UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al.,	)	
Plaintiffs,	)	Civ. No. 03-2006 (EGS/JMF)
v.	)	Judge: Emmet G. Sullivan
RINGLING BROTHERS AND BARNUM & BAILEY CIRCUS, et al.,	)	
Defendants.	)	

PLAINTIFFS' MOTION FOR RECONSIDERATION
OR ALTERNATIVELY PARTIAL RECONSIDERATION

Introduction

Pursuant to Rule 59(e), Fed. R. Civ. P., plaintiffs respectfully move for reconsideration, or alternatively partial reconsideration, of the Court's August 23, 2007 grant of partial summary judgment to defendant on the issue of whether plaintiffs may challenge the mistreatment of the captive-born Asian elephants who are used by defendant Feld Entertainment Inc. ("FEI") in the Ringling Bros.' circus. See Memorandum Opinion ("Mem. Op.") (Docket No. 173) at 15-23. Although plaintiffs recognize that reconsideration is a remedy that should be sought only in unusual circumstances, they believe that those circumstances are present here because (1) the Court relied heavily on a case that, contrary to the representations made by defendant, has been vacated on the merits by the Eleventh Circuit Court of Appeals, and (2) the Court did not expressly address one of plaintiffs' statutory arguments.

BACKGROUND

In their Complaint under the Endangered Species Act ("ESA), plaintiffs assert two distinct claims with respect to the captive-bred elephants in defendant's possession: first, that defendant's beating, striking, and constant chaining of Asian elephants, and its forcible removal of baby elephants from their mothers violate the "take" prohibitions of Section 9 of the ESA, see Complaint, ¶96; and second, that defendant's treatment of the elephants "also violates the permit it was issued by the Fish and Wildlife Service, and the FWS's regulations implementing the ESA." See Complaint, ¶ 97 (emphasis added).[1]

In its motion for summary judgment, defendant contended that it was entitled to summary judgment with respect to the entire case as it relates to the captive-bred elephants because those animals are covered by a "captive-bred wildlife permit" that allows defendant to engage in "normal husbandry practices" to breed and exhibit the animals that could otherwise be considered unlawful "takes" under Section 9 of the ESA, including "use of the guide," "tethering," and "weaning." See Defendant's Summary Judgment Memorandum ("Def. SJ Mem.") (Docket No. 82) at 27.

Relying on the district court ruling in Atlantic Green Sea Turtle, No. 6:04-cv-1576-Orl-31KRS, 2005 WL 1227305 (M.D. Fla. May 3, 2005), and a subsequent case from the Northern District of California that also relied on that case, Environmental Protection Center v. FWS, No. 04-04647 CRB, 2005 U.S. Dist. LEXIS 30843, at *22 (N.D. Cal. Nov. 10, 2005), defendant moved for summary judgment on the ground that it was using "normal husbandry practices" to breed the

[1]Plaintiffs assert that FEI is in violation of those regulations because its treatment of the elephants is not "humane and healthful," as required of permit holders, 50 C.F.R. § 13.41, and because FEI is also not in compliance with "all applicable laws and regulations governing the permitted activity," 50 C.F.R. § 13.48, including the Animal Welfare Act. See Complaint ¶ 97.

animals and that the citizen suit provision does not allow a challenge to the "terms and conditions" of a permit issued by the FWS; rather, only the FWS can bring an enforcement action challenging compliance with a permit. See Def. SJ Mem. at 29.

In response, plaintiffs pointed out that Atlantic Green Sea Turtle had been vacated by the Eleventh Circuit Court of Appeals. Plaintiffs' Summary Judgment Opposition ("Pl. SJ Opp.") (Docket No. 96) at 42. Plaintiffs also argued that, in any event, they were additionally contending that defendant engages in a host of prohibited activities that fall outside that permit and upon which defendant did not move for summary judgment – i.e., the routine beating, striking, and chaining of the elephants in order to make them perform tricks in the circus, and the forcible separation of baby elephants from their mothers for that same purpose. See Pl. SJ Opp. at 27-32.

In reply, defendant insisted that the only "judgment" the Eleventh Circuit had vacated was one awarding attorneys' fees to the defendant. Defendant's Summary Judgment Reply ("Def. SJ Reply") (Docket No. 100) at 19. Hence, defendant argued that, based on the holding of Atlantic Green Sea Turtle, this Court "has no jurisdiction over Plaintiffs' claim that FEI is violating its CBW permit." Def. SJ Reply at 17 (emphasis added). In response to plaintiffs' argument that defendant was engaging in conduct that is not covered by its captive bred wildlife "permit,"defendant conspicuously did not contend that such conduct was authorized by that permit. Rather, it simply insisted that, by virtue of operating under the CBW "registration" system, it may engage in any conduct that constitutes a "take" of the elephants. See Def. SJ Reply at 21.

