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) Hon. Beryl A. Howell
EXOTIC WILDLIFE ASSOCIATION, et al., Plaintiffs, v. U.S. DEPARTMENT OF THE INTERIOR, et al., Defendants.	

PLAINTIFFS' REPLY IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

Despite the flurry of briefing in response to Plaintiffs' (collectively, the Exotic Wildlife Ranchers) motion for summary judgment, the Federal Defendants and the Defendant-Intervenors

(Born Free, Defenders of Wildlife, and the Humane Society) make essentially the same arguments, and fail to offer any good reason why this Court should not grant Plaintiffs' motion for summary judgment and hold that the Final Rule promulgated by the U.S. Fish and Wildlife Service (FWS) is arbitrary, capricious, and contrary to law. Defendant-Intervenor Friends of Animals makes only one argument—that the Exotic Wildlife Ranchers lack standing to bring this challenge—but this Court has already ruled that the Exotic Wildlife Ranchers do.

The Exotic Wildlife Ranchers thus oppose the cross-motions for summary judgment filed by the Federal Defendants and the two sets of Defendant-Intervenors. On May 25, 2012, the Federal Defendants,[1] the Defendant-Intervenors (Born Free, Defenders of Wildlife, and the Humane Society),[2] and Defendant-Intervenor, Friends of Animals,[3] each filed a cross-motion for summary judgment and opposition to the Exotic Wildlife Ranchers' motion for summary judgment. Their briefs were filed in response to the motion for summary judgment filed by the Exotic Wildlife Ranchers on May 4, 2012.[4]

The Exotic Wildlife Ranchers further reply in support of their motion for summary judgment as follows:

1. The Federal Defendants' entire case for upholding this regulation boils down to a single erroneous contention that Judge Kennedy ordered FWS, on penalty of contempt, to issue the challenged rule. But the Federal Defendants are flatly wrong when they state:

> Federal Defendants had no choice but to remove the Management Rule from the regulations after Judge Kennedy's ruling that the rule violated ESA Section 10(c).

[1] Mem. in Supp. of Federal Def.'s Cross-Mot. for Summ. J. and Opp'n to Pl.'s Mot. for Summ. J., Doc. 85 (May 25, 2012) (Federal Def.'s Br.).
[2] Intervenor-Def .'s Opp'n to Pl.'s Mot. for Summ. J. and Cross-Mot. for Summ. J., Doc. 83 (May 25, 2012) (Def.-Intervenors' Br.).
[3] Intervenor-Def. Friends of Animals' Mem. in Supp. of its Cross-Mot. for Summ. J., Doc. 87-1 (May 25, 2012).
[4] Mot. for Summ. J., Doc. 78 (May 4, 2012).

> *See, e.g.*, *SEC v. Bilzerian*, 112 F. Supp. 2d 12, 16 (D.D.C. 2000) (a party that violates a court order is subject to contempt proceedings), *aff'd*, 75 Fed. Appx. 3 (D.C. Cir. 2003). The Service did not have the option to leave the rule in place even if it benefitted the Three Antelope species.[5]

The Federal Defendants are similarly wrong in arguing that "whether removing the Management Rule would lead to negative impacts to the species or not was irrelevant, since the Service did not have discretion to leave the Management Rule in place in light of Judge Kennedy's ruling."[6] Section 7 of the Endangered Species Act[7] requires that each agency ensure that its actions are "not likely to jeopardize the continued existence of any endangered species or threatened species,"[8] and nothing in Judge Kennedy's order relieved FWS of this statutory duty.

And despite the National Environmental Policy Act's (NEPA) requirement that each agency must prepare an environmental impact statement for "major federal actions significantly affecting the quality of the human environment,"[9] the Federal Defendants contend that Judge Kennedy's order exempted the FWS from doing so. But Judge Kennedy's order cannot be construed, as the Federal Defendants contend, to state that "the Service did not have to comply with NEPA . . . ."[10] Section 102(2)(C) of NEPA mandates that proposals for "major federal actions significantly affecting the quality of the human environment" must be accompanied by a detailed Environmental Impact Statement.[11]

Likewise, the Federal Defendants' claim that this rulemaking fell within a categorical exclusion under NEPA is merely another version of their tired, unpersuasive argument that Judge

---

[5] Federal Def.'s Br., Doc. 85 at 23−24.
[6] *Id.* at 14.
[7] 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).
[8] 16 U.S.C. § 1536(a)(2).
[9] 42 U.S.C. § 4332(2)(C).
[10] Federal Def.'s Br., Doc. 85 at 25.
[11] 42 U.S.C. § 4332.

