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.	

Supplemental Brief of Plaintiffs, Exotic Wildlife Association, in Support of Their Motion for Summary Judgment and Opposition to Defendant-Intervenor's Motion to Dismiss

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) supplement their briefs supporting their motion for summary judgment and opposition to Defendant-Intervenor's Motion to Dismiss in accordance with this Court's order of March 22, 2013.[1] As explained in this Supplemental Brief, the Exotic Wildlife Ranchers have prudential standing to bring this lawsuit. The Final Rule promulgated by the U.S. Fish and Wildlife Service (FWS) and challenged in this case, directly regulates their ranching activities involving three listed species of endangered antelope—the scimitar-horned oryx, the addax, and the dama gazelle.

Prior to FWS's promulgation of the Final Rule, the Exotic Wildlife Ranchers' ordinary ranching activities involving these three species did not subject them to civil or criminal liability under Section 9 of the Endangered Species Act but under the Final Rule, those same ranching activities—no longer exempt—would subject them to such liability. Consequently, the Exotic Wildlife Ranchers also have prudential standing to bring their ESA claims, which fall squarely within the zone of interests of the ESA.[2] Likewise, the Exotic Wildlife Ranchers challenge FWS's failure to consider the environmental impacts of the Final Rule—particularly its interference with the Exotic Wildlife Ranchers' ability to continue raising and caring for the endangered antelope, endangering their continued existence. As conservationists of these endangered antelope, the Exotic Wildlife Ranchers' interest in preventing the extinction of these three antelope species falls squarely within the zone of interest of NEPA.[3] There is nothing in the D.C. Circuit's ruling in *Grocery Manufacturers* that changed the general rule that a party directly regulated by a regulation satisfies the prudential standing requirement under the statute

[1] Order, *Safari Club Int'l v. Salazar*, No. 11-cv-1564 (Mar. 22, 2013).
[2] *Building Indus. Ass'n of Superior Cal. v. Babbitt*, 979 F. Supp. 893, 899–901 (D.D.C. 1997).
[3] *See Sierra Club v. Morton*, 514 F.2d 856 (D.C. Cir. 1975).

in question.[4] Finally, recent rulings by the D.C. Circuit, consistent with the majority of other Circuit Courts of Appeal, hold that prudential standing is not jurisdictional. So having never challenged the Exotic Wildlife Ranchers' standing in this litigation, FWS has waived the right to now challenge the Exotic Wildlife Ranchers' prudential standing.

Issues Presented for Review

> Plaintiffs challenge a Final Rule issued by FWS because it will require the ranchers to obtain permits under the ESA. These permits are so burdensome that Plaintiffs will discontinue owning, caring for, and propagating the endangered antelope, possibly leading to the species' extinction. Are the interests Plaintiffs seek to protect in this lawsuit within the zone of interests protected by the Administrative Procedure Act, the Endangered Species Act, and NEPA, as recently applied in Grocery Manufacturers?

Procedural Background

On March 2, 2012**,** the Exotic Wildlife Ranchers filed this complaint challenging a Final Rule promulgated by the U.S. Fish and Wildlife Service on January 5, 2012.[5] On March 6, 2012, the Exotic Wildlife Ranchers filed a motion for a preliminary injunction, seeking to maintain the status quo after the Final Rule became effective, but the Court denied that motion on April 3, 2012.[6] In denying the motion, the Court held that the Exotic Wildlife Ranchers had standing to bring this challenge:

> 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.[7]

On May 4, 2012, the Exotic Wildlife Ranchers filed their motion for summary judgment.[8]

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[4] *Building Indus. Ass'n of Superior Cal. v. Babbitt*, 979 F. Supp. at 899–901.
[5] Compl., Doc. 1 (Mar. 3, 2012).
[6] *Safari Club Int'l v. Salazar*, 852 F. Supp. 2d 102 (D.D.C. 2012).
[7] *Id.* at 111 n.7.
[8] Plaintiff Exotic Wildlife Association's Motion for Summary Judgment, Doc. 78 (May 4, 2012).

Federal Defendants and Defendant-Intervenors, Friends of Animals and Born Free USA, filed cross-motions for summary judgment on May 25, 2012.[9] The Exotic Wildlife Ranchers replied on June 8, 2012.[10]

On March 22, 2013, this Court issued a minute order, directing the Exotic Wildlife Ranchers to "supplement their briefing, by April 5, 2013, by submitting a short memorandum of law explaining the bases for prudential standing in this matter"[11] in light of the D.C. Circuit's decision in *Grocery Manufacturers Association v. EPA*.[12]

