club called on FWS to include in the rule protections for the ranchers from those opposed to any lawful herd management activities, including hunting—again a suggestion that was simply ignored by FWS. These suggestions are entirely consistent with Judge Kennedy's ruling and could have been incorporated into the Final Rule:

> A rancher cannot run a cost-effective business involving one or more of these species, if he or she is not sure if and when the Service will act on his or her request for permit authority. To remedy this uncertainty and relieve the Service of some of the weight of responsibility that this new permit process may bring, the

[81] Comments of Texas Wildlife Association, A.R. at 358–59.
[82] Comments of Michael Simpson, A.R. at 587.

> Service should commit to acting on permit applications within 60 days of receiving the application. The process should also include a provision establishing that if the Service fails to meet its 60 day deadline, the permit will be deemed granted.
>
> Any new regulations promulgated pertaining to the trade and take of these three antelope species should include penalties for those who harass the ranchers and owners of these herds, as well as the hunters who hunt on these ranches. The permit application process and its public notice requirement potentially expose permit applicants to unnecessary public scrutiny. Many of those who seek information about ESA enhancement of survival permit applications for these three species philosophically oppose the sustainable use conservation that has led to the successful U.S. recovery of scimitar-horned oryx, dama gazelle and addax. Unfortunately, a few of those opponents have, from time to time, taken it upon themselves to attempt to interfere with and otherwise harass the ranchers and hunters engaged in these sustainable use activities.[83]

Finally, the Association of Zoos and Aquariums expressed support for a permitting scheme that would allow for international movement of the animals, but this too was ignored by FWS, even though it also could have been incorporated in a final rule that was consistent with Judge Kennedy's ruling:

> AZA suggests a provision which would allow AZA institutions to engage in the time-sensitive international movement of these animals for non-commercial purposes such as breeding loans for public display or reintroduction purposes without the constraints of additional permit authorizations and other logistical procedures.[84]

In short, the record contains numerous suggestions and thoughtful explanations for a variety of alternatives to the one-size-fits all permitting scheme chosen by FWS in the rulemaking. But FWS steadfastly ignored all of these comments and alternatives, leaving no room whatsoever for the unique role that the ranchers play in conserving these endangered antelope. Indeed, FWS's only response to these alternatives was that "[t]hese comments are outside the scope of this rulemaking because they do not address the Court's ruling that 50 CFR

[83] Comments of Safari Club International and Safari Club International Foundation, A.R. at 554–55.

17.21(h) violates section 10(c) of the Act and the rescission of 17.21(h)."[85] But that response only demonstrates that FWS did not really consider the alternatives at all, since even a cursory reading of the suggestions show that the commenters recognized the importance of complying with ESA Section 10(c).

Because FWS failed to consider these alternatives, instead subjecting the three endangered species to dire consequences, the Final Rule is therefore arbitrary and capricious and contrary to law.

C. FWS failed to consider the alternative of delisting the U.S. captive-bred populations even though the listing and the exemption were not severable

Because the Rule listing the three species and the tandem Rule exempting them from the permit scheme were not severable, it was arbitrary and capricious for FWS to keep the listing while revoking the exemption: "[S]everance and affirmance of a portion of an administrative regulation is improper if there is 'substantial doubt' that the agency would have adopted the severed portion on its own."[86]

In 2005 FWS stated that adoption of the rule placing captive-bred populations of these three species on the endangered species list, while exempting them from the permit process, was a single and inseparable critical action to avoid disruption of breeding programs:

> It was critical that development of a rule that provides an incentive to continue captive breeding of these species proceed concurrently with the determination of their legal status under the Act to ensure that no breeding programs would be disrupted by a final listing determination.[87]

FWS went on to explain how the exemption would enhance the survival of the three species that it was that day placing on the endangered species list:

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[84] Comments of the Association of Zoos and Aquariums, A.R. at 568.
[85] 77 Fed. Reg. at 436, A.R. at 851.
[86] *New Jersey v. EPA*, 517 F.3d 574, 584 (D.C. Cir. 2008) (citing *Davis Cty. Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1459 (D.C. Cir. 1997)).

