

Plaintiffs' Attachment
Motion To Compel Inspections
(Civ. No. 03-2006 (EGS/JMF))

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

REBECCA ANN CARY, et al,
Plaintiffs,

No C 05-4363 VRW
ORDER

v

DALE HALL, et al,
Defendants,

SAFARI CLUB INTERNATIONAL, et al,
Intervenor-Applicants.

Rebecca Cary, Debra Boban, Misti Schmidt, Marcia Slackman, the Humane Society of the United States, Defenders of Wildlife, the Kimya Institute, Born Free USA and Bill Clark (collectively "plaintiffs") bring this action pursuant to the Administrative Procedure Act (APA), 5 USC § 701 et seq, against Dale Hall, Director of the United States Fish and Wildlife Service, and Gale Norton, Secretary of the United States Department of the

1 Interior (collectively "the Service"). Doc #1 (Compl). Plaintiffs
2 challenge a regulation promulgated by the Service which permits
3 certain otherwise unlawful activities with respect to three
4 endangered species of African antelope. The Service moves pursuant
5 to FRCP 12(b) (1) to dismiss the complaint for lack of subject
6 matter jurisdiction on the ground that plaintiffs lack standing.
7 For reasons discussed below, the Service's motion is GRANTED IN
8 PART and DENIED IN PART.

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10 I

11 The scimitar-horned oryx (*Oryx dammah*), addax (*Addax*
12 *nasomaculatus*) and dama gazelle (*Gazella dama*) (the "three antelope
13 species") are indigenous to the Sahara and Sahel regions of North
14 Africa. 56 Fed Reg 56491 (1991). Although at one time the
15 scimitar-horned oryx could be found throughout the plains and semi-
16 deserts north of the Sahara (ranging from Morocco in the west to
17 Egypt in the east), by the mid-1980s only a few hundred remained
18 and none has been sighted in the wild since the late 1980s.
19 Scimitar-horned oryx bred in captivity have been introduced into
20 large fenced areas in Morocco and Tunisia and will be released into
21 the wild if and "when adequately protected habitat is available."
22 70 Fed Reg 52319 (2005). Addax were formerly widespread in the
23 deserts and sub-deserts of North Africa (ranging from the Atlantic
24 Ocean in the west to the Nile River in the east). Because addax
25 are able to utilize waterless areas in the very heart of the Sahara
26 Desert, they are less susceptible than the scimitar-horned oryx to
27 the pressures of humans and livestock. 56 Fed Reg 56491. Despite
28 their heartiness, it is now estimated that fewer than 600 addax

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1 live in the wild. As with the scimitar-horned oryx, efforts are
2 underway to reintroduce captive-bred addax into their native
3 habitat. Dama gazelles were once plentiful in the arid and semi-
4 arid regions of the Sahara; now, less than a thousand exist in the
5 species' historical range, and one sub-species (*Gazella dama mhorr*)
6 might be extinct in the wild. 70 Fed Reg 52319.

7 Section 4 of the Endangered Species Act (ESA), 16 USC §
8 1533, directs the Secretary of the Interior to determine whether a
9 given species should be listed as either "endangered" or
10 "threatened." Once a species has been so designated, § 9 makes it
11 unlawful for any person to "take any such species within the United
12 States." Id § 1538(a)(1)(C). The ESA defines "take" as "to
13 harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or
14 collect, or to attempt to engage in any such conduct." Id §
15 1532(19).

16 Notwithstanding the general prohibition against taking
17 listed species, § 10 sets forth a detailed application process by
18 which private persons may obtain permits to take listed species
19 "for scientific purposes or to enhance the propagation or survival
20 of the affected species." Id § 1539(a)(1)(A). Applications for
21 § 10 permits are subject to mandatory notice and comment review,
22 and "[i]nformation received by the Secretary as a part of any
23 application shall be available to the public as a matter of public
24 record at every stage of the proceeding." Id § 1539(c).

25 On November 15, 1991, the Fish and Wildlife Service (FWS)
26 proposed to list the three antelope species as endangered, 56 Fed
27 Reg 56491, and re-opened the comment period in 1992, 57 Fed Reg
28 24220, and again in 2003, 68 Fed Reg 43706. From the outset, the

1 Service indicated it might treat captive-bred populations of the
2 three antelope species in the United States "in a manner
3 differently from the natural populations," 56 Fed Reg at 56492; see
4 also 68 Fed Reg 43706, 43707 (2003) (soliciting comments regarding
5 "[a]lternatives to the treatment of captive populations of [the
6 three antelope species]"), and formally proposed such an
7 alternative regulatory scheme on February 1, 2005, 70 Fed Reg 5117.
8 As required by the National Environmental Protection Act (NEPA), 42
9 USC § 4321 et seq, and regulations promulgated thereunder, the
10 Service performed an environmental assessment of the proposed
11 regulatory scheme to determine whether the impact of the proposed
12 action was significant so as to require preparation of an
13 environmental impact statement (EIS). See 40 CFR § 1508.9.
14 Shortly thereafter, the Service issued a "finding of no significant
15 impact" (FONSI).