D.C. Circuit's Ruling in *Grocery Manufacturers Association v. EPA*

In *Grocery Manufacturers Association v. EPA*,[13] the D.C. Circuit addressed challenges brought by trade associations comprised of engine manufacturers, petroleum suppliers, and food producers to two EPA decisions approving the introduction of E15—a blend of gasoline and 15% ethanol for use in select motor vehicles and engines. The petitions were brought as a direct review under the federal Clean Air Act.[14] The Energy Policy Act of 2005[15] directs EPA to promulgate regulations requiring that fuel suppliers meet annual targets for the amount of renewable fuel they introduce into the U.S. market.[16] The purpose of the Energy Policy Act is to require suppliers to develop new, more renewable fuels.[17] But under the Clean Air Act,[18] suppliers introducing new fuels must first obtain a waiver from the EPA affirming the fuel's

[9] Docs. 82 through 87.
[10] Pls.' Reply in Support of Motion for Summary Judgment, Doc. 93 (June 8, 2012).
[11] Order, *Safari Club Int'l v. Salazar*, No. 11-cv-1564 (Mar. 22, 2013).
[12] *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169 (D.C. Cir. 2012).
[13] *Id.*
[14] 42 U.S.C. § 7545.
[15] Pub. L. No. 109-58, 119 Stat. 594 (2005) (codified in relevant part at 42 U.S.C. § 7545 (2006).
[16] 42 U.S.C. § 7545 (o)(2).
[17] *Grocery Mfrs. Ass'n*, 693 F.3d at 172.
[18] 42 U.S.C. §§ 7401–7671.

compatibility with existing vehicles before the new fuel can be introduced.[19]

In March 2009, an ethanol industry association—Growth Energy—applied for a waiver under Section 211(f)(4) of the Clean Air Act seeking EPA's approval to introduce a new ethanol-blend fuel.[20] EPA responded by granting two separate partial waiver decisions. The first partial waiver allowed the distribution of the new fuel for use only in "light-duty motor vehicles" of model years 2007 and later.[21] The second decision extended the waiver to permit use of E15 in light-duty motor vehicles and engines from model years 2001–2006.[22]

Three affected industries directly petitioned the D.C. Circuit to review EPA's decision granting the partial waivers, claiming that introduction of the new fuel would cause each industry to incur more costs.[23] Writing for a divided panel, Chief Judge Sentelle, joined by Judge Tatel, held that none of the three petitioners had standing to challenge EPA's partial waiver and therefore dismissed the challenge for lack of jurisdiction.[24] Chief Judge Sentelle explained that two of the petitioners, the engine manufacturer and the petroleum suppliers, lacked constitutional standing because neither petitioner had suffered injury-in-fact that was fairly traceable to the agency action. Nor was the court convinced that a favorable decision would likely remedy those petitioners' alleged injury.[25]

Chief Judge Sentelle concluded that the third petitioner, a group of food producers, likewise did not have constitutional standing. But lacking another vote on the panel for that

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[19] 42 U.S.C. §7525 (f)(1)(B)(4).
[20] *Grocery Mfrs. Ass'n*, 693 F.3d at 173.
[21] Partial Grant and Partial Denial of Clean Air Act Waiver Application Submitted by Growth Energy To Increase the Allowable Ethanol Content of Gasoline to 15 Percent, 75 Fed. Reg. 68,094 (Nov. 4, 2010).
[22] Partial Grant of Clean Air Act Waiver Application Submitted by Growth Energy To Increase the Allowable Ethanol Content of Gasoline to 15 Percent, 76 Fed. Reg. 4,662 (Jan. 26, 2001).
[23] *Grocery Mfrs. Ass'n*, 693 F.3d at 173.
[24] *Id.* at 172.
[25] *Id.* at 173–178.

holding—Judge Tatel in concurrence and Judge Kavanaugh in dissent believed that the food producers did have constitutional standing—Chief Judge Sentelle addressed prudential standing.

The food producers claimed that

> as a result of EPA's E15 waiver, ethanol production will increase and demand for corn (a necessary raw material for ethanol) will rise significantly. In turn, corn prices will rise. Therefore, food producers, which compete directly with ethanol producers in the upstream market for purchasing corn, will have to pay more for corn.[26]

Under the D.C. Circuit's standards for establishing prudential standing, the petitioner must show that the interest that the petitioner seeks to protect through litigation is "arguably within the zone of interests to be protected or regulated by the statute . . . in question."[27] The majority concluded that the food producers had failed to make the necessary showing under this standard:

> [The food producers] point out only that their interests are protected by EISA, the legislation that set forth the RFS, because EISA requires EPA to review, among other things, "the impact of the use of renewable fuels on . . . the price and supply of agricultural commodities . . . and food prices" when EPA sets renewable fuel volume requirements in the future.[28]