In its August 23, 2007 decision, the Court relied on defendant's representation that Atlantic Green Sea Turtle had not been vacated, and that, rather, "[t]he Eleventh Circuit merely vacated the district court's judgment with respect to attorneys' fees and not with respect to any findings

regarding permit enforcement." Mem. Op. at 21. The Court further found that because plaintiffs were "arguing, in part, that defendant's treatment of its elephants that are subject to the permit is not in compliance with the terms of the permit," id. at 17, this challenge was foreclosed under the citizen suit provision for essentially the same reasons set forth in Atlantic Green Sea Turtle, which the Court observed was "the one district court that had directly considered this issue" – i.e., whether the citizen suit provision allows a challenge to compliance with a permit. Mem. Op. at 19-20 (emphasis added).

The Court also ruled that, by the same token, plaintiffs' allegations that FEI is not in compliance with the "regulations" that govern the permitted activity are also foreclosed, since "[a]ny determination by the Court that FEI is not in compliance with these regulations would be a determination that the permit is not properly being enforced," and "[t]he Court does not have jurisdiction to make such a determination as Congress has specifically delegated such responsibility to the Secretary of the Department of the Interior." Id. at 21.

However, although the Court had specifically noted that plaintiffs' challenge to defendant's compliance with the captive-bred wildlife regulations was only "part" of plaintiffs' ESA challenge, Mem. Op. at 17, the Court did not specifically address plaintiffs' other claim concerning the captive-bred elephants – i.e., that defendant is violating the "take" prohibition of Section 9 of the statute, because it is engaging in practices that fall outside the coverage of the "captive-bred wildlife regulations," which is the basis of its "permit." See Complaint ¶ 96; Pl. SJ Opp. at 27-32; see also 16 U.S.C. § 1540(g) ("any person" may bring a citizen suit to enjoin any person "who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof") (emphasis added).

REASONS FOR RECONSIDERATION

A request for reconsideration may be granted if the Court "finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (internal citations and quotations omitted). Hence, the "moving party must show 'new facts or clear errors of law which compel the court to change its prior position.'" Scorah v. District of Columbia, No. 03-160, 2004 U.S. Dist. Lexis 27806 *5 (D.D.C. Dec. 17, 2004) (quoting National Ctr. For Mfg. Sciences v. DOD, 199 F.3d 507, 511 (D.C. Cir. 2000) (internal citation omitted)).

Plaintiffs respectfully suggest that this is one of the rare cases where reconsideration is appropriate. As discussed below, because the Court relied on defendant's misrepresentation that the Atlantic Green Sea Turtle case has not been vacated on the merits – when in fact it has been – the Court's summary judgment ruling contains a "clear error," Firestone v. Firestone, 76 F.3d at 1208, and one of substantial import because that was the principal precedent relied on by the Court. In addition, although plaintiffs had two separate claims with respect to defendant's captive-bred elephants – one involving violations of the "captive-bred wildlife regulations" – i.e., defendant's "permit" – and one involving violations of the statute that are not authorized by that permit, the Court addressed the first claim, but did not expressly address the second one. Thus, for reasons previously raised by plaintiffs, but unaddressed in the Court's ruling, plaintiffs' "take" claim should be allowed to go forward with respect to the captive-bred elephants even if the Court adheres to its ruling that plaintiffs' additional claim that defendant is also in violation of the "captive-bred wildlife regulations" may not proceed.

A. The Atlantic Green Sea Turtle Decision Should Not Be Relied On By This Court.

1. Atlantic Green Sea Turtle Was Vacated On The Merits By The Eleventh Circuit.

Contrary to the representations made by defendant in its Reply Brief, the district court's May 3, 2005 decision in Atlantic Green Sea Turtle was in fact vacated on the merits by the Eleventh Circuit on January 20, 2006. See Plaintiffs' Exhibit ("Pl. Ex.") 1. The plain language of the Eleventh Circuit's Order states:

> The 'Motion to Dismiss Appeal as Moot," also construed as a motion to vacate the district court's judgment and to remand with instructions to dismiss the action below as moot, is GRANTED. The judgment is hereby VACATED, and this matter is REMANDED with instructions to dismiss the action as moot.