> [A]uthorizing these activities for U.S. captive-breeding operations enhances the propagation of these species by providing an incentive to continue to raise animals in captivity while managing their genetic diversity, serving as repositories for surplus animals, and facilitating the movement of specimens between breeding facilities.
>
> [This] also enhances the survival of the species by providing an incentive to continue captive-breeding and genetic management programs, which have . . . prevented the possible extinction of at least one of the species, contributed significantly to the total number of remaining animals of the other two species, and provided founder stock for reintroduction." [88]

So FWS described the exemption as an appropriate regulatory management provision for the newly listed species:

> Because of the need to facilitate the continued captive breeding of these species in private ranches and zoos, this rule is an appropriate regulatory management provision for scimitar-horned Oryx, Addax, and Dama gazelle captive-bred in the United States. The probable direct and indirect effects of this rule will facilitate activities associated with captive breeding and thus contribute to the propagation and survival of the species."[89]

Yet in revoking the exemption half of the 2005 tandem rulemaking, FWS refused to even consider also reversing its earlier, simultaneous decision to list the captive-bred populations of these three species, peremptorily asserting that this was "outside the scope of this rulemaking . . . ."[90] FWS's refusal to even consider that the two 2005 rulemakings were halves of a single action—and that revoking one half left a rule that would harm the species—was arbitrary and capricious.

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[87] 70 Fed. Reg. at 52,313, A.R. at 4.
[88] 70 Fed. Reg. at 52,310, A.R. at 1.
[89] *Id.* at 52,318, A.R. at 9.
[90] *E.g.*, 77 Fed. Reg. at 436.

III. THE FINAL RULE IS CONTRARY TO LAW BECAUSE IT DESTROYS RATHER THAN CONSERVES THE SPECIES AS REQUIRED BY THE ESA

The Endangered Species Act mandates that FWS must not take any action that harms or jeopardizes a species.[91] Jeopardize includes any action that makes recovery of the endangered species remote.[92] Because the Final Rule will prevent continued conservation and recovery of these species of endangered antelope, the rule is contrary to law.

Under the ESA, conservation is broadly defined as:

> [T]he use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.[93]

The ESA requires the Secretary "to conserve threatened and endangered species to the extent that they are no longer threatened or endangered."[94]

Likewise, Section 7(a)(2) of the ESA[95] requires that each agency ensure that its actions are "not likely to jeopardize the continued existence of any endangered species or threatened species . . . ."[96] Regulations issued by FWS further explain that "jeopardize" "means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the

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[91] 16 U.S.C. § 1536(a)(2).
[92] *San Luis & Delta-Mendota Water Auth. v. Salazar*, 760 F. Supp. 2d 855, 870 (E.D. Cal. 2010).
[93] 16 U.S.C. § 1532(3).
[94] *Carson-Truckee Water Conservancy Dist. v. Clark*, 741 F.2d 257, 261 (9th Cir. 1984) (citing *TVA v. Hill*, 137 U.S. 153, 184 (1978) ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.")).
[95] These requirements, although part of the Section 7 consultation process, are also directly applicable to FWS through Section 2. *See Defenders of Wildlife v. Dep't of Interior*, 354 F. Supp. 2d 1156, 1173–74 (D. Or. 2005).

reproduction, numbers, or distribution of that species."[97] This includes action that keeps recovery "far out of reach" while only providing for the species' continued survival.[98]

Here, these three species of antelope are listed as endangered. Therefore, under its own regulations, FWS is required to take steps to conserve the antelope until the antelope are no longer endangered or threatened. Since the ultimate goal of the ESA is recovery of the species and removal from the endangered species list, action that limits (or prevents) the endangered antelope populations from recovering is contrary to the requirements of the ESA.

The permitting process required by the Final Rule will make the conservation efforts of these private ranchers economically impossible. In fact, since this Rule was published for notice and comment on January 5, 2012, many ranchers have begun dramatically reducing the size of their herds, either by selling live animals or by selling more rights to hunt the antelope. Ranchers who had hoped to pass along their herds of endangered species to their children and grandchildren now have no choice but to get rid of the animals. In addition, the ranchers have not bred the animals.

The permitting process will also result in a reduction of the reproduction, numbers, and distribution of the antelope. Smaller herds mean less genetic diversity among the herd, and so less sustainable breeding. Likewise, the decrease in breeding, the (temporary) increase in hunting, and the long-term decrease in any incentive to maintain herds of these antelope will reduce their numbers. The decrease in genetic diversity will ultimately reduce the sustainable population size.