As Chief Judge Sentelle explained, "[h]ypothetical prudential standing to challenge actions under EISA," however, "does not give the food petitioners prudential standing to petition for review of action taken pursuant to CAA Section 211(f)(4)."[29] Although the Energy Policy Act—the statute setting fuel targets—did require EPA to consider food prices when setting renewable-fuel-volume requirements, the majority concluded that the challenged and thus relevant statute was the Clean Air Act because the challenge was based on EPA's authority to waive restrictions on

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[26] *Grocery Mfrs. Ass'n*, 693 F.3d at 180–181(Kavanaugh, J., dissenting).
[27] *Id.* at 179 (*quoting Nat'l Petrochem. Refiners Ass'n v. EPA*, 287 F.3d 1130, 1147 D.C. Cir. 2002 (per curiam)) (internal quotation marks omitted).
[28] *Id.*
[29] *Id.*

new fuel under the Clean Air Act.[30] And the Clean Air Act does not identity the price of food as an interest to be protected. Therefore, the majority held that the food producers' concerns were outside the zone of interests protected by the Clean Air Act, and they therefore lacked prudential standing.[31]

The dissenting judge, Judge Kavanaugh, not only believed that the food producers had prudential and constitutional standing to bring the claims, but he further concluded that because EPA had not challenged the food producers' prudential standing that issue was waived: "In short, respondent EPA has not raised prudential standing. EPA has thus forfeited the argument."[32] Judge Kavanaugh based his conclusion that prudential standing was nonjurisdictional on recent decisions that he contends make clear that the Supreme Court would hold prudential standing nonjurisdictional.[33] Judge Kavanaugh also discussed a growing majority among other Circuit Courts of Appeal holding that prudential standing is nonjurisdictional.[34] Judge Kavanaugh concluded that the internal split within the D.C. Circuit over this issue is more likely to be resolved in favor of holding that prudential standing is nonjurisdictional; he in fact cites to more recent cases decided by the D.C. Circuit so holding:

> [O]ur more recent cases have indicated that prudential standing is not jurisdictional. *See American Chiropractic Ass'n v. Leavitt*, 431 F.3d 812, 816

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[30] *Grocery Mfrs. Ass'n*, 693 F.3d at 179.
[31] *Id.*
[32] *Id.* at 185 (Kavanaugh, J., dissenting)
[33] *Id.* at 183–184 (*citing Gonzalez v. Thaler*, 132 S.Ct. 641, 648 (2012); *Henderson ex rel. Henderson v. Shinseki*, 131 S.Ct. 1197, 1202–1203 (2011); *Bowles v. Russell*, 554 U.S. 205, 213 (2007); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006); *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004)).
[34] *Id.* 184–185 (*citing Board of Mississippi Levee Commissioners v. EPA*, 674 F.3d 409, 417 (5th Cir. 2012); *Independent Living Center of Southern California, Inc. v. Shewry*, 543 F.3d 1050, 1065 n. 17 (9th Cir. 2008); *Rawoof v. Texor Petroleum Co.*, 521 F.3d 750, 756 (7th Cir. 2008); *Finstuen v. Crutcher*, 496 F.3d 1139, 1147 (10th Cir. 2007); *Gilda Industries, Inc. v. United States*, 446 F.3d 1271, 1280 (Fed.Cir. 2006); *American Iron & Steel Institute v. OSHA*, 182 F.3d 1261, 1274 n. 10 (11th Cir. 1999)).

> (D.C. Cir. 2005) (contrasting "the less-than-demanding zone-of-interest test" with "[t]he jurisdictional question"); *Toca Producers v. FERC*, 411 F.3d 262, 265 n. * (D.C. Cir. 2005) ("the prudential standing doctrine, like the abstention doctrine, represents the sort of threshold question that may be resolved before addressing jurisdiction") (internal quotation marks and brackets omitted); *Amgen Inc. v. Smith*, 357 F.3d 103, 111 (D.C. Cir. 2004) ("That Amgen has prudential standing does not resolve this appeal, however. Another threshold issue is whether the court has jurisdiction to entertain Amgen's complaint."); *see also Oryszak v. Sullivan*, 576 F.3d 522, 527 (D.C. Cir. 2009) (Ginsburg, J., concurring) (*citing Tenet*, 544 U.S. at 6 n. 4, 125 S.Ct. 1230).[35]

Argument

In this case, the Exotic Wildlife Ranchers have brought this challenge to FWS's Final Rule promulgated on January 5, 2012, seeking a judgment holding 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 Administrative Procedure Act (APA). The complaint in this case contains four claims for relief, for violations of the Administrative Procedure Act,[36] the Endangered Species Act,[37] and the National Environmental Policy Act.[38]

I. The prudential standing of the Exotic Wildlife Ranchers is self-evident because they are directly regulated by the Final Rule

As the Supreme Court has held, a party has prudential standing to challenge a regulation under the Administrative Procedure Act if that party's interests are arguably regulated by the statute in question:

> For a plaintiff to have prudential standing under the APA, "the interest sought to be protected by the complainant [must be] arguably within the zone of interests to be protected or regulated by the statute . . . in question."[39]

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[35] *Grocery Mfrs. Ass'n*, 693 F.3d at 185 n.4.
[36] 5 U.S.C. §§ 551–808.
[37] 16 U.S.C. §§ 1531–1544.
[38] 42 U.S.C. §§ 4321–4370.
[39] *Nat'l Credit Union Admin. v. First Fed. Bank & Trust Co.*, 522 U.S. 479, 488 (1998) (*quoting Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970).)