16 On September 2, 2005, the Service listed the three
17 antelope species as endangered. 70 Fed Reg at 52319. The same
18 day, the Service published a final rule "authoriz[ing] certain
19 otherwise prohibited activities that enhance the propagation or
20 survival of the [three antelope] species." 70 Fed Reg at 52310.
21 Specifically, with certain enumerated limitations, "any person
22 subject to the jurisdiction of the United States may take; export
23 or re-import; deliver, receive, carry, transport or ship in
24 interstate or foreign commerce live wildlife, including embryos and
25 gametes, and sport-hunted trophies" of the three antelope species.
26 50 CFR § 17.21(h).

27 Plaintiffs seek a declaration that defendants have
28 violated the ESA, NEPA and the APA, as well as an injunction

1 against the implementation and enforcement of the newly promulgated
2 exemption. Doc #1 (Compl) at 41. Pursuant to FRCP 12(b)(1), the
3 Service moves to dismiss all claims for lack of subject matter
4 jurisdiction on the ground that plaintiffs lack standing. Doc #14
5 (MTD).

6
7 II

8 The doctrine of standing "serv[es] to identify those
9 disputes which are appropriately resolved through the judicial
10 process." Lujan v Defenders of Wildlife, 504 US 555, 560 (1992)
11 (plurality opinion) (quotations omitted). "[T]he irreducible
12 constitutional minimum of standing contains three elements." *Id.*
13 First, the plaintiff must have suffered "injury in fact" — that
14 is, the plaintiff's legally protected interest must be encroached
15 upon in a manner that is both "concrete and particularized" and
16 "actual or imminent." *Id.* (quotations omitted). Second, there must
17 be a causal nexus between the plaintiff's injury and the subject of
18 his complaint such that the plaintiff's injury is "fairly traceable
19 to the challenged action of the defendant, and not the result of
20 the independent action of third parties not before the court." *Id.*
21 (alterations and quotations omitted). Third, the court must be
22 able to grant relief that is likely to redress the plaintiff's
23 injury. *Id.* at 561. See also Friends of the Earth, Inc v Laidlaw
24 Environmental Servs (TOC), Inc, 528 US 167, 180-81 (2000).

25 "The party invoking federal jurisdiction bears the burden
26 of establishing these elements." *Id.* Plaintiffs must make this
27 showing "based on their complaint." Raines v Byrd, 521 US 811, 818
28 (1997). "For purposes of ruling on a motion to dismiss for want of

1 standing," the court "must accept as true all material allegations
2 of the complaint, and must construe the complaint in favor of the
3 complaining party." Warth v Seldin, 422 US 490, 501 (1975). But
4 "[a] federal court is powerless to create its own jurisdiction by
5 embellishing otherwise deficient allegations of standing."
6 Whitmore v Arkansas, 495 US 149, 155-56 (1995). When, as in this
7 case, "the plaintiff is not himself the object of the government
8 action or inaction he challenges, standing is not precluded, but it
9 is ordinarily 'substantially more difficult' to establish." Lujan,
10 504 US at 562 (quoting Allen v Wright, 468 US 737, 758 (1984)).

11 A motion to dismiss for lack of subject matter
12 jurisdiction "can attack the substance of a complaint's
13 jurisdictional allegations despite their formal sufficiency, and in
14 so doing rely on affidavits or any other evidence properly before
15 the court. It then becomes necessary for the party opposing the
16 motion to present affidavits or any other evidence necessary to
17 satisfy its burden of establishing that the court, in fact,
18 possesses subject matter jurisdiction." St Clair v City of Chico,
19 880 F2d 199, 201 (9th Cir 1989). See also Ass'n of American
20 Medical Colleges v United States, 217 F3d 770, 778 (9th Cir 2000).

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22 III

23 *Section 10(a) of the ESA*

24 Plaintiffs' first claim actually alleges three violations
25 of the ESA. The first sub-claim alleges that the Service issued
26 the captive-bred antelope exemption without demonstrating that the
27 activities permitted "enhance the propagation or survival" of the
28 three antelope species as required by § 10(a)(1)(A). Compl ¶115.

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1 Dr Bill Clark's aesthetic interest in the three antelope species is
2 the underlying basis for standing.

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5 Although Dr Clark is a United States citizen, he
6 currently works for the Department of Law Enforcement at the Israel
7 Nature and Parks Authority. Dr Clark's efforts to conserve and
8 reintroduce the three antelope species into the wild include the
9 reintroduction of eight scimitar-horned oryx to Senegal in 1999.
10 Compl ¶23. Dr Clark "receives great pleasure and enjoyment from
11 excursions to observe the addax and dama gazelle in the wild and
12 from viewing the reintroduced scimitar-horned oryxes in Senegal,
13 and [from] researching and working on reintroduction programs to
14 ensure that all of these antelope species will persist in the wild
15 in the future." Id ¶24.

16 Dr Clark "believes" that trophy hunting "has contributed,
17 and continues to contribute," to the decline of the three antelope
18 species in the wild. Id. Dr Clark further believes that the
19 challenged exemption "send[s] the signal" that hunting of the three
20 antelope species in the United States is acceptable, which in turn
21 "will only result in additional hunters traveling to these species'
22 native ranges in order to obtain a trophy from the wild," which in
23 turn will impede both "the conservation efforts by the range
24 countries, including those in which Dr Clark is involved," as well
25 as "the concomitant opportunities to view these already greatly
26 imperiled animals in the wild, including Dr Clark's own such
27 opportunities." Id.