Kennedy left the agency with no discretion. In their motion, the Federal Defendants offer no new argument, relying instead on FWS's statement to this effect in the Final Rule:

> The Service explained its determination that the Removal Rule is "administrative and legal in nature," AR202 at 000858, given that there were no alternative means for the Service to comply with Judge Kennedy's ruling that the Management Rule violates ESA Section 10(c), *id.* at 000830. This explanation more than adequately satisfies the Service's minimal burden to invoke the categorical exclusion for "[p]olicies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature." 43 C.F.R. § 46.210(i).[12]

But FWS faced more than a "minimal burden" when it invoked the categorical exclusion. As the Federal Defendants point out, "[a]n agency's decision to forego production of an EIS or EA in favor of a categorical exclusion is subject to judicial review under the 'arbitrary and capricious' standard of review."[13] There is simply no support for FWS's contention that "there were no alternative means" for complying with Judge Kennedy's ruling, or for the Defendant-Intervenors' mirror-image assertion that FWS had to impose the permitting rule or break the law,[14] as the Exotic Wildlife Ranchers have explained.

> The entirety of Judge Kennedy's remand order reads:
>
> 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.
>
> This is a final, appealable order. *See* Fed. R. App. P. 4(a).[15]

The Federal Defendants point to nothing in this order, nor in Judge Kennedy's accompanying memorandum opinion,[16] that could possibly be construed to state that FWS "had no choice"[17] in

[12] Federal Def.'s Br., Doc. 85 at 28.
[13] *Id.* at 6.
[14] Def.-Intervenors' Br., Doc. 83 at 31.
[15] *See* Ex. A, attached hereto.
[16] *Friends of Animals v. Salazar*, 626 F. Supp. 2d 102 (D.D.C. 2009).

this rulemaking, that "whether removing the Management Rule would lead to negative impacts to the species or not was irrelevant,"[18] or that "the Service did not have to comply with NEPA . . . ."[19] Likewise, the Defendant-Intervenors cannot show that "FWS had no choice"[20] because of its "obligation to comply with Judge Kennedy's decision . . . ."[21] And that is because there is no such language in Judge Kennedy's opinion or order. Judge Kennedy's order instead allowed FWS the discretion to choose how to cure the problem he identified—lack of notice—because under the Administrative Procedure Act (APA) "the usual rule is that, with or without vacatur, an agency that cures a problem identified by a court is free to reinstate the original result on remand."[22]

FWS's incorrect determination that Judge Kennedy ordered the agency to issue this particular rule without regard for the statutory requirements of the APA, ESA, or NEPA led it into the error of ignoring those statutory requirements. And because FWS did not comply with those statutory requirements, the challenged rulemaking is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[23]

2. FWS's erroneous conclusion that Judge Kennedy required it to issue this rule led the agency to the predetermined decision that it would simply revoke the exemption rule,[24] regardless of what commenters said. By predetermining the outcome of the rulemaking, FWS undermined the very purpose of the APA. The Supreme Court held in *Motor Vehicle Mfrs. Ass'n*

---

[17] Federal Def.'s Br., Doc. 85 at 23.
[18] *Id.* at 14.
[19] *Id.* at 25.
[20] Def.-Intervenors' Br., Doc. 83 at 24.
[21] *Id.* at 25.
[22] *Heartland Reg'l Med. Ctr. v. Leavitt*, 415 F.3d 24, 29 (D.C. Cir. 2005) (explaining that agency had all options available on remand, including reinstating prior invalidated rule, if agency considered all alternatives as required by the remand).
[23] 5 U.S.C. § 706(2)(A).
[24] 77 Fed. Reg. 431, A.R. at 840.