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[96] 16 U.S.C. § 1536(a)(2).
[97] 50 C.F.R. § 402.02.
[98] *San Luis & Delta-Mendota Water Auth. v. Salazar*, 760 F. Supp. 2d 855, 870 (E.D. Cal. 2010).

That FWS was obligated under the ESA to ensure the conservation of these three species of endangered antelope but did not do so renders the Final Rule plainly contrary to law.

IV. THE CHALLENGED RULE IS CONTRARY TO LAW BECAUSE FWS FAILED TO CONSIDER THE ENVIRONMENTAL IMPACTS AS REQUIRED BY NEPA

Section 102(2)(C) of the National Environmental Policy Act mandates that proposals for "major federal actions significantly affecting the quality of the human environment" must be accompanied by a detailed Environmental Impact Statement.[99] All federal actions involving "unresolved conflicts concerning alternative uses of available resources" must be preceded by an agency effort to develop alternatives.[100]

On January 5, 2012, FWS circumvented compliance with these requirements, claiming that the rulemaking in this case was "administrative" and "legal" in nature, and required by the district court's invalidation of an earlier rule.[101] As previously explained in this Memorandum, FWS ignored alternatives that could have preserved the status quo by adopting permitting requirements that accommodated the ranchers' conservation efforts or by delisting the three antelope species and eliminating any need for permits.

There is nothing in the rulemaking explaining FWS's claim that its rulemaking is for "administrative" or "legal" reasons, other than the conclusory, sparse statement to this effect.[102] These conclusory statements hardly satisfy the requirement that an agency comply with NEPA "to the fullest extent possible."[103] Likewise, to the extent that FWS believes that this rulemaking is exempt from NEPA compliance, in this Circuit exemptions are narrowly construed.[104]

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[99] 42 U.S.C. § 4332.
[100] *Id.*
[101] 77 Fed. Reg. at 437.
[102] *Id.*
[103] 42 U.S.C. § 4332.
[104] *Calvert Cliffs Coordinating Comm. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

And here, the Agency's own regulations remove any possibility that this rulemaking could be exempt from NEPA compliance, because exemptions cannot apply to decisions that have a significant impact on endangered species. The NEPA compliance exemption is:

> The following actions are categorically excluded under paragraph 46.205(b), unless any of the extraordinary circumstances in section 46.215 apply:
>
> * * *
>
> (i) Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.[105]

The "exceptions to the exception" listed at 43 C.F.R. § 46.215 include actions that:

> (h) Have significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species or have significant impacts on designated Critical Habitat for these species.[106]

FWS's conclusory assertion that the Final Rule is simply a legal change is not supported by the record, is further contradicted by FWS's earlier position with regards to the permits, and is not sufficiently reasoned to allow FWS to apply the exclusion.[107] "Defendants' failure to apply the correct standard by which to consider environmental impacts . . . is sufficient by itself to render the DOI's decision to invoke a categorical exclusion arbitrary and capricious."[108]

Finally, in *Sierra Club v. Peterson*,[109] the D.C. Circuit held that if an agency decided to forego NEPA compliance, the agency should take a "hard look" at the relevant areas of environmental concern, and the reviewing court should determine if the agency had made a

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[105] 43 C.F.R. § 46.210.
[106] *Id.* § 46.215.
[107] *See Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 15–20 (D.D.C. 2009).
[108] *Id.* at 17.
[109] 717 F.2d 1409 (D.C. Cir. 1983).

convincing case that the impact was insignificant, and whether the agency convincingly established that proposed changes reduced the impact to a minimum.[110]

Plainly, FWS's consideration of the impacts that the permitting requirements would have on these endangered species fell far short of the *Petersen* standard. For example, FWS never countered the Exotic Wildlife Ranchers' contentions that they would not be able to comply with all of the permitting requirements and continue to afford to conserve the animals on their ranches. To the contrary, FWS simply said that it did not believe the ranchers.[111] The rulemaking does not demonstrate that FWS took a hard look at the problem the permitting requirement will create nor does it make a convincing showing that the impact of the permitting requirement in the challenged rule will be anything other than devastating for the endangered antelope.

The rulemaking here also does not demonstrate that FWS engaged in any meaningful consideration or discussion of alternatives to the permitting scheme contained in the Final Rule. NEPA specifically requires all federal agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources[.]"[112] The consideration of alternatives is independent of the duty to prepare an Environmental Impact Statement.[113] When no Environmental Impact Statement is prepared, the analysis must still be presented in an Environmental Assessment.[114] FWS prepared neither.