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2 Dr Clark's alleged injury arises from an alleged threat
3 to wild African populations of the three antelope species, not
4 captive-bred members of the species in the United States. See
5 Compl ¶24. The Service argues that Dr Clark cannot demonstrate
6 injury in fact because he has no connection to the captive-bred
7 members of the three antelope species that are the subject of the
8 challenged exemption. MTD at 13.

9 As Justice Scalia explained in Lujan:

10 It is clear that the person who observes or works
11 with a particular animal threatened by a federal
12 decision is facing perceptible harm, since the very
13 subject of his interest will no longer exist. It is
14 even plausible — though it goes to the outermost
15 limit of plausibility — to think that a person who
16 observes or works with animals of a particular
17 species in the very area of the world where that
18 species is threatened by a federal decision is
19 facing harm, since some animals that might have been
20 the subject of his interest will no longer exist.

21 504 US at 566-67. See also Ecological Rights Foundation v Pacific
22 Lumber Co, 230 F3d 1141, 1147 (9th Cir 2000) ("The 'injury in fact'
23 requirement in environmental cases is satisfied if an individual
24 adequately shows that she has an aesthetic or recreational interest
25 in a particular place, or animal, or plant species and that that
26 interest is impaired by a defendant's conduct.").

27 At the least, Dr Clark has alleged a connection with the
28 eight scimitar-horned oryx (and perhaps their descendants) that he
helped reintroduce to Senegal. At most, Dr Clark has alleged a
connection with members of the species in areas where he works with
and observes them. Either way, Dr Clark's allegations exist at or
within the "outermost limit of plausibility" described by Justice
Scalia.

1 In support of its contention that he must have a
2 connection with members of the species that are the "subject" of
3 the challenged exemption, the Service cites a passage from Lujan
4 where the Court rejected the plaintiff's "ecosystem nexus" theory
5 of injury. The Court reaffirmed that "a plaintiff claiming injury
6 from environmental damage must use the area affected by the
7 challenged activity and not an area roughly 'in the vicinity' of
8 it." Lujan, 504 US at 565-66 (quoting Lujan v National Wildlife
9 Federation, 497 US 871, 887-89 (1990)). Here, Dr Clark alleges
10 that the challenged exemption will adversely affect wild
11 populations of the three antelope species in North Africa where he
12 works with and observes them. Nothing more is required.

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15 Next, the Service argues that Dr Clark has not alleged an
16 injury that is actual or imminent because the complaint does not
17 specifically allege that Dr Clark has any future plans to observe
18 or work with the three antelope species in the wild. According to
19 the Service, Dr Clark's allegations of past and present excursions
20 to observe and work with the three antelope species do not suffice.
21 The Service relies upon the Lujan Court's rejection of "'some day'
22 intentions," 504 US at 564, to observe an endangered species for
23 purposes of injury in fact. The Service's argument rests on a
24 constricted reading of the complaint's allegations. Fairly
25 construed, the complaint alleges that Dr Clark's conservation
26 efforts and excursions to observe wild populations of the three
27 antelope species are ongoing, see Compl ¶¶ 23-24, not intermittent
28 or something he will get around to "some day."

1 Further, the Service overlooks that "'imminence' is
2 concededly a somewhat elastic concept." Lujan, 504 US at 564 n 2.
3 As the Ninth Circuit has observed, under Laidlaw, "an individual
4 can establish 'injury in fact' by showing a connection to the area
5 of concern sufficient to make credible the contention that the
6 person's future life will be less enjoyable" by virtue of
7 governmental action or perceived risks arising therefrom.
8 Ecological Rights Foundation, 230 F3d at 1149. The complaint
9 alleges such a connection between Dr Clark and at least some of the
10 native ranges of the three antelope species.

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13 Finally, in its reply memorandum the Service argues that
14 Dr Clark's allegations of injury are "entirely speculative"
15 inasmuch as they are "based only on his 'belief'" that the hunting
16 of captive-bred antelopes in the United States will adversely
17 affect efforts to conserve and observe the three antelope species
18 in Africa. Reply at 8. To the extent the Service is arguing that
19 Dr Clark has failed to show that the hunting of the three antelope
20 species in the United States will actually negatively affect wild
21 populations of the three antelope species, the Service overlooks
22 that "an increased risk of harm can itself be injury in fact
23 sufficient for standing." Ecological Rights Foundation, 230 F3d at
24 1151. See also Ocean Advocates v United States Army Corps of
25 Engineers, 402 F3d 846, 860 (9th Cir 2005). "To require that
26 plaintiffs prove particular environmental effects for standing
27 purposes is overmuch and 'would in essence be requiring that the
28 plaintiff conduct the same environmental investigation that he

1 seeks in his suit to compel the agency to undertake.' " Kootenai
2 Tribe of Idaho v Veneman, 313 F3d 1094, 1112 (9th Cir 2002)
3 (quoting City of Davis v Coleman, 521 F2d 661, 671 (9th Cir 1975)).
4 Accord Ecological Rights Foundation, 230 F3d at 1151. To the
5 extent the Service takes the position that Dr Clark has failed to
6 show a connection between the challenged exemption and the injury
7 he will allegedly suffer, those considerations are more properly
8 considered in connection with second element of constitutional
9 standing — causation — to which the court now turns.