of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.[25] that under the APA, an agency must during rulemaking "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[26] Often, the relevant data is provided by interested parties during the notice and comment period. The D.C. Circuit has explained that the notice requirement "does not simply erect arbitrary hoops through which federal agencies must jump without reason," but rather "improves the quality of agency rulemaking by exposing regulations to diverse public comment."[27] The notice-and-comment procedure is crucial to the administrative system:

> The notice-and-comment procedure assures that the public and the persons being regulated are given an opportunity to participate, provide information and suggest alternatives. It thus gives interested parties an opportunity to participate in the rulemaking through the submission of data, views, and arguments. Notice also ensures fairness to affected parties and provides a well-developed record that enhances the quality of judicial review.[28]

The notice-and-comment procedure "improves the quality of agency rulemaking" and provides the public "an opportunity to be heard, which is basic to fundamental fairness."[29]

In short, as the Federal Defendants' brief makes clear, FWS went into this rulemaking with its mind made up ahead of time—it intended to subject these three antelope species to the general, one-size-fits-all permitting scheme and there wasn't a darn thing anyone could say to change their minds. But what about the more than 90 comments FWS received on the proposed rule, the vast majority of which vigorously opposed it as endangering the three species themselves? The Federal Defendants now simply dismiss the comments as insignificant, stating

[25] 463 U.S. 29 (1983).
[26] *Id.* at 43.
[27] *Sprint Corp. v. F.C.C.*, 315 F.3d 369, 373 (D.C. Cir. 2003) (citations omitted).
[28] 2 Am. Jur. 2d Administrative Law § 153.
[29] *United Church Bd. for World Ministries v. S.E.C.*, 617 F. Supp. 837, 839 (D.D.C. 1985).

that "the Service did receive comments that suggested alternatives to the permitting scheme, but these comments were not 'significant,' and so the Service did not have to respond to them."[30]

By "not significant" the Federal Defendants do not mean that the comments were not thoughtful and valuable suggestions for conserving these three endangered species, but rather that FWS "based its decision on a need to take a rule off the books that a Court had held did not comply with the ESA"[31] and "whether removing the Management Rule would lead to negative impacts to the species or not was irrelevant, since the Service did not have discretion to leave the Management Rule in place in light of Judge Kennedy's ruling."[32] The Defendant-Intervenors make the same claim that "those comments were made in vain in light of the obligation to comply with Judge Kennedy's decision . . . ."[33]

But in the Final Rule, FWS admitted that

> [m]any commenters expressed concerns that the current permitting process does not work well and is a disincentive to ranching operations. Two commenters thought the Service should create an alternative permitting process that includes an online submission process to register herds and obtain take permits electronically, develop the ability to receive electronic reports, develop scientifically based cull requirements, and allocate permit application fees to in situ conservation efforts. One commenter suggested that the Service implement a herd inventory monitoring program to get additional information for making permitting decisions. Several commenters provided specific examples of how to improve the permitting process to reduce unnecessary burdens in the interest of the species. Suggestions included combining the application processes for registration under the captive wildlife registration (50 CFR 17.21(g)) and take permits (50 CFR 17.22) or revising the applications to be clearer. Other comments included moving to an electronic application process, making permits valid for a longer period of time, and reviewing and processing applications in a more timely manner. One commenter, while believing no regulation is needed, could accept some form of moderately priced, multi-year permit that requires limited annual report data. One commenter said expectations related to transfers between facilities, including breeding-only and hunting-only operations, must be well

[30] Federal Def.'s Br., Doc. 85 at 16.
[31] *Id.* at 14 n.4.
[32] *Id.* at 14.
[33] Def.-Intervenors' Br., Doc. 83 at 25.