But establishing prudential standing in the D. C. Circuit is not particularly difficult to do:

> In addition to Article III's standing requirements, parties bringing suit under the APA must establish the "prudential" elements of standing. This is not particularly difficult to do. *See Shays v. FEC*, 414 F.3d 76, 83 (D.C. Cir. 2005).[40]

The D.C. Circuit has held that prudential standing is established if there is some indicia, however slight, that a party was intended to be regulated by the statute under which suit is brought:

> [T]here must be "some indicia—however slight—that the litigant before the court was intended to be protected, benefited or regulated by the statute under which suit is brought." *Copper & Brass Fabricators Council, Inc. v. Department of the Treasury*, 679 F.2d 951, 952 (D.C.Cir.1982).[41]

Applying these principles, in *Building Industry Association of Superior California v. Babbitt*,[42] this Court has held that an association of home builders had prudential standing to challenge a rule listing as endangered a species that occupied land they owned, thus interfering with their homebuilding activities:

> As soon as the fairy shrimp were listed, it became a violation of the ESA to significantly modify fairy shrimp habitat. Section 9 of the ESA makes it unlawful for any person to "take any such [listed endangered] species within the United States or the territorial sea of the United States." 16 U.S.C. § 1538(a)(1)(B). Under the ESA the term "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). The term "harm" as used in the ESA's definition of "take" includes significant habitat modification or degradation where it actually kills or injures wildlife. *Babbitt v. Sweet Home Chapter of Communities for Great Oregon,* 515 U.S. 687, 707–09, 115 S.Ct. 2407, 2418, 132 L.Ed.2d 597 (1995). Since plaintiffs are landowners who already have modified, or are in the process of modifying or are about to modify the fairy shrimp's habitat, they are directly regulated by the listing of the fairy shrimp and they therefore have prudential standing under the ESA.[43]
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> Likewise, in *Cape Hatteras Access Preservation Alliance v. U.S. Department of the*

[40] *Am. Petroleum Inst. v. Johnson*, 541 F. Supp. 2d 165, 176 (D.D.C. 2008).
[41] *Int'l Fabricare Inst. v. U.S. E.P.A.*, 972 F.2d 384, 390 (D.C. Cir. 1992).
[42] *Bldg. Indus. Ass'n of Superior Cal. v. Babbitt*, 979 F. Supp. 2d 893 (D.D.C. 1997).
[43] *Id.* at 901.

Interior,[44] this Court held that a citizens group had prudential standing to challenge designation of a public beach as critical habitat for an endangered bird because the challenged regulation directly affected its members. The group's members regularly drove off-road vehicles on and around land that the Fish and Wildlife Service had recently designated as critical habitat for the piping plover.[45] Because the group's members were "concerned that the Service's critical habitat designation will lead to substantial limits, or an outright ban, on off-road vehicle use within certain areas of the Cape Hatteras Seashore,"[46] the group had prudential standing to challenge the critical habitat designation.[47]

In a third case, this Court held that the American Petroleum Institute and its members had prudential standing to challenge an EPA regulation under the Clean Water Act:

> Plaintiffs argue that, as parties subject to the 2002 SPCC Rule, their interests are indisputably within the zone of interests to be regulated by Section 311(j) and regulations issued pursuant to EPA's Section 311(j) authority. *See* API Mot. at 34; Marathon Mot. at 7. EPA and the Environmental Intervenors do not dispute this proposition, nor could they. The Court therefore concludes that plaintiffs have prudential standing to challenge the new definition.[48]

In a fourth case, this Court held that operators of public water systems have prudential standing to challenge regulations setting standards for drinking water:

> Petitioners Shell, Dow, Occidental, and the National Electrical Manufacturers Association have alleged that they or their members operate public water systems and therefore will be directly regulated by the new drinking water standards established pursuant to the challenged rulemaking. Clearly, then, they have standing to bring their challenges.[49]

Finally in a fifth case, this Court held that a regulated medical provider has standing to