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11 B

12 "[T]he causal connection put forward for standing
13 purposes cannot be too speculative, or rely on conjecture about the
14 behavior of other parties * * *." Id at 1152. What matters is the
15 "plausibility of the links that comprise the chain" of causation,
16 not the "length of the chain" itself. Autolog Corp v Regan, 731
17 F2d 25, 31 (DC Cir 1984) (quotations omitted), cited with approval
18 in National Audubon Society, Inc v Davis, 307 F3d 835, 849 (9th Cir
19 2002). The causation requirement is usually met "when a plaintiff
20 demonstrates that the challenged agency action authorizes the
21 conduct that allegedly caused the plaintiff's injuries, if that
22 conduct would allegedly be illegal otherwise." Animal Legal
23 Defense Fund, Inc v Glickman, 154 F3d 426, 440 (DC Cir 1998) (en
24 banc).

25 Here, the conduct ultimately causing Dr Clark's alleged
26 injury is the hunting of the three antelope species in the areas in
27 North Africa where he works with them. The exemption he challenges
28 does not authorize that activity and limits all exemptions to

1 antelopes that are captive-bred within the United States. 50 CFR §
2 17.21(h)(3). Although more indirect, causation would not be
3 implausible if the exemption allowed the importation into the
4 United States of trophies of the three antelope species taken in
5 the wild. For accepting as true plaintiffs' allegation that such
6 trophies are the end goal of sport hunters, it would be fair to
7 recognize a causal connection between legalizing their importation
8 (which would otherwise be illegal) and Dr Clark's injury. But,
9 again, the challenged exemption does not authorize the importation
10 of trophies of the three antelope species unless they were captive-
11 bred within the United States. Id.

12 Rather, plaintiffs' theory of causation proceeds as
13 follows: First, the challenged exemption will "send[] the signal"
14 that hunting the three antelope species in the United States is
15 acceptable. Compl ¶24. It is not clear whether this signal can be
16 picked up by hunters around the world, only in the United States or
17 nowhere beyond Texas, where most trophy hunting of the three
18 antelope species takes place. See Doc #24, Ex E. In any event, a
19 signal is being broadcast and sport hunters somewhere, maybe
20 everywhere, are tuning in. And for purposes of causation, these
21 hunters must be tuning in for the first time because there is no
22 dispute that, as a matter of federal law, it has long been legal to
23 hunt captive-bred members of the three antelope species in the
24 United States. Next, at least some hunters who receive the signal
25 will journey to North Africa to search for one of the small number
26 of scimitar-horned oryx, addax and dama gazelle that live in the
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1 wild — all because these hunters picked up the signal.¹ This is
2 just so much speculation.

3 The court has reviewed the exhibits attached to
4 plaintiffs' opposing memorandum. None of them fortifies the anemic
5 causal connection that appears on the face of the complaint. To
6 the extent these exhibits even speak to a connection between the
7 hunting of captive-bred members of the species in the United States
8 and poaching of wild specimens, for the most part they consist of
9 speculative opinions unsubstantiated by data. See, for example,
10 Doc #24, Ex G at 8. The best plaintiffs can muster is a
11 description of a surge in elephant poaching and illegal ivory
12 trading in the wake of a "one-off" sale of ivory from Botswana,
13 Namibia and Zimbabwe to Japan in 1997. See *id*, Ex D at 19-20.
14 Plaintiffs also rely upon Cayman Turtle Farm, Ltd v Andrus, 478 F
15 Supp 125 (DDC 1979), which sustained regulations that banned the
16 importation of green sea turtle products without exception for
17 green sea turtle products produced in "mariculture operations"
18 (that is, derived from turtles bred in captivity). As one basis
19 for its decision, the court relied upon evidence that the marketing
20 of sea turtle products could result in increased poaching of wild
21 sea turtles. *Id* at 132-33.

22 Elephants and sea turtles are not antelope and plaintiffs
23 have not adduced any facts suggesting a black market in the three
24 antelope species (notwithstanding that it has long been legal to
25 hunt captive-bred members in the United States). Further,
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27 ¹ The parties have not briefed whether it is illegal to hunt the
28 three antelope species in their indigenous ranges and, if so, whether
and how that would properly bear upon standing.

1 plaintiffs have not satisfied the court that hunting captive-bred
2 members of a species and trading in animal-derived products are not
3 apples and oranges for present purposes.

4 The court is mindful that "in cases involving chains of
5 events, it is common to confuse * * * the issue of the likelihood
6 of harm with its cause." Idaho Conservation League v Mumma, 956
7 F2d 1508, 1517 (9th Cir 1992). But the foregoing observations
8 regarding the dearth of support for plaintiffs' theory of causation
9 serves only to emphasize the consideration that is dispositive in
10 this case: The causal link between the challenged regulation and
11 Dr Clark's injury depends upon the unfettered choices of third
12 parties — sport hunters who might actually be less likely to take
13 wild specimens given the opportunities they have legally to take
14 captive-bred members of the species. And as already discussed, the
15 challenged regulation neither authorizes sport hunting in North
16 Africa nor authorizes the importation of trophies taken in the
17 wild. In no sense, then, can the challenged regulation be said to
18 be a "but for" cause of Dr Clark's alleged injury.

19 The court concludes that the causal connection between
20 the challenged regulation and Dr Clark's alleged injury is too
21 speculative and unquestionably relies on the unfettered decisions
22 of third parties. Dr Clark fails the second prong of Article III
23 standing. Moreover, the court concludes that these shortcomings
24 cannot be cured by amendment or discovery.