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[110] *Sierra Club v. Patterson*, 717 F.2d at 1413.
[111] 77 Fed. Reg. at 433.
[112] 42 U.S.C. § 4332(2)(E).
[113] *Trinity Episcopal School Corp. v. Romney*, 523 F.2d 88, 93 (2d Cir. 1975).
[114] 40 C.F.R. § 1508.9(b).

In short, FWS was required under NEPA to engage in "intense consideration of other more ecologically sound courses of action, including shelving the entire project, or of accomplishing the same result by entirely different means."[115] Here, several alternatives were available to FWS that would have allowed these antelope to continue to thrive on the private ranches. But there is no showing that FWS carefully considered these alternatives in this rulemaking—let alone considered those alternatives in an Environmental Impact Statement as require by NEPA. Therefore, this rulemaking in arbitrary, capricious, and contrary to the requirements of NEPA.

V. THE COMPLAINT PLAINLY STATES A LEGALLY COGNIZABLE CLAIM FOR RELIEF AND SHOULD NOT BE DISMISSED UNDER RULE 12(b)(6)

Finally, the Exotic Wildlife Ranchers also ask this Court to deny Defendant-Intervenor's motion to dismiss this lawsuit for failure to state a claim on which relief can be granted. Defendant-Intervenor's arguments in support of its motion are not designed to test the sufficiency of the allegations of the complaint, but instead go to the merits of this case.

To survive a motion to dismiss under Rule 12(b)(6), a complaint simply "must be well-pleaded in that it must state the necessary elements of the plaintiff's claim, independent of any defense that may be interposed."[116] "[T]he plaintiff's factual assertions in the Complaint are 'presumed to be true unless directly contradicted by affidavit.'"[117]

Here, the Exotic Wildlife Ranchers' Complaint alleges that the Final Rule violates the APA, the ESA, and NEPA. As the Complaint states, the APA "provides that, in all cases, agency action must be set aside if the action was 'arbitrary, capricious, an abuse of discretion, or

[115] *Envtl. Def. Fund v. Corps of Eng'rs of U.S. Army*, 492 F.2d 1123, 1135 (5th Cir. 1974).
[116] *Holley v. United States*, 124 F.3d 1462, 1465 (Fed. Cir. 1997).
[117] *Rundquist v. Vapiano SE*, 798 F. Supp. 2d 102, 111 (D.D.C. 2011) (quoting *DSMC, Inc. v. Convera Corp.*, 273 F. Supp. 2d 14, 20 (D.D.C. 2002)).

otherwise not in accordance with law' . . . or 'unsupported by substantial evidence.'"[118] The Complaint alleges as the first cause of action that that the Final Rule was based on factual assertions that "find no support in the administrative record,"[119] including FWS's assertions that "[m]any facilities and ranches that currently maintain these species will continue to do so, regardless of whether or not they are exempt from prohibitions under the [ESA],"[120] that "[t]he elimination of this regulation should not result in lower economic incentives or a negative economic impact,"[121] and, that "[t]he rule will not result in negative impacts on the genetic diversity of the species."[122] But, as the Complaint alleges, none of these statements are supported by the administrative record.

The second cause of action is the "refusal to consider alternatives"[123] such as "streamlining, adaption or improvement of the permit system to accommodate the unique circumstances of these three African antelope," or "removing the captive-bred populations of these three species . . . from the endangered species list," or "any suggestion for improving the existing permit system."[124] Again, FWS's failure to consider, or even respond to these suggestions is arbitrary and capricious and violates the APA.

The third cause of action is that the Final Rule violates the ESA because it will jeopardize the existence of these antelope, since "FWS's adoption of this rule causes Exotic Wildlife [R]anchers to reduce or eliminate their herds of African antelope . . . ."[125] And the fourth cause of action is that FWS violated NEPA when it failed to prepare an Environmental Impact

[118] Compl. ¶ 50, Doc. 1.
[119] Compl. ¶ 51, Doc. 1.
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] Compl. ¶ 20, Doc. 1.
[124] Compl. ¶ 55, Doc. 1.

Statement, even though subjecting these antelope to the permitting scheme was a "major federal action"[126] and when FWS falsely claimed that the Final Rule was "administrative and legal in nature."[127]

These allegations plainly state legally cognizable causes of action.