> defined in order to provide landowners with a transparent process. Two commenters suggested working with a State's wildlife authority to regulate and oversee the permitting process to increase cooperation with landowners. The AZA suggested that there needs to be a provision that allows AZA institutions to engage in time-sensitive international movement of these animals for noncommercial purposes, such as breeding loans or reintroduction, without having to obtain additional permits.
>
> Several commenters expressed opinions on what would constitute enhancement or furthering the conservation of the species so that permits or authorizations could be granted. Three nongovernment organizations were concerned that the existing permitting system would undermine the conservation of these antelope species due to questions on whether or not current permits are being issued in accordance with the Act. One commenter suggested that permits must provide flexibility in harvest allowances to allow managers to maintain balanced numbers relative to habitat carrying capacities. Another commenter recommended that the permit address additional harvest protocols and emergency response for when properties enter severe, extreme, or exceptional drought.[34]

And what was FWS's single-minded response to all of these comments? "These comments are outside the scope of this rulemaking because they do not address the Court's ruling that 50 CFR 17.21(h) violates section 10(c) of the Act and the rescission of 17.21(h)."[35]

3. If we could turn the clock back to September 2, 2005, FWS would not have listed these three species without also adopting the tandem rule exempting them from the ill-fitting permit scheme—and FWS does not argue the contrary. Rather, FWS argues that severability of the regulation is a matter solely for the court (and not the agency) to consider: "*New Jersey* [*v. EPA*][36] does not stand for the proposition that the Service (as opposed to a court) had to vacate the Listing Rule on its own when it rescinded the Management Rule because the rules were issued concurrently, as Plaintiffs claim."[37]

---

[34] 77 Fed. Reg. 431, A.R. at 840.
[35] *Id.*
[36] 517 F.3d 574 (D.C. Cir. 2008).
[37] Federal Def.'s Br., Doc. 85 at 20 n.6.

But the key consideration in determining severability of a regulation—whether by the Court or the agency—is the same: severability "depends on the issuing agency's intent."[38] So, "[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."[39] By rescinding only the exemption rule without considering the devastating effects of retaining the listing rule on Exotic Wildlife Ranchers and their herds—an approach that would be clear error for a court[40]—FWS arbitrarily imposed on the Exotic Wildlife Ranchers a permit scheme that it never intended to impose—and would not have imposed had it known the exemption rule was unlawful.

The Federal Defendants's belated argument that the exemption and listing rules are, in fact, severable is flatly contradicted by FWS's own words in adopting the tandem rules:

> 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.[41]

And in any case, the Federal Defendants admit that FWS did not even consider how the challenged rule might affect conservation of the species:

> [T[he Service did not support or base its decision on whether or not holders of U.S. captive-bred members of the Three Antelope species would reduce or eliminate their herds so as to avoid having to obtain a permit. Rather, as the Service explained, it based its decision on a need to take a rule off the books that a Court had held did not comply with the ESA. AR202 at 000830.[42]

---

[38] *Davis County Solid Waste Mgmt. v. U.S. E.P.A.*, 108 F.3d 1454, 1459 (D.C. Cir. 1997).
[39] *Id.*
[40] *See New Jersey v. E.P.A.*, 517 F.3d at 574; *Davis County Solid Waste Mgmt.*, 108 F.3d at 1459.
[41] 70 Fed. Reg. at 52,313, A.R. at 3.
[42] Federal Def.'s Br., Doc. 85 at 14 n.4.

In sum, while the 2005 tandem rules adopted a regulatory regime that encouraged conservation and increased propagation of the three species by their primary protectors—the Exotic Wildlife Ranchers—the challenged rule does just the opposite—forcing the Exotic Wildlife Ranchers to divest themselves of their herds, and shrinking the populations of the three antelope species. Because the exemption and listing rules are not severable, and would not have been separately adopted by FWS, the Federal Defendants' admission that "[t]he Service did not propose a different permitting system or to delist the U.S. captive herds of these species and was under no obligation to do so"[43] is a confession that FWS acted arbitrarily.

4. Defendant-Intervenor Friends of Animals is the sole party challenging the standing of the Exotic Wildlife Ranchers to challenge the Final Rule in this litigation. Given that this Court already held that the Exotic Wildlife Ranchers have standing, the Exotic Wildlife Ranchers do not intend to say more on this point unless this Court intends to reconsider this ruling, in which case, the Exotic Wildlife Ranchers ask for leave to then respond to this argument. The Court previously stated:

> As an initial matter, the Court finds that the plaintiffs have standing to seek relief, which is unchallenged by the Federal Defendants. "[T]he requirement that a claimant have 'standing is an essential and unchanging part of the case-or-controversy requirement of Article III.'" *Davis v. FEC*, 554 U.S. 724, 733 (2008) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). In order to establish standing under Article III, a claimant must show: (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *See Lujan*, 504 U.S. at 560-61; *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002). "An association has standing to bring suit on behalf of its members when its members would have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires individual members' participation in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envt'l. Servs.* (TOC), Inc., 528 U.S. 167, 180-181 (2000) (citing

[43] *Id.* at 13.