[44] 731 F. Supp. 2d 15 (D.D.C. 2010).
[45] *Id.* at 20–21.
[46] *Id.* at 18.
[47] *Id.* at 20–21.
[48] *Am. Petroleum Inst. v. Johnson*, 541 F. Supp. 2d at 176.
[49] *Int'l Fabricaire Inst.*, 972 F. Supp. at 390.

challenge a regulation reducing reimbursement payments due from the Government:

> Indeed, plaintiffs have prudential standing as parties that are "'regulated by the particular regulatory act being challenged' " and have " 'the incentive to guard against any administrative attempt to impose a greater burden than contemplated by Congress.'" *Building Industry Ass'n of Superior Cal. v. Babbitt,* 979 F.Supp. 893, 900 (D.D.C.1997) (quoting *Hazardous Waste Treatment Council v. Thomas,* 885 F.2d 918, 922 (D.C.Cir.1989)).[50]

In this case, the standing of the Exotic Wildlife Ranchers is self-evident because the Final Rule challenged in this lawsuit directly regulates their ranching activities, subjecting them to a permitting scheme that the Exotic Wildlife Ranchers had previously been exempted from by regulation. Failure to comply with this new permitting scheme could subject the Exotic Wildlife Ranchers to civil and even criminal penalties under Section 9 of the ESA.[51]

For example, the permits require the Exotic Wildlife Ranchers to prepare and file with FWS :

- A description of how the proposed activities are going to facilitate captive breeding, including a long-term goal and intended disposition of any newly-born animals. But there is no indication how detailed this plan must be, so FWS can impose any plan it desires on the ranchers—regardless of what has worked in the past.

- Documentation showing how the captive breeding program is being managed to maintain its genetic diversity.

- For each species, a description of the rancher's experience in maintaining and propagating the requested species or similar species; the same requirement also applies to any buyer, meaning that no one can raise these animals unless they already have done so.

- The number of successful births during the past five years, the number of those births that survived more than 30 days, and the number of mortalities during the past five years, including the causes and a description of the measures taken to prevent future mortalities.

As FWS stated in its Federal Register notice, the Exotic Wildlife Ranchers were

[50] *Beverly Health & Rehab. Services, Inc. v. Thompson*, 223 F. Supp. 2d 73, 86 (D.D.C. 2002).
[51] 16 U.S.C. § 1540.

previously exempt from these requirements:

> Under 50 CFR 17.21(h), individuals carrying out certain activities that would contribute to increasing or sustaining the captive numbers of the three species were not required to notify the Service of those activities involving these species, provided that those activities met the criteria established within these regulations.[52]

Finally, the D.C. Circuit in *Fund for Animals v. Norton*[53] construed *Bennett* to negate the zone-of-interest test for cases brought under the ESA, holding that only constitutional standing is required to bring an ESA citizen suit:

> The plaintiffs do not question the NRD's prudential standing, and rightly so. In *Bennett v. Spear,* the Supreme Court held that the broad language of the citizen-suit provision of the ESA—which extends to departments of foreign governments, *see* 16 U.S.C. §§ 1532(13), 1540(g)(1)(C), and on which the plaintiffs rely in the present case—"negates the zone-of-interests test" and expands standing "to the full extent permitted under Article III." 520 U.S. 154, 164, 165, 117 S.Ct. 1154, 1163, 137 L.Ed.2d 281 (1997).[54]

Here, the Exotic Wildlife Ranchers have constitutional standing to challenge the Final Rule and thus have prudential standing to bring this challenge.

II. The Exotic Wildlife Ranchers—who seek to ensure that FWS considers the impact of the proposed rule on the future survival and flourishing of the three antelope species—have prudential standing under NEPA

The D.C. Circuit has held that to establish prudential standing to bring an APA challenge under NEPA, the plaintiff must allege that they will suffer an "environmental injury" as a result of the agency action.[55] The issue of what is necessary to fall within NEPA's zone-of-interest has been examined by the D.C. Circuit in recent years. In those cases the D.C. Circuit has held that a plaintiff bringing a claim under NEPA must demonstrate "a substantial probability that they fall

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[52] 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).
[53] 322 F.3d 728 (D.C. Cir. 2003).
[54] *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 734 (D.C. Cir. 2003) (citing *Bennett v. Spear*, 520 U.S. 154 (1997)).
[55] *ANR Pipeline Co. v. F.E.R.C.*, 205 F.3d 403, 408 (D.C. Cir. 2000).

within NEPA's zone of interest."[56] The D.C. Circuit has broadly construed the zone of interest under NEPA, holding that so long as there is some connection to the environment then the party will have standing to bring a NEPA claim.[57]