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26 C

27 "[T]o have standing, a federal plaintiff must show only
28 that a favorable decision is likely to redress his injury, not that

1 a favorable decision will inevitably redress his injury." Beno v
2 Shalala, 30 F3d 1057, 1065 (9th Cir 1994). Even so, Dr Clark fails
3 to establish redressability.

4 A situation comparable to the case at bar was presented
5 in Fund for Animals v Norton, 295 F Supp 2d 1 (DDC 2003), which,
6 incidentally, was litigated by counsel for plaintiffs and
7 intervenor-applicants in this action. Fund for Animals involved a
8 challenge to the Service's decision to permit sport hunters to
9 import trophies of argali sheep, a threatened species. Id at 2.
10 Much like Dr Clark, "[p]laintiffs' purported injuries result[ed]
11 from the sport hunting of argali in Krygystan, Mongolia, and
12 Tajikistan." Id at 7. And similar to the exemption challenged
13 here, the Service's "import permits and related threatened listing
14 of argali [did] not authorize the killing of argali" in the wild.
15 Id. "Thus, even if the Service allowed no import permits, the
16 three governments [remained free] to permit the sport hunting of
17 argali in their own countries." Id.

18 At oral argument, the undersigned asked counsel for
19 plaintiffs in this case (and plaintiffs in Fund for Animals) to
20 distinguish this case from Fund for Animals in terms of
21 redressability. Counsel's only response was to point out that Fund
22 for Animals was rendered on summary judgment rather than the
23 pleadings stage. The court fails to see the import of this
24 distinction, for even at this procedural phase (a factual challenge
25 to plaintiffs' standing), where redressability hinges on the
26 choices of third parties, "it becomes the burden of the plaintiff
27 to adduce facts showing that those choices have been or will be
28 made in such manner as to * * * permit redressability of injury."

1 Lujan, 504 US at 562.

2 Indeed, in the court's view, redressability is more
3 problematic in this case. In Fund for Animals, although a decision
4 in plaintiffs' favor would have had no effect on the legality of
5 hunting argali sheep in their native habitat, it at least would
6 have had the effect of making it unlawful to import trophies of the
7 species taken in their native habitat. Here, a decision in
8 plaintiffs' favor has no such legal effect. The legality of
9 hunting the three antelope species in their native habitat is a
10 matter far beyond the court's power; the importation of trophies of
11 members of the three antelope species is illegal now and whether it
12 remains so does not depend in any direct way upon the outcome in
13 this case. Rather, the best possible outcome for plaintiffs in
14 this case would be the removal of some of the kindling that fuels
15 the fire energizing the so-called "macho culture" of which
16 plaintiffs are so wary. But a decision in plaintiffs' favor would
17 in no way affect the legal rights or obligations of the third
18 parties at whose feet Dr Clark's alleged injury must ultimately be
19 laid.

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21 IV

22 *Sections 10(c) and 10(d) of the ESA*

23 In addition to Dr Clark's claim under § 10(a), the first
24 claim asserted in the complaint also alleges violations of § 10(c)
25 and § 10(d). Specifically, the complaint alleges that by issuing a
26 regulation that allows activities otherwise prohibited by § 9
27 without a § 10 permit, the Service has violated § 10(c)'s
28 requirement that notice of each application for a § 10 exemption or

1 permit be published in the Federal Register accompanied by an
2 invitation for comments from interested parties and § 10(d)'s
3 requirement that the Secretary grant a permit or exemption "only if
4 [s]he finds and publishes his finding in the Federal Register that
5 such exceptions were (1) applied for in good faith, (2) if granted
6 and exercised will not operate to the disadvantage of such
7 endangered species, and (3) will be consistent with the purposes
8 and policy" of the ESA. Id ¶116. Standing to assert these two
9 sub-claims purportedly arises from the informational injuries
10 allegedly suffered by the remaining individual plaintiffs and the
11 organizational plaintiffs.

12 Before delving into plaintiffs' standing to assert these
13 claims, the court makes a preliminary observation. Although at
14 first blush it might appear the contrary, plaintiffs do not claim
15 that defendants (1) failed to publish notice in the Federal
16 Register of any particular application for a § 10 permit as
17 required by § 10(c), (2) failed to provide an opportunity for
18 public comment upon such an application as required by § 10(c) or
19 (3) granted such an application without publishing the findings
20 required by § 10(d). Indeed, such claims would be implausible in
21 the absence of any allegation that an application for a permit to
22 take a captive-bred member of the three antelope species has been
23 filed since the Service designated the species as endangered.

24 Rather, the gravamen of the plaintiffs' second and third
25 sub-claims is that § 10(c) and § 10(d) constrain the Service's
26 authority to authorize activities otherwise prohibited by § 9 on a
27 categorical (rather than case-by-case) basis and in the absence of
28 a permit application. See Compl ¶2 (alleging that the ESA "only

1 grants the Service the authority to issue permits * * * on a case-
2 by-case basis"); id ¶98 (alleging that the Humane Society and
3 Defenders of Wildlife submitted comments to the Service opposing
4 the then-proposed exemption on several grounds, including that "the
5 agency violated the plain language of [§ 10], which only gives the
6 [Service] authority to issue permits on a case-by-case basis").
7 Although the clarity with which the complaint postulates this *ultra*
8 *vires* theory leaves something to be desired, reasonably construed,
9 the complaint advances such a claim.