See Order (January 20, 2006) (emphasis added); see also Westlaw Keycite History (Pl. Ex. 2) (red flag next to district court decision with history "*vacated as moot (Jan. 20, 2006)"*).[2]

The only "judgment" that was before the Eleventh Circuit was the same May 3, 2005 judgment on the merits on which this Court relied in its summary judgment ruling, and which the plaintiffs in that case had appealed. See Statement of the Issues, Plantiffs-Appellants' Brief, Appeal No. 05-13683-HH (11 th Cir.) (Pl. Ex. 3). Thus, when the FWS issued a new incidental take permit for the County in that case, the Department of Justice filed a motion to dismiss that appeal as "moot," and argued that "[b]ecause this case has become moot on appeal, the proper disposition is dismissal of the appeal, with an order vacating the judgment of the district court and remanding with instructions to dismiss as moot." See DOJ Motion to Dismiss (Pl. Ex. 4) at 2 (emphasis added). It is that motion, which said nothing about an award of attorneys' fees, that was granted by the

[2] Although this history is reported in Westlaw, apparently it is not reported in LEXIS, which both defendant and the Court cited.

Eleventh Circuit. See Pl. Exhs. 1, 3.

Therefore, because defendant's erroneous representation that the merits of that decision had not been vacated was central to this Court's summary judgment ruling, see Mem. Op. at 20-21, the Court should reconsider its ruling. Such reconsideration is especially warranted because the Court agreed that plaintiffs' had "correctly" distinguished the only other case cited by defendant for its argument that the citizen suit provision could not be used to challenge violations of an ESA permit, Mem. Op. at 20, and this Court's decision is now the only extant decision in the country that holds that the citizen suit provision of the ESA may not be used to challenge violations of permits issued under that statute.

2. The Reasoning Of Atlantic Green Sea Turtle Does Not Apply To This Case.

Relying on the reasoning of Atlantic Green Sea Turtle that because the word "permit" is contained only in the enforcement provisions of the ESA which pertain to enforcement by the Secretary of the Interior and does not appear in the citizen suit provision, the Court held that "Congress evidenced its intent to preclude private parties from permit enforcement." Mem. Op. at 19. However, although we recognize that the Court may certainly look to the reasoning of a vacated decision in deciding a legal issue, the reasoning of Atlantic Green Sea Turtle does not apply to this case for several reasons.

First, as this Court itself noted in its Opinion, here plaintiffs challenge defendant's compliance with "the CBW regulation," Mem. Op. at 16, including provisions of those regulations that in turn require all CBW registrants to also comply with other FWS "regulations," including a "regulation" that states that any wildlife possessed under a permit "must be maintained under

humane and healthful conditions," 50 C.F.R. § 13.41, and a "regulation" that states that registrants must also "comply with all conditions of the permit and with all applicable laws and regulations governing the permitted activity," 50 C.F.R. § 13.48. See Mem. Op. at 16-17 (emphasis added). Therefore, since the plain language of the citizen suit provision allows plaintiffs to bring a suit "to enjoin any person . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof," 16 U.S.C. § 1540(g)(1)(A), plaintiffs' claim that defendant is in violation of these various "regulations" falls squarely within the scope of that provision. Indeed, because it also constitutes a violation of Section 9 of the statute for "any person" to "violate any regulation pertaining to [an endangered] species," 16 U.S.C. § 1538(a)(1)(G) (emphasis added), this provides an additional basis for plaintiffs' claim under the plain language of the citizen suit provision. 16 U.S.C. § 1540(g)(1)(A).

Therefore, all of plaintiffs' claims against defendant fall squarely within the ESA citizen suit's plain language that should govern this Court's analysis – i.e. plaintiffs may seek to enjoin violations of both the ESA itself and "any regulation" issued under the authority of the statute. See, e.g., FMC Corp. v. Holliday, 498 U.S. 52, 57 (1990) ("[w]e begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose"). This result is particularly applicable here, where in contrast to the incidental take permit at issue in Atlantic Green Sea Turtle, which was issued to a single entity and included detailed terms and conditions that applied solely to that entity, see id., 2005 WL 1227305 *2, here the permit relied on by defendant is an entire set of "regulations" that were issued by the FWS in 1979 that apply to all entities that breed and exhibit endangered species in captivity, as long as they are "registered" under those regulations. See Pl. SJ Opp. at 7-9. Thus, as the FWS has explained

