ATTACHMENT B

United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

REBECCA ANN CARY, et al,

Plaintiffs,

v

DALE HALL, et al,

Defendants,

_____

SAFARI CLUB INTERNATIONAL, et al,

Intervenor-Applicants.

_____/

No C 05-4363 VRW

ORDER

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

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

I

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

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

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

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

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

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

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

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

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

II

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

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

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

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

III

Section 10(a) of the ESA

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

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

A

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

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

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

As Justice Scalia explained in Lujan:

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

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

At the least, Dr Clark has alleged a connection with the 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.

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

2

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

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

3

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

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

B

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

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

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

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

wild —— all because these hunters picked up the signal.[1] This is just so much speculation.

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

Elephants and sea turtles are not antelope and plaintiffs have not adduced any facts suggesting a black market in the three antelope species (notwithstanding that it has long been legal to hunt captive-bred members in the United States). Further,

[1] The parties have not briefed whether it is illegal to hunt the three antelope species in their indigenous ranges and, if so, whether and how that would properly bear upon standing.

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

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

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

C

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

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

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

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

Lujan, 504 US at 562.

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

IV

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

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

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

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

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

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

A

"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

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

In pertinent part, § 10(c) provides:

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

16 USC § 1539(c) (emphasis added).

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

The District of Columbia Circuit addressed the 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

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

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

B

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

1

The parties do not dispute that plaintiffs' first claim

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

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

Akins confirms that a focused approach to zone-of-interests analysis is appropriate in the context of informational injury. Akins arose under the Federal Election Campaign Act (FECA). The Supreme Court has recognized that FECA's "primary purpose" is "to limit the actuality and appearance of corruption resulting from large individual financial contributions." Buckley v Valeo, 424 US 1, 26 (1976). Yet Akins concerned not the "better-known contribution and expenditure limitations" associated with this primary purpose, but rather the FECA's "extensive recordkeeping and disclosure requirements." 524 US at 14. Specifically, plaintiffs in Akins challenged the Federal Election Commission's decision not to treat a particular organization as a "political committee" within the meaning of FECA. Such treatment would have triggered FECA's recordkeeping and disclosure requirements. Because FECA specifically authorized the lawsuit in language indicating congressional intent to "cast the standing net broadly," the zone-of-interests component of prudential standing was not implicated. Id at 19-20. The Court nonetheless briefly engaged in zone-of-interests analysis, concluding that plaintiffs' "failure to obtain relevant information" was "injury of a kind that FECA seeks to address." Id at 20.

2

Published notice and public availability of information generated in connection with § 10 permit applications make meaningful the participation of interested parties in the process of determining whether to allow an otherwise prohibited activity with respect to an endangered species. Section 10(c) protects the

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

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

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

C

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

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

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

IV

Section 7 of the ESA

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

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

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

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

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

> the FWS, as the consultation agency, issued a Biological Opinion allowing the Bureau of Reclamation, as the action agency, to undertake a water reclamation project subject to certain conditions. Although the Bennett [C]ourt held that the FWS could not be sued for maladministration of the ESA under 16 USC § 1540(g)(1)(A), the Court expressly recognized that citizen suits are a 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).

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

V

NEPA

"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.

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

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

VI

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

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

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

SO ORDERED.

VAUGHN R WALKER

United States District Chief Judge

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