Since Defendant-Intervenor cannot demonstrate that the Exotic Wildlife Ranchers have failed to state a cause of action, its motion to dismiss erroneously discusses the merits of the Exotic Wildlife Ranchers' claims. But even on the merits, which is what this motion really addresses, Defendant-Intervenor's argument is flawed. Defendant-Intervenor bases two of its arguments for dismissal on its mistaken position that Judge Kennedy's ruling required FWS to promulgate the Final Rule subjecting the three species to the permitting regime. But that ruling did not require the Agency to promulgate the Final Rule. Rather, Judge Kennedy's ruling held that the exemption was contrary to the ESA because it did not require information on the Exotic Wildlife Ranchers' operations to be made public as required by Section 10 of the ESA:

> Subsection 10(c) reads, in part, "[t]he Secretary shall publish notice in the Federal Register of each application for an exemption or permit which is made under this section . . . Information received by the Secretary as part of any application shall be available to the public . . . ."
>
> * * *
>
> Because the court concludes that the 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 grants summary judgment to plaintiffs with respect to their claim that the FWS violated subsection 10(c) when it promulgated the Rule.[128]

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[125] Compl. ¶ 59, Doc. 1.
[126] Compl. ¶ 62, Doc. 1.
[127] Compl. ¶ 62, Doc. 1.
[128] *Friends of Animals v. Salazar*, 626 F. Supp. 2d 102, 117, 120 (D.D.C. 2009).

Judge Kennedy's order simply remanded the matter back to the agency "for further proceedings consistent with the memorandum opinion."[129] There is simply nothing in either the opinion or order that required FWS to issue the Final Rule. And importantly, Judge Kennedy did not vacate the 2005 exemption rule, and thus left the FWS with the broadest possible discretion in complying with his ruling on remand. FWS could have come up with a modified permit scheme, considered whether to delist in light of this permit requirement, or found another way to supply the information the plaintiffs in that lawsuit sought.

As the Government told this Court in its cross-motion for summary judgment filed on April 27, 2012, remand without vacating a rule allows the agency to correct any flaws in the rule:

> [C]ourts have frequently exercised their discretion to leave the Service's ESA rules, including listing rules, in place pending remand.
>
> * * *
>
> The decision whether to vacate or not "depends on (1) the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and (2) the disruptive consequences of an interim change that may itself be changed." *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 755-56 (D.C. Cir. 2002) (quoting *Allied-Signal, Inc.*, 988 F.2d at 150-151). In this case, remand without vacatur is the appropriate remedy to allow the agency to correct any deficiency on remand, the Listing Rule provides the appropriate protections to the Three Antelope species, and there would be significant, negative consequences of vacating the Listing Rule. Under such circumstances, the Court should exercise its discretion to leave the Listing Rule in place.[130]

So there is no basis for Defendant-Intervenor's suggestion that FWS was required to issue the Final Rule.

Likewise, Defendant-Intervenor asserts that this permitting regime is the "default" option for species listed under the ESA, and nothing in Judge Kennedy's order required FWS to

[129] Order remanding cases to United States Fish and Wildlife Service, *Friends of Animals v. Salazar*, No. 04-01660 (D.D.C. Jun. 22, 2009) Doc. 85-1.

promulgate a Final Rule that is arbitrary, capricious, and contrary to law. In fact, the administrative record is at odds with Defendant-Intervenor's contention that the permitting "default option" was a valid option here.

Defendant-Intervenor simply ignores why Judge Kennedy invalidated the exemption. The only reason Judge Kennedy held the exemption rule to be unlawful was because it meant that the public—including organizations like Defendant-Intervenor—was not given information that the ESA required be made public.[131] That was the basis for both Defendant-Intervenor's standing in that case and the decision itself. Judge Kennedy's opinion states:

> A plaintiff "suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute."
>
> * * *
>
> Plaintiffs suffer an informational injury that is specific and concrete because they regularly use information from the section 10 permitting process to participate in the subsection 10(c) process and to inform their members.
>
> * * *
>
> Importantly, the information provided in subsection 10(c) is necessary for plaintiffs to meaningfully participate in the section 10 process, and therefore deprivation of that information causes a specific, concrete, actual and imminent injury.[132]
>
> * * *
>
> The FWS argues that the Rule ensures that the exception will enhance the propagation or survival of the antelope species by requiring that those taking advantage of the exception maintain the antelope species in a manner that contributes to increasing or sustaining captive numbers or to potential reintroduction to range countries and manage the species in a manner that maintains genetic diversity. *See* 70 Fed. Reg. at 52319. The information necessary to determine whether those taking advantage of the exception are