many times, "[i]n other words, the regulation itself contains the permit." 58 Fed. Reg. 68323, col. 3 (Dec. 27, 1993) (Pl. SJ Ex. E) (emphasis added); 63 Fed. Reg. 48634, 48635, col. 2 (Sept. 11, 1998) (Pl. SJ Ex. E)(same); see also Defendant's "Captive-Bred Wildlife Permit," Def. SJ Ex. 9 ("Acceptance of this permit serves as evidence that the permittee is registered under 50 CFR 17.21(g) and that the permittee understands and agrees to abide by the Special Conditions for Captive-bred Wildlife Registrations . . ."). Therefore, whatever validity the reasoning of Atlantic Green Sea Turtle may have to individual "permits" that are issued on a case by case basis, it does not apply to this case, which involves a "permit" that is embodied in a broad set of "regulations" that apply to all entities that breed and exhibit captive-bred endangered species.

Finally, while it is true as the Court notes, Mem. Op. at 19, that the Court must "give effect, if possible, to every clause and word of a statute," Bennett v. Spear, 520 U.S. 154, 173 (1997) (emphasis added), that is easily accomplished here, where the statutory enforcement remedies afforded the Secretary and those that may be pursued by private citizens may be construed as complementary, rather than exclusive. Thus, only the Federal government may assess "civil penalt[ies]" or bring criminal enforcement actions, including for violation of "permits." 16 U.S.C. § 1540(a), (b). However, citizens are expressly authorized to bring actions "to enjoin" any person from violating "any provision [of the Act] or regulation" implementing the Act, 16 U.S.C. § 1540(g)(1)(a) – including the captive-bred wildlife "regulations" and the general "regulations" governing permits.

Therefore, while citizens may not under the ESA ask a Court to impose civil or criminal penalties – remedies that are reserved solely to the Federal government – they most assuredly may seek to enjoin further violations of the statute or "regulations." Indeed, it is impossible to fathom

– and the district court in Atlantic Green Sea Turtle certainly did not suggest – why Congress would want citizens to enforce the ESA when entities are unlawfully taking species without a permit, but not when they are unlawfully taking species in violation of a "permit" that is designed to protect the species. In both situations, the harm inflicted on the species is the same.

Thus, should the Court adhere to its decision on this point, not only will this be the only extant ruling on this issue, but it will have extremely significant implications for the protection of all captive endangered and threatened species. It will mean that all captive-bred wildlife "registrants" are completely insulated from citizen suits under the ESA for any violations of not only the extensive "captive-bred wildlife regulations," see 50 C.F.R. § 17.21(g), but also the general regulations that apply to all holders of permits under the ESA, see 50 C.F.R. §§ 13.41, 13.48 – a result that runs counter to the plain language of the citizen suit provision, as well as the Supreme Court's observation that the citizen suit provision contains "an authorization of remarkable breadth." Bennett v. Spear, 520 U.S. at 155.

B. The Court Did Not Expressly Address Plaintiffs' Separate Claim That Defendant Is Violating Section 9 Of The Statute.

Although plaintiffs believe that they have presented adequate reasons why the Court should reconsider its entire ruling as to the captive-bred elephants, plaintiffs request that the Court, at minimum, allow them to pursue their separate claim that defendant is violating Section 9 of the statute by engaging in prohibited "take" activities that are not authorized by its "captive-bred wildlife registration." See Complaint ¶ 96. Thus, should the Court adhere to its ruling that plaintiffs may not use the citizen suit provision to challenge defendant's violation of the "terms and conditions" of its "permit" – i.e., the "captive-bred wildlife regulations" – this would mean only that

plaintiffs could not pursue their specific claim that defendant is violating the CBW regulations because it is not maintaining the elephants in a "humane and healthful" condition, as required by all CBW registrants, see 50 C.F..R. § 13.41, and that it is also not in compliance with "all applicable laws and regulations governing the permitted activity," 50 C.F.R. § 13.48, including the Animal Welfare Act. See Complaint ¶ 97; see also Mem. Op. at 21-22.

However, such a determination should not bar plaintiffs from pursuing their separate claim that defendant is violating the "take" prohibitions of Section 9 by engaging in activities that are not covered by defendant's CBW registration – i.e., that it is beating and striking elephants with bullhooks, keeping them chained most of the day and night, and forcibly separating baby elephants from their mothers to make these animals perform tricks in the circus. See Complaint at ¶ 96. As plaintiffs explained in their opposition to defendant's motion for summary judgment, Pl. SJ Opp. at 27-28, none of those activities are listed as permissible practices under the CBW regulations or defendant's "permit," nor, conspicuously, has defendant even asserted that these particular practices are authorized by the FWS.