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"It is well settled that plaintiffs may suffer injury as
a result of a denial of information to which they are statutorily
entitled." Fund for Animals, 295 F Supp 2d at 8. The Supreme
Court has found that purely informational injury may be sufficient
to confer standing where there is a statute that "seek[s]" to
protect individuals from "failing to receive particular information
about campaign-related activities," Federal Election Commission v
Akins, 524 US 11, 22 (1998), where a plaintiff "has specifically
requested, and been refused," information subject to mandatory
public disclosure, Public Citizen v Department of Justice, 491 US
440, 449 (1989), and where a specific statutory provision
"establish[es] an enforceable right to truthful information,"
Havens Realty Corp v Coleman, 455 US 363, 373 (1982). These cases
make clear that informational injury is implicated when plaintiffs
are effectively denied information to which they would otherwise be
entitled by statute. The first question, then, is whether § 10(c)
of the ESA creates a right to information. See Salt Institute v

1 Leavitt, 440 F3d 156, 159 (4th Cir 2006) (stating that "whether
2 Congress has granted a legal right to the information in question"
3 is a question "antecedent" to the question of informational
4 standing).

5 In pertinent part, § 10(c) provides:

6 The Secretary shall publish notice in the Federal
7 Register of each application for an exemption or
8 permit which is made under this section. Each
9 notice shall invite the submission from interested
10 parties, within thirty days after the date of the
11 notice, of written data, views, or arguments with
12 respect to the application * * *. Information
13 received by the Secretary as a part of any
14 application shall be available to the public as a
15 matter of public record at every stage of the
16 proceeding.

17 16 USC § 1539(c) (emphasis added).

18 Plaintiffs contend that the mandatory language of § 10(c) creates a
19 right to information upon which a claim of informational injury may
20 be predicated. Relying primarily upon the District of Columbia
21 Circuit's statement that standing by virtue of informational injury
22 arises only where a statute "explicitly create[s] a right to
23 information," Animal Legal Defense Fund, Inc v Espy, 23 F3d 496,
24 502 (DC Cir 1994), the Service argues that informational standing
25 does not exist in this case because the ESA creates no
26 informational rights.

27 The District of Columbia Circuit addressed the
28 obligations imposed by § 10(c) in Gerber v Norton, 294 F3d 173 (DC
Cir 2002). Gerber involved a challenge to the issuance of a § 10
permit authorizing the incidental taking of Delmarva fox squirrels
on a real estate community development site. Plaintiffs argued
that the Service violated § 10(c) by failing to make publicly
available the map of a parcel of land which the applicant had

1 designated for a conservation easement to compensate for the
2 incidental taking of fox squirrels on the real estate development.
3 Because the map was "received by" the Service "as part of" the
4 application for the incidental take permit, the panel held that the
5 map had to be made publicly available pursuant to § 10(c). Id at
6 179. The panel's conclusion was buttressed by § 10(a), which
7 requires that the public have a meaningful opportunity to comment
8 on an incidental take permit application. Id. Compare Food
9 Chemical News v Dept of Health and Human Servs, 980 F2d 1468, 1472
10 (DC Cir 1992) (relying upon Congress's intent to foster meaningful
11 public participation in the advisory committee process to reinforce
12 the conclusion that § 10(b) of the Federal Advisory Committee Act
13 mandates that certain information be publicly available).

14 Although standing was not disputed in Gerber, the court
15 is persuaded by Gerber's reasoning and concludes that § 10(c)
16 creates a right to information sufficient to support standing.

17
18 B

19 The Service also argues that cases recognizing
20 informational standing have done so in the context of statutes
21 enacted for the purpose of providing information to the public,
22 unlike the ESA, the purpose of which is to conserve endangered and
23 threatened species and their habitat. Id. In effect, the Service
24 argues that plaintiffs' alleged injuries fall outside the "zone of
25 interests" protected by the ESA.

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27 1

28 The parties do not dispute that plaintiffs' first claim

1 arises under the APA and not the ESA's citizen-suit provision.
2 Accordingly, in addition to the immutable standing requirements of
3 Article III, the court must also determine "whether the interest
4 sought to be protected by [plaintiffs] is arguably within the zone
5 of interests to be protected or regulated by the statute in
6 question." Ass'n of Data Processing Serv Organizations, Inc v
7 Camp, 397 US 150, 153 (1970). The zone-of-interests test "denies a
8 right of review if the plaintiff's interests are so marginally
9 related to or inconsistent with the purposes implicit in the
10 statute that it cannot be reasonably be assumed that Congress
11 intended to permit the suit." Clarke v Securities Industry Ass'n,
12 479 US 388, 399 (1987). The inquiry is not "whether Congress
13 specifically intended to benefit the plaintiff." Nat Credit Union
14 Admin v First Nat Bank & Trust Co, 522 US 479, 492 (1998). Rather,
15 the court first discerns the interests arguably protected by the
16 statutory provision at issue and then determines whether the
17 plaintiffs' interest affected by the agency action falls among
18 them. *Id.*

19 The Service emphasizes that the primary goal of the ESA
20 is wildlife conservation, not providing information to the public.
21 But the Service overlooks the Supreme Court's instruction that
22 "[w]hether a plaintiff's interest is arguably protected by the
23 statute within the meaning of the zone-of-interests test is to be
24 determined not by reference to the overall purpose of the Act in
25 question (here, species preservation), but by reference to the
26 particular provision of law upon which the plaintiff relies."
27 Bennett v Spear, 520 US 154, 175-76 (1997) (quotations and
28 alterations omitted).