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[130] Federal Defs.' Cross-Mot. for Summ. J. at 26–27, *Safari Club Int'l v. Salazar*, No. 11-1564 (D.D.C. April 27, 2012), Doc. 68.
[131] *Friends of Animals*, 626 F. Supp. 2d 102, 118–19 (D.D.C. 2009).
[132] *Friends of Animals*, 626 F. Supp. 2d at 111–13.

> actually doing so, however, need only be maintained and made accessible to the FWS for inspection. *See id.* Thus, plaintiffs are deprived of the information they would otherwise be provided to assess whether individual facilities will or are in fact maintaining the antelope species in a manner that contributes to their propagation or survival and thus are entitled to the exception. Instead, by requiring such information to be available only to the FWS, the public is shut out. This flies in the face of the "meaningful opportunity" that subsection 10(c) was intended to provide.[133]

There is nothing in the administrative record to support the assertion that the informational requirement of the ESA can only be satisfied by the Final Rule—and as the comments to the proposed rule demonstrate, FWS was given ample feedback on alternatives to the permitting rule that would also satisfy Judge Kennedy's order.

Finally, Defendant-Intervenor is wrong that NEPA did not apply to the Final Rule decision. NEPA requires an Environmental Impact Statement whenever a proposed rule amounts to "major federal action[]."[134] And even if Judge Kennedy had expressly ordered FWS to rescind the exemption and put the permitting rule into effect, which he did not, FWS's own regulations would have mandated NEPA review since the administrative action exception does not apply to rules that "[h]ave significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species or have significant impacts on designated Critical Habitat for these species."[135] And it is no answer that FWS had prepared an Environmental Assessment in preparation for the tandem listing and exemption rules because FWS has already admitted that it did not consider any part of the administrative record for those rules when it decided on the permitting rule.[136]

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[133] *Friends of Animals*, 626 F. Supp. 2d at 118–19.
[134] 42 U.S.C. § 4332.
[135] 43 C.F.R. § 46.215
[136] In response to the Exotic Wildlife Ranchers request that some or all of the record for the tandem listing and exemption rules be included in the record, Counsel for the Government consulted with FWS, then informed the Exotic Wildlife Ranchers that "the Service does not

The Exotic Wildlife Ranchers have plainly stated a claim upon which relief can be granted and have more than satisfied the requirements of Rule 12(b)(6). Defendant-Intervenor is wrong to suggest otherwise, and is wrong on the merits of the Exotic Wildlife Ranchers' claims as well. The motion to dismiss should therefore be denied.

CONCLUSION

Plaintiffs, the Exotic Wildlife Ranchers, ask this Court to grant their motion for summary judgment, holding that FWS's Final Rule promulgated on January 5, 2012, which became effective on April 4, 2012, is arbitrary and capricious and contrary to the ESA and NEPA, and thus invalid under the APA. The Exotic Wildlife Ranchers further ask this Court to deny the motion to dismiss filed by Defendant-Intervenor under Rule 12(b)(6) because this lawsuit states a legally cognizable claim.

Respectfully submitted,

/s/ Nancie G. Marzulla
Nancie G. Marzulla
D.C. Bar No. 400985
Roger J. Marzulla
D.C. Bar No. 394907
MARZULLA LAW, LLC
1150 Connecticut Avenue, NW
Suite 1050
Washington, D.C. 20036
(202) 822-6760 (telephone)
(202) 822-6774 (facsimile)
Nancie@marzulla.com
Roger@marzulla.com

Dated: May 4, 2012 Counsel for Plaintiffs

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agree that those documents are properly part of the record for the removal rule because the Service did not consider them directly or indirectly in making its decision." Ex. 1.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAFARI CLUB INTERNATIONAL, Plaintiff, v. KEN SALAZAR, *et al.*, Defendants.	
TERRY OWEN, *et al.*, Plaintiffs, v. U.S. DEPARTMENT OF THE INTERIOR, *et al.*, Defendants.	1:11-cv-01564-BAH (consolidated with cases 1:12-cv-00194-BAH and 1:12-cv-00340-BAH)
EXOTIC WILDLIFE ASSOCIATION, *et al.*, Plaintiffs, v. U.S. DEPARTMENT OF THE INTERIOR, *et al.*, Defendants.	