In fact, defendant did not move for summary judgment on the grounds that these practices are allowed under its CBW registration as "normal husbandry practices." Instead, defendant confined its motion to arguing that very different practices – i.e., "use of the guide, tethering, and weaning" – are allowed under its "permit." See, e.g., Def. SJ Mem. at 27. Therefore, in granting judgment to defendant on plaintiffs' claim, the Court necessarily accepted defendant's characterization of the practices at issue in this case, rather than plaintiffs' version of those facts as is required when deciding a motion for summary judgment. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (court must view facts in the light most favorable to

the non-moving party). At the very least there is a significant factual dispute on this issue, which should also preclude the grant of summary judgment to defendant. See Fed. R. Civ. P. 56(c).

Furthermore, the FWS itself has emphasized that "physical mistreatment" of the animals – precisely what plaintiffs complain about here – falls outside the conduct that is allowed under the "captive-bred wildlife registration." See 63 Fed. Reg. at 48638, col. 3 (Pl. SJ Ex. E) (explaining that "physical mistreatment" of animals still "constitute[s] harassment" – i.e., an unlawful "take" under Section 9 – that is not allowed under the captive-bred registration). Hence, because defendant did not move for summary judgment on this particular claim, nor demonstrate that the specific activities about which plaintiffs complain are in fact permitted by its "CBW registration" because those practices are "normal husbandry practices," the Court's grant of summary judgment to defendant should not preclude plaintiffs from pursuing their additional claim that defendant is also violating the take prohibition in Section 9 by engaging in conduct that is not authorized by any permit that has been granted to defendant. Indeed, the statute itself provides that any entity wishing to rely on a "permit" as a defense to a Section 9 challenge – as defendant does in this case – "shall have the burden of proving that the . . . permit is applicable"). 16 U.S.C. § 1539(g) (emphasis added). Here, defendant conspicuously failed even to attempt to meet that burden with respect to the practices that plaintiffs have challenged.[3]

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[3] Pointing to an exchange of letters it had with the FWS at the same time that it was preparing its motion for summary judgment in this case, defendant asserted that since the FWS is "aware" of plaintiffs' allegations and yet has chosen not to revoke FEI's CBW registration, the alleged unlawful "takes" about which plaintiffs complain are therefore necessarily authorized by that registration. See Def. SJ Reply at 20. However, while FEI certainly tried mightily to convince the FWS to state that the specific actions about which plaintiffs complain do not violate the "take" prohibitions of the statute, see DX 24, in fact all that the FWS would say is that it has "no information in [its] files that would prompt [it] to review Feld Entertainment Inc.'s eligibility

Thus, it is beyond legitimate dispute that captive bred wildlife registrants are not authorized to engage in any conduct that constitutes a "take" of an endangered species, and that if they wish to engage in unlawful activities that are not authorized by the CBW registration, they must obtain a separate Section 10 permit to do so. The FWS has made this clear on a number of occasions. See, e.g., 44 Fed. Reg. 54002, 54005, col. 2 (Sept. 17, 1979) (Pl. SJ Ex. E) (explaining that CBW registrants wishing to "take" captive animals for scientific research would need a separate permit to do so because "authorization of activities for that purpose is beyond the scope" of the captive-bred wildlife regulations) (emphasis added); 58 Fed. Reg. at col. 1 (June 11, 1993) (Pl. SJ Ex. E) ("[h]olders of species . . . who do not qualify for a breeding program" under the CBW regulations are "required to obtain an interstate commerce permit for interstate purchases"); 63 Fed. Reg. 48634, 48635, col. 2 (September 11, 1998) (Pl. Ex. E) ("[i]nterstate or foreign commerce in the course of a commercial activity, with respect to non-living wildlife is not authorized under the CBW registration. To conduct such activities, separate permits must be applied for under the appropriate regulations for endangered or threatened wildlife") (emphasis added).