1 informational interests of those who participate in that process.
2 Whether denial of the ability to participate meaningfully in the §
3 10 permit process is an injury that is "procedural" or
4 "informational" in nature, the court concludes it is sufficient to
5 support standing. Compare Earth Island Institute v Ruthenbeck, ___
6 F3d ___, 2006 WL 2291168, *4 (9th Cir Aug 11, 2006) (holding that
7 the loss of a right of administrative appeal under the Appeals
8 Reform Act was a sufficient injury to confer standing). But
9 information for information's sake is not within the zone of
10 interests served by § 10(c).

11 Here, the complaint alleges that plaintiff Defenders of
12 Wildlife ("Defenders") "closely follows and regularly comments on
13 applications for permits under the ESA." Compl ¶16. Specifically,
14 Defenders "regularly" obtains information about proposed actions
15 "that [a]ffect endangered species and their habitats, including
16 applications for permits under the ESA. Defenders uses this
17 information to provide comments on * * * legislative and
18 administrative action * * *." Id ¶17. By alleging that the
19 challenged regulation effectively denies Defenders information
20 required to be made publicly available under § 10(c) so that
21 Defenders can meaningfully participate in the § 10 permit process,
22 Defenders has alleged a concrete injury that comes within the zone
23 of interests protected by § 10(c). And because Defenders has
24 alleged that it regularly comments on § 10 permits, Defenders'
25 injury is actual or imminent. Causation and redressability are
26 clear. Defenders has standing to pursue its claim under § 10(c).
27 The court need not consider the standing of other plaintiffs to
28 claim a violation of § 10(c). See Public Citizen v Dept of

1 Transportation, 316 F3d 1002, 1014-15 (9th Cir 2003) ("We need only
2 find that one petitioner has standing to allow a case to
3 proceed."), rev'd on other grounds, 541 US 752 (2004).

4
5 C

6 In sum, the complaint alleges that the ESA requires that
7 the Service consider whether to grant § 10 permits on a case-by-
8 case basis and after the public has had an opportunity to
9 participate. Further, § 10(c) creates an enforceable right to
10 information that the public have an opportunity to participate in
11 the notice and comment process that is to accompany each § 10
12 permit application. Defenders' allegations satisfy the
13 constitutional and non-constitutional requirements of standing.
14 The § 10(c) claim may proceed.

15 The court finds it unnecessary at this time to consider
16 whether § 10(d) also creates a right to information sufficient to
17 support standing. The court observes, however, that it is doubtful
18 whether the findings required to be published under § 10(d) are
19 essential to make public participation in the § 10 permit process
20 meaningful. In the absence of a specific provision authorizing
21 suit for violations of § 10(d) or a zone of interests narrower than
22 a general interest in agency compliance with statutory
23 requirements, it is unclear whether the informational interests
24 ostensibly protected by § 10(d) are sufficient to support
25 constitutional, prudential and statutory standing. See Akins, 524
26 US at 19-20, 25 (suggesting that the generalized nature of an
27 injury is not a constitutional impediment and therefore can be
28 overridden by Congress with a citizen-suit provision). In any

1 event, the parties may brief these specific questions at a later
2 juncture and as appropriate.

3 IV

4 Section 7 of the ESA

5 Plaintiffs' second claim alleges that the Service
6 violated § 7(a)(2) of the ESA, 16 USC § 1536(a)(2), by failing to
7 consult on the impact of the challenged exemption on the three
8 antelope species. Compl ¶119. The complaint alleges that such
9 failure amounted to an abuse of agency discretion in violation of
10 the Administrative Procedure Act (APA), 5 USC § 706(2). Id ¶120.
11 The Service argues that plaintiff's second claim must be dismissed
12 for failure to comply with notice requirements of the ESA's citizen
13 suit provision. The court agrees.

14 Plaintiffs suggest that their second claim arises under
15 § 706 of the APA. See Opp at 26 n 9. But § 706 does not itself
16 confer subject matter jurisdiction. Your Home Visiting Nurse
17 Servs, Inc v Shalala, 525 US 449, 457-58 (1999). And although
18 § 704 creates an avenue by which to seek judicial review of agency
19 action, that provision applies only to agency actions "for which
20 there is no other adequate remedy in a court." See Bowen v
21 Massachusetts, 487 US 879, 903 (1988). Such is not the case here,
22 because the ESA authorizes citizen suits "to enjoin any person,
23 including the United States and any other governmental
24 instrumentality or agency * * * who is alleged to be in violation
25 of the [ESA] or regulation issued under the authority thereof." 16
26 USC § 1540(g)(1)(A). When judicial review of agency action may be
27 had under the ESA, the APA does not create a separate avenue of
28 relief. See Washington Toxics Coalition v Environmental Protection

1 Agency, 413 F3d 1024, 1034 (9th Cir 2005). Thus, plaintiffs' § 7
2 claim must proceed, if at all, under the ESA citizen-suit
3 provision.