The D.C. Circuit has routinely held that associations with members interested in conservation fall squarely within NEPA's zone of interests. For example, in *Sierra Club v. Morton*,[58] the D.C. Circuit held that a conservation group had standing to challenge the Government's development of coal resources in the Northern Great Plains that was approved without an EIS.[59] In that case, the Northern Plains Resource Council identified "those members of [the] organization who reside in the vicinity of the proposed mine and the adverse environmental, aesthetic, and economic effects on those members of continued construction of the mine . . . ."[60] Based on the effect that strip mining the coal would have on the group's members, D.C. Circuit held that the Northern Plains Resource Council's "injury is within the zone of interests intended to be protected by NEPA . . . ."[61]

In *Natural Resources Defense Council, Inc. v. Securities and Exchange Commission*,[62] the D.C. Circuit found that the NRDC had prudential standing to assert a claim that the SEC failed to comply with NEPA when it refused to modify its corporate disclosure requirements, because of the NRDC's interest in protecting the environment:

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[56] *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 417 F.3d 1272, 1289 (D.C. Cir. 2005).
[57] *See Realty Income Trust v. Eckerd*, 564 F.2d 447, 452 (D.C. Cir. 1977); *Lemon v. Geren*, 514 F.3d 1312 (D.C. Cir. 2008); *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228 (D.C. Cir. 1996).
[58] 514 F.2d 856 (D.C. Cir. 1975) (*overruled on other grounds by Kleppe v. Sierra Club*, 427 U.S. 390 (1976)).
[59] *Sierra Club v. Morton*, 514 F.2d at 861.
[60] *Id.* at 868 n.20.
[61] *Id.*
[62] 89 F. Supp. 689 (D.D.C. 1974).

> The Court agrees with NRDC and its members that their interest in protecting the environment, in investing their funds, and in voting their shares in a socially responsible manner, have been and continue to be adversely affected and aggrieved by the SEC's failure to adopt corporate disclosure regulations which will require disclosure of a corporation's impact on the environment and statistics about its equal employment practices.[63]

Further, in *Natural Resources Defense Council, Inc. v. Berklund*,[64] the D.C. Circuit found that several conservation groups had standing to sue the Bureau of Land Management for violating NEPA when it issued certain mining leases:

> Plaintiffs are two associations suing on behalf of their members, a "considerable number" of whom "use and enjoy the land, air, water, historic, archeological and aesthetic resources of the public lands administered by the defendants herein, some of which are subject to preference right coal lease applications." Other members of the two associations "live in geographical areas which may be adversely affected by the development and urbanization attendant to the mining of federal coal lands pursuant to preference right coal leases." These uncontroverted factual statements by the respective heads of NRDC and EDF are sufficient to support standing to sue.[65]

Here, the Exotic Wildlife Ranchers are the conservationists who raise, breed, manage and conserve these endangered species. As FWS stated back in 2005 when it exempted the Exotic Wildlife Ranchers from the permitting scheme, the Exotic Wildlife Ranchers' interest in conserving these species is the reason these species still exist:

> 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.[66]

In this case, declarations filed by noted conservationist, Dr. Pat Condy, and Exotic Wildlife Rancher, Larry Johnson, in support of the Exotic Wildlife Ranchers' motion for a

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[63] *Natural Res. Def. Council, Inc.*, 89 F. Supp. at 697.
[64] 458 F. Supp. 925, (D.D.C. 1978),
[65] *Natural Res. Def. Council, Inc. v. Berklund*, 458 F. Supp. at 932.
[66] Final Rule To List the Scimitar-Horned Oryx, Addax, and Dama Gazelle as Endangered, 70 Fed. Reg. 52,319 (Sept. 2, 2005).

preliminary injunction demonstrate that the Government's failure to comply with NEPA will adversely affect the environment:

> [T]he highly successful recovery results achieved by the Exotic Wildlife ranchers will all come to an end if there is no longer a market force monetary incentive for these ranchers to keep hosting and breeding these species. And that's exactly what this FWS rule means—no more economic incentive. And to these species, it means a rapid decline in numbers, a loss of genetic diversity, and likely extinction.[67]

> Tragically, the very Government entity charged with responsibility of protecting these animals—the FWS—is instead contributing directly to the extinction of three majestic species of African antelope by this rule. This is not conservation, and in no way, shape or form does it appear to relate to the purpose of the Endangered Species Act.[68]

> I have seen firsthand the adverse impacts that the permit process has on the survival of a species. For example, the population of the scimitar-horn Oryx, during the time it was not listed, went from 7 animals to over 10,000 in the state of Texas compared with the Arabian Oryx, that has been listed as an endangered species since the mid 70s, and whose population reduced from approximately 1,600 in the United States, to less the 250 animals today. Unlike the reintroduction program for the scimitar-horned Oryx (using animals from the United States) there has been no successful reintroduction of the Arabian Oryx. There have only been enough animals for one herd to be introduced; all the females were poached and now that herd is a biological dead-end. If the new rule issued by FWS is not stopped, it will have the same adverse impact on these three species in captivity, therefore eliminating the possibility of recovering these animals from extinction.[69]