For example, a research facility that operates under the same "CBW registration" system as defendant, with respect to the endangered mangabey – a primate species – was required to obtain an additional Section 10 permit to engage in "take" activities that are not permitted under the CBW

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for holding a Captive-Bred Wildlife registration for captive Asian elephants." Compare DX 24 with DX 25. Not only does this statement not state that the actions about which plaintiffs complain are authorized by defendant's "CBW registration," but the mere fact that the FWS is not inclined to "review" FEI's eligibility for a CBW registration certainly does not mean that plaintiffs cannot avail themselves of the citizen suit provision of the ESA to challenge these activities as being unlawful. See also Bennett v. Spear, 520 U.S. at 165 (explaining that the "obvious purpose" of the broad citizen suit provision of the ESA is "to encourage enforcement" of the statute by "private-attorneys' general" in addition to the agency).

program. Compare Pl. Ex. 5 (CBW "permit" issued under the authority of the CBW regulations, 50 C.F.R. § 17.21(g), which allows the "take" of endangered primates "for normal husbandry practices") with Pl. Ex. 6 (a separate Section 10 permit, issued under the authority of 50 C.F.R. § 17.22, which also allows the permittee to "take sooty mangabeys . . . by collection of blood, [etc.] . . . for the purpose of scientific research"). Thus, that entity now holds both a captive-bred wildlife registration for its activities related to breeding and a Section 10 permit for other activities in which it engages that would otherwise be illegal. See id. Accordingly, here plaintiffs may challenge defendant's violation of Section 9 for engaging in "take" activities for which it does not have a permit – e.g., the beating of elephants to make them perform tricks in the circus – again, especially when defendant has never asserted, let alone met its burden to prove, that it does have a permit for these particular practices. See 16 U.S.C. § 1539(g).

Thus, in Loggerhead Turtle v. Council of Volusia County, 148 F.3d 1231, 1242 (11th Cir. 1998), the Court held that citizens could bring a Section 9 case against the County challenging the unauthorized "take" of listed turtles for allowing artificial lighting on the beach which in turn adversely affected the turtles' ability to lay their eggs, even though the County had a permit to "take" the turtles by allowing cars on the beach, and despite the additional fact that the mitigation measures contained in that permit specifically required the County to mitigate harm to the turtle caused by the lighting. Finding that the County "lacks the Service's express permission to take sea turtles . . . through artificial beachfront lighting," the Court held that the plaintiffs in that case could pursue their claim that this was an unauthorized "take" under Section 9 of the ESA. Id. Indeed, noting that as the Supreme Court observed in Tennessee Valley Authority v. Hill, 437 U.S. 153, 174 (1978), it is "beyond doubt that Congress intended endangered species to be afforded the highest of priorities,"

the Eleventh Circuit held that "[c]onsequently, permits that purport to excuse takes of wildlife must be clear on their face." 148 F.3d at 1246 (emphasis added).

Here, nothing on the face of FEI's CBW "permit" or in the CBW regulations authorizes defendant to beat and strike the elephants with bullhooks, keep them in chains for most of their lives, and forcibly remove extremely young elephants from their mothers before they are naturally weaned. Accordingly, for the same reasons recognized in Loggerhead Turtle, and under the plain language of the citizen suit – which allows suits to enjoin "violation[s] of [the statute]," 16 U.S.C. § 1540(g)(1)(A) – plaintiffs may pursue their claim that defendant is violating Section 9 by engaging in unauthorized conduct that "takes" these Asian elephants.

Indeed, even in Atlantic Green Sea Turtle, although the district court dismissed the part of the case that challenged the County's alleged violation of its "incidental take permit" limiting the volume of vehicles and artificial lighting the County could allow on the beach, that same court recognized that those plaintiffs could pursue their additional claim that the County was in violation of the statute because of the adverse impact its activities had on the endangered piping plover – a species that was not covered by the permit, since "[i]f an unauthorized 'take' has occurred, the ESA [citizen suit] provides a basis for injunctive relief." 2005 WL 1227305 at *19 (citing 16 U.S.C. § 1540(g)(1)(A)) (emphasis supplied).

Therefore, regardless of whether the Court reconsiders its ruling with respect to plaintiffs' specific additional claim that defendant's conduct "also violates [its] permit," Complaint ¶ 97, plaintiffs respectfully request that, at minimum, the Court reconsider its ruling insofar as it also forecloses plaintiffs from pursuing their separate claim that FEI is violating Section 9 of the statute by engaging in unlawful practices for which it has not obtained a permit, Complaint ¶ 96 – a

challenge that is clearly allowed under the plain language of the citizen suit provision. See 16 U.S.C. § 1540(g).

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that this Court reconsider its grant of partial summary judgment with respect to the captive-bred Asian elephants.

Respectfully submitted,

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