> *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). While the Court concludes that the plaintiffs have not shown that they face "irreparable harm," the plaintiffs have demonstrated "an injury in fact" that is concrete and particularized, actual or imminent, fairly traceable to the defendant's actions, and potentially remedied by this Court's decision. The plaintiffs therefore have standing and this Court may properly hear their claims.[44]

5. Finally, although the Federal Defendants state that FWS "considered the possibility that holders of U.S. captive-bred members of the Three Antelope species might dispose of their stock rather than obtain authorization or permits before carrying out previously exempted activities and determined that it did not believe this would occur,"[45] the Federal Defendants cite absolutely nothing in the record to support the FWS's mistaken belief. The Endangered Species Act is not "an authorization to act without data to support its conclusions, even acknowledging the deference due to agency expertise."[46] As many commenters explained during the comment period and the Exotic Wildlife Ranchers explained in their opening brief, many ranchers will dispose of their hoofstock as a direct result of this arbitrary rule.[47]

Conclusion

For all these reasons, the Exotic Wildlife Ranchers ask this Court to grant the Exotic Wildlife Ranchers's motion for summary judgment and hold that the Final Rule promulgated by the FWS on January 5, 2012, violates the Administrative Procedure Act, the National Environmental Policy Act, and the Endangered Species Act. The Exotic Wildlife Ranchers further ask this Court to deny the Federal Defendants' cross-motion for summary judgment, deny Intervenors Born Free, Defenders of Wildlife, and the Humane Society's cross-motion for

[44] Mem. Op., Doc. No. 61, April 3, 2012, at 13 n.7.
[45] Federal Def.'s Br., Doc. 85 at 25.
[46] *Otay Mesa Prop., L.P. v. U.S. Dept. of Interior*, 646 F.3d 914, 918 (D.C. Cir. 2011).
[47] Exotic Wildlife Rancher's Mem. in Support of Summ. J., Doc. 78-1 at 30.

summary judgment, and deny Intervenor Friends of Animal's cross-motion for summary judgment.

Respectfully submitted,

s/ Nancie 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, DC 20036
(202) 822-6760 (telephone)
Nancie@marzulla.com
Roger@marzulla.com

Dated: June 8, 2012

Counsel for Plaintiffs

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRIENDS OF ANIMALS, et al., **Plaintiffs,** **v.** **KEN SALAZAR, Secretary of the Interior,** **Defendant.**	**Civil Action 04-01660 (HHK)**
REBECCA ANN CARY, et al., **Plaintiffs,** **v.** **ROWAN GOULD, Acting Director, Fish and Wildlife Service, et al.,** **Defendants.**	**Civil Action 06-02120 (HHK)**

ORDER

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. This is a final, appealable order. *See* Fed. R. App. P. 4(a).

Henry H. Kennedy, Jr.
United States District Judge

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)

Hon. Beryl A. Howell

EXOTIC WILDLIFE ASSOCIATION, et al.,

Plaintiffs,

v.

U.S. DEPARTMENT OF THE INTERIOR, et al.,

Defendants.

CERTIFICATE OF SERVICE

I certify that on June 8, 2012, I filed a copy of Plaintiffs' Reply in Support of Motion for Summary Judgment in *Exotic Wildlife Association v. U.S. Department of the Interior* with this Court's ECF system, which electronically notified:

Meredith L. Flax
U.S. Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
Ben Franklin Station
P.O. Box 7611
Washington, DC 20044
(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 Sturm College of Law
2255 East Evans Avenue, Suite 335
Denver, CO 80208
(303) 871-7870
Fax: (303) 871-6847
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
katherinemeyer@meyerglitz.com

John Reed Clay, Jr.
Office of the Attorney General
209 West 14th Street
8th Floor
Austin, TX 78701
(512) 936-2541
reed.clay@oag.state.tx.us

Date: June 8, 2012

By: Hayley Neal

Hayley Neal