PROPOSED ORDER

Before the Court is the motion of Plaintiffs, the Exotic Wildlife Association and its members, for Summary Judgment. Upon the careful consideration of this Motion, the

Oppositions thereto, and the Reply in support, the Motion is hereby **GRANTED**.

It is further **DECLARED** that the final rule promulgated by the United States Fish and Wildlife Service on January 5, 2012, and reported as 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), is arbitrary, capricious, and contrary to law. Accordingly, the final rule is hereby **VACATED** and the issue is **REMANDED** to the United States Fish and Wildlife Service for further consideration consistent with this Order and the accompanying Opinion.

In addition, also before the Court is the motion of Intervenor-Defendants Friends of Animals to dismiss the Complaint of Plaintiffs, the Exotic Wildlife Association and its members, for failure to state a claim. Upon the careful consideration of this Motion, the Opposition thereto, and the Reply in support, the Motion is hereby **DENIED**.

_____

Dated: United States District Judge

EXHIBIT 1

From: Flax, Meredith (ENRD) [mailto:Meredith.Flax@usdoj.gov]
Sent: Monday, April 30, 2012 3:53 PM
To: Elizabeth Nicholas
Cc: Nancie Marzulla; Ian Gaunt
Subject: RE: Materials to Supplement the Administrative Record

Elizabeth:

I have discussed your request with the Service. A couple of the documents you seek to have added to the record are already in the record. Specifically, the first item on your list from yesterday (Letter from Forrest Michael Simpson to U.S. Fish and Wildlife) is part of AR 166 at Bates No. 000587, and the last item on your list (9/2/2005 FR final rule Published final captive-bred rule) is AR 1. As for your request that the Service add the final January 5, 2012 rule to the record, the final rule is in the record at AR 202. While the Service believes the inclusion of the signed, final rule is sufficient, the Service is willing to add the January 5, 2012 publication of the rule in the Federal Register to the record if plaintiffs wish for it to be added. As for plaintiffs' request that the Service add all documents from the record filed in the SCI case challenging the listing rule to the record for plaintiffs' case challenging the removal rule, the Service does not agree that those documents are properly part of the record for the removal rule because the Service did not consider them directly or indirectly in making its decision.

Let me know if you have further questions.

Thanks,
Meredith

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAFARI CLUB INTERNATIONAL, Plaintiff, v. KEN SALAZAR, *et al.*, Defendants.	
TERRY OWEN, *et al.*, Plaintiffs, v. U.S. DEPARTMENT OF THE INTERIOR, *et al.*, Defendants.	1:11-cv-01564-BAH (consolidated with cases 1:12-cv-00194-BAH and 1:12-cv-00340-BAH)
EXOTIC WILDLIFE ASSOCIATION, *et al.*, Plaintiffs, v. U.S. DEPARTMENT OF THE INTERIOR, *et al.*, Defendants.	

CERTIFICATE OF SERVICE

I certify that on May 4, 2012, a copy of Plaintiffs' Motion for Summary Judgment and Memorandum in Support of their Motion for Summary Judgment and Opposition to Defendant-

Intervenor's Motion to Dismiss in *Exotic Wildlife Association v. U.S. Department of the Interior* was filed with this Court's ECF system, thereby electronically notifying:

Meredith L. Flax
U.S. Department of Justice
Environment & Natural Resources Division
Ben Franklin Station
P.O. Box 7611
Washington, DC 20044-7369
(202) 305-0404
Fax: (202) 305-0275
meredith.flax@usdoj.gov

Anna Margo Seidman
Safari Club International
501 Second Street, NE
Washington, DC 20002
(202) 543-8733
Fax: 202-543-1205
aseidman@safariclub.org

Michael R. Harris
Environmental Law Clinic
University of Denver-Law
2255 East Evans Avenue
Denver, CO 80208
(303) 871-7870
mharris@law.du.edu

William Stewart Eubanks, II
Katherine A. Meyer
Meyer Glitzenstein & Crystal
1601 Connecticut Avenue, NW
Suite 700
Washington, DC 20009
(202) 588-5206
Fax: (202) 588-5049
beubanks@meyerglitz.com

Dated: May 4, 2012

Ian Gaunt