As FWS itself admitted in the challenged Final Rule, 32 commenters "pointed out that intensive wildlife management by U.S. ranchers is the reason the species exist today." 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." Commenters further expressed their belief that "[c]aptive groups of these species would shrink, and, potentially, the species would be allowed to go extinct." Finally, the commenters noted that

[67] Condy Decl. ¶10, Pls.' Motion for Preliminary Injunction Ex. F, Doc. 3-8 (Mar. 3, 2012)
[68] *Id.* ¶15.
[69] Johnson Decl. ¶7, Pls.' Motion for Preliminary Injunction Ex. J, Doc. 3-12 (Mar. 5, 2012).

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."[70] NEPA requires FWS to examine these possible environmental impacts before adopting this regulation.

Therefore, the Exotic Wildlife Ranchers, who have a strong interest in the continued survival of their herds of these endangered antelope, have prudential standing to bring their claims under NEPA.

III. FWS has waived the right to challenge EWA's prudential standing

In his dissent in *Grocery Manufacturer*s, Judge Kavanaugh makes a compelling argument that prudential standing is nonjurisdictional and can be waived. In this case, that issue is important because FWS never challenged the Exotic Wildlife Ranchers' standing to bring this lawsuit. In fact, the Court already concluded that the Exotic Wildlife Ranchers had constitutional standing to bring this lawsuit without the benefit of any briefing by the Plaintiffs.

Judge Kavanaugh bases his conclusion that prudential standing is nonjurisdictional on the fact that Congress has never ranked prudential standing as jurisdictional.[71] He further notes that the word "jurisdiction" is sometimes not used carefully by courts, but that the Supreme Court has recently put the issue "under a microscope" in an effort to pin down the meaning of that term:

> In recent years, the terminology of jurisdiction has been put under a microscope at the Supreme Court. And the Court has not liked what it has observed—namely, sloppy and profligate use of the term "jurisdiction" by lower courts and, at times in the past, the Supreme Court itself. These recent Supreme Court cases have significantly tightened and focused the analysis governing when a statutory requirement is jurisdictional.[72]

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[70] 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).
[71] *Grocery Mfrs. Ass'n*, 693 F.3d at 185–186; *see also Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010).
[72] *Id.* at 183–184.

He further notes that decisions of the Supreme Court strongly suggest that prudential standing is nonjurisdictional:

> In *Reed Elsevier*, for example, the Court emphasized that a statutory requirement is jurisdictional when it speaks to the power of a court to hear a case rather than to the rights of or restrictions on the parties. *Id.* at 1243; *see also Gonzalez v. Thaler*, ––– U.S. ––––, 132 S.Ct. 641, 648, 181 L.Ed.2d 619 (2012) ("Recognizing our less than meticulous use of the term in the past, we have pressed a stricter distinction between truly jurisdictional rules, which govern a court's adjudicatory authority, and nonjurisdictional claim-processing rules, which do not.") (internal quotation marks omitted); *Henderson ex rel. Henderson v. Shinseki*, ––– U.S. ––––, 131 S.Ct. 1197, 1202–03, 179 L.Ed.2d 159 (2011) ("We have urged that a rule should not be referred to as jurisdictional unless it governs a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction. Other rules, even if important and mandatory, we have said, should not be given the jurisdictional brand.") (citations omitted); *Bowles v. Russell*, 551 U.S. 205, 213, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007) ("the notion of subject-matter jurisdiction obviously extends to classes of cases falling within a court's adjudicatory authority") (internal quotation marks and ellipsis omitted); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006) ("Jurisdiction, this Court has observed, is a word of many, too many, meanings.") (internal quotation marks omitted); *Kontrick v. Ryan*, 540 U.S. 443, 455, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004) ("Clarity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority.").[73]

Finally, he notes that recent decisions from the D.C. Circuit and other Circuit Courts of Appeal have concluded that prudential standing is nonjurisdictional:

> Some older cases from this Court said that prudential standing was jurisdictional. *See, e.g., Animal Legal Defense Fund, Inc. v. Espy*, 29 F.3d 720, 723 n. 2 (D.C. Cir. 1994). But our more recent cases have indicated that prudential standing is not jurisdictional. *See American Chiropractic Ass'n v. Leavitt*, 431 F.3d 812, 816 (D.C. Cir. 2005) (contrasting "the less-than-demanding zone-of-interest test" with "[t]he jurisdictional question"); *Toca Producers v. FERC*, 411 F.3d 262, 265 n. * (D.C. Cir. 2005) ("the prudential standing doctrine, like the abstention doctrine, represents the sort of threshold question that may be resolved before addressing jurisdiction") (internal quotation marks and brackets omitted); *Amgen Inc. v. Smith*, 357 F.3d 103, 111 (D.C. Cir. 2004) ("That Amgen has prudential standing does not resolve this appeal, however. Another threshold issue is whether the

[73] *Grocery Mfrs. Ass'n*, 693 F.3d at 184.