4 "No action may be commenced under [§ 1540(g)(1)(A)] prior
5 to sixty days after written notice of the violation has been given
6 to the Secretary [of the Interior], and to any alleged violator of
7 any such provision or regulation * * *." 16 USC §
8 1540(g)(2)(A)(i). "This sixty-day notice requirement is
9 jurisdictional" and "failure to strictly comply with the notice
10 requirement acts as an absolute bar to bringing suit under the
11 ESA." Southwest Ctr for Biological Diversity v Bureau of
12 Reclamation, 143 F3d 515, 920 (9th Cir 1998).

13 Plaintiffs do not dispute that they did not provide
14 sixty-day notice of their intent to file this lawsuit. Relying
15 upon Bennett v Spear, 520 US 154 (1997), plaintiffs posit that
16 their second claim cannot be brought under the ESA's citizen
17 provision, thereby rendering the sixty-day notice requirement
18 inapplicable. Opp at 26 n 9. Plaintiffs misinterpret Bennett.
19 The Ninth Circuit has explained that in Bennett,

20 the FWS, as the consultation agency, issued a
21 Biological Opinion allowing the Bureau of
22 Reclamation, as the action agency, to undertake a
23 water reclamation project subject to certain
24 conditions. Although the Bennett [C]ourt held that
25 the FWS could not be sued for maladministration of
26 the ESA under 16 USC § 1540(g)(1)(A), the Court
27 expressly recognized that citizen suits are a
28 permissible means to enforce the substantive
provisions of the ESA against regulated parties —
including government agencies like the FWS in its
role as the action agency.

Environmental Protection Information Ctr v Simpson Timber Co, 255
F3d 1073, 1079 (9th Cir 2001) (emphasis added).

1 At oral argument, counsel for plaintiffs conceded that
2 their second claim seeks relief from actions taken by the Service
3 in its capacity as an action agency and not as a consultation
4 agency. Such a challenge must be brought pursuant to the ESA's
5 citizen suit provision, and the sixty-day notice requirement
6 therefore applies. Plaintiffs' failure to comply deprives the
7 court of jurisdiction over their second claim.

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"A cognizable procedural injury exists when a plaintiff alleges that a proper EIS has not been prepared under NEPA when the plaintiff also alleges a concrete interest — such as an aesthetic or recreational interest — that is threatened by the proposed action." Nuclear Information and Resource Serv v Nuclear Energy Regulatory Commn, 457 F3d 941, 949-50 (9th Cir 2006) (quotations and alterations omitted). The concrete interest prong requires "a geographic nexus between the individual asserting the claim and the location suffering an environmental impact." Ashley Creek Phosphate Co v Norton, 420 F3d 924, 938 (9th Cir 2005) (quotations omitted), cert denied, 126 S Ct 2967 (2006). "That is, environmental plaintiffs must allege that they will suffer harm by virtue of their geographic proximity to and use of areas that will be affected * * *." Citizens for Better Forestry v United States Dept of Agriculture, 341 F3d 961, 971 (9th Cir 2003). For reasons discussed in part III(A) of this order, Dr Clark has alleged a concrete interest. But no other plaintiff has alleged or shown a geographic nexus with the area(s) of concern to support standing.

1 "Once a plaintiff has established injury in fact under
2 NEPA, the causation and redressability requirements are relaxed."
3 Cantrell v City of Long Beach, 241 F3d 674, 682 (9th Cir 2001).
4 "[C]ausation need only be established with 'reasonable
5 probability.'" Kootenai Tribe, *supra*, 313 F3d at 1114 (citing
6 Douglas County v Babbitt, 48 F3d 1495, 1501 n 6 (9th Cir 1995)
7 (quoting Pacific Northwest Generating Co-op v Brown, 25 F3d 1443,
8 1449 (9th Cir), amended, 38 F3d 1058 (9th Cir 1994)). And it is
9 enough that an EIS "may redress plaintiffs' alleged injuries." *Id.*

10 Relaxed as the causation requirement may be in
11 NEPA/procedural injury cases, it is not eliminated. And "where an
12 injury caused by a third party is too tenuously connected to the
13 acts of the defendant," standing may be precluded even for claims
14 asserting procedural injuries under NEPA. See Citizens for Better
15 Forestry, 341 F3d at 975. Accordingly, for the same reasons that
16 Dr Clark has failed to establish causation for purposes of his
17 claim for a violation of § 10(a) of the ESA, see *supra* III(B), the
18 court concludes that he fails to establish causation for purposes
19 of his NEPA claim.

20
21 VI

22 In sum, the Service's motion to dismiss for lack of
23 subject matter jurisdiction is GRANTED IN PART and DENIED IN PART
24 as follows: The court concludes that Dr Clark lacks standing to
25 pursue claims under NEPA or § 10 of the ESA. All claims that
26 depend upon Dr Clark's alleged injuries as a basis for standing are
27 accordingly DISMISSED. Leave to amend Dr Clark's allegations will
28 not be granted. On the other hand, the court concludes that

1 Defenders of Wildlife has standing to pursue its claim that the
2 Service has violated § 10 of the ESA by issuing a regulation which
3 permits the taking of the three antelope species on a categorical
4 rather than case-by-case basis.

5 The parties are ORDERED to appear for a case management
6 conference on October 24, 2006, at 9 am, or at such other time as
7 the parties may mutually arrange with court's deputy clerk, Ms Cora
8 Delfin, 415-522-2039.

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SO ORDERED.



VAUGHN R WALKER

United States District Chief Judge