> court has jurisdiction to entertain Amgen's complaint."); see also *Oryszak v. Sullivan*, 576 F.3d 522, 527 (D.C. Cir. 2009) (Ginsburg, J., concurring) (citing *Tenet*, 544 U.S. at 6 n. 4, 125 S.Ct. 1230).

A recent Harvard Law Review article analyzing *Grocery Manufacturers* further notes that agencies frequently rely on the non-jurisdictional nature of prudential standing and purposefully waive any prudential standing challenges:

> Federal agencies frequently do not challenge the standing of plaintiffs challenging regulatory actions. While this inaction may at times be simple oversight, agencies may deliberately forfeit prudential standing objections or other procedural limitations for a number of reasons. First, executive agencies might forfeit prudential standing to obtain an accelerated judgment on the merits. For regulatory actions that an agency considers likely to face challenges, the agency might wish to obtain a final judgment that would allow it to raise an issue-preclusion defense in subsequent cases, rather than win one case on procedural grounds only to face further challenges. This approach would allow the agency to move forward with a regulatory action unclouded by legal uncertainty and would provide clarity to regulated parties. The executive would not be arrogating power to itself, but rather carrying out Congress's legislation through the speediest and least wasteful route possible.[74]

Here, despite the extensive briefing in this case, FWS has not once raised the possibility that the Exotic Wildlife Ranchers do not have prudential standing to challenge the Final Rule. As the D.C. Circuit has explained, a party must set forth its argument during briefing, or else lose the right to later do so: "[A] litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace."[75] FWS has had every opportunity to state any belief it might have that the Exotic Wildlife Ranchers do not have standing, having filed a response to the Exotic Wildlife Ranchers' motion for a preliminary injunction and a response and cross motion

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[74] Federal Civil Procedure - Standing - D.C. Circuit Raises Prudential Standing Sua Sponte to Dismiss Regula Challenge on Jurisdictional Grounds. - Grocery Manufacturers Ass'n v. 693 F.3d 169 (D.C. Cir. 2012), Reh'g En Banc, 126 HARV. L. REV. 1446, 1451–1452 (2013).

[75] *Schneider v. Kissinger*, 412 F.3d 190, 200 n.1 (D.C. Cir. 2005) (internal quotation marks omitted); *see also Rivera-Gomez v. De Castro*, 843 F.2d 631, 634–35 (1st Cir. 1988); *Miller v. Holzmann*, 563 F. Supp. 2d 54, 141 n.138 (D.D.C. 2008); *Davis v. Dist. of Columbia*, 503 F. Supp. 2d 104, 126 (D.D.C. 2007).

for summary judgment.

The Exotic Wildlife Ranchers are prejudiced if FWS now decides to brief the NEPA issue in a response brief to which the Exotic Wildlife Ranchers get no reply. And even if the Court were to allow such a response, to require the parties to engage in additional briefing simply because the Government chose not to raise the NEPA issue in either its opposition to the preliminary injunction or its Motion for Summary Judgment would impose a significant burden on the parties, and waste judicial resources on a matter that could and should have been addressed in compliance with the briefing schedule established by the Court.[76]

Conclusion

The Court has raised the issue of the prudential standing for the Plaintiffs in this case sua sponte. Defendant, the United States, has never raised this issue. Apparently, counsel for the United States was satisfied that the Exotic Wildlife Ranchers had constitutional and prudential standing to bring these claims. Indeed, this Court has held that the Exotic Wildlife Ranchers have constitutional standing. For all of these reasons, the Exotic Wildlife Ranchers ask this Court to further hold that they have prudential standing to bring this challenge to FWS' Final Rule, and to grant their motion for summary judgment and to deny Defendant-Intervenor's motion to dismiss.

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

[76] *Canady v. Erbe Elektromedizin GmbH*, 307 F. Supp. 2d 2, 11 (D.D.C. 2004).

(202) 822-6760 (telephone)
(202) 822-6774 (facsimile)
Nancie@marzulla.com
Roger@marzulla.com

Dated: April 5, 2012

Counsel for Plaintiffs

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

This confirms that on Friday, April 5, 2013, I served a copy of the Supplemental Brief of Plaintiffs, Exotic Wildlife Association, in Support of Their Motion for Summary Judgment and Opposition to Defendant-Intervenor's Motion to Dismiss by filing the document with the Court's ECF system, which electronically notified:

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: April 5, 2013

By: _____
Ian F. Gaunt