UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al.,	)	
Plaintiffs,	)	
v.	)	**Civ. No. 03-2006 (EGS/JMF)**
FELD ENTERTAINMENT, INC.,	)	
Defendant.	)	

PLAINTIFFS' BRIEF REGARDING THE PLAINTIFF ORGANIZATIONS' STANDING TO BRING SUIT IN THIS CASE

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February 23, 2009

BACKGROUND

In deciding that Mr. Rider had alleged sufficient standing to pursue this lawsuit, the Court of Appeals made it clear that it was not deciding whether the organizational plaintiffs also have standing, "because each of them is seeking relief identical to what Rider seeks." ASPCA v. Ringling Bros., 317 F.3d 334, 338 (D.C. Cir. 2003) (emphasis added). Several years after that decision was issued, the Animal Protection Institute ("API") joined the suit. See DE 180 (Feb. 2006). Hence, this Court has never had occasion to address the standing of API.[1]

Moreover, despite FEI's insistence that the Pre-Act elephants that it currently holds in captivity are not subject to the "take" prohibition of Section 9 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1538, in denying FEI summary judgment on this issue in 2007, this Court already ruled that these elephants are subject to that provision of the statute. See Mem. Op. (DE 173) (Aug. 23, 2007), at 7-15. Accordingly, pursuant to the plain language of the ESA, FEI may not engage in any activity that "takes" the Asian elephant except as permitted by Section 10 of the statute. See 16 U.S.C. § 1538(a)(1) ("except as provided in section[] . . . 1539 [Section 10] of this title" it is unlawful to "take" any endangered species of fish or wildlife that is listed as endangered).

Section 10 in turn provides the Fish and Wildlife Service ("FWS") with limited authority to issue permits for activities that are otherwise prohibited by section 9 "for scientific purposes or to enhance the propagation or survival of the affected species . . . ." 16 U.S.C. § 1539(a)(1)(A) (emphasis added). Section 10(c) further provides that each such application for a permit "shall" be published in the Federal

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[1] It is also well-settled that this Court may also revisit any of its prior rulings on standing, particularly in light of more recent authorities. See Fed. R. Civ. P. 54(b) (the court may revise its own interlocutory rulings "at any time before the entry of judgment adjudicating all the claims and all the parties' rights and liabilities"); Childers v. Slater, 197 F.R.D. 185, 190 (D.D.C. 2000) (the court may reconsider any interlocutory judgment "as justice requires") (quoting Fed. R. Civ. P. 60(b)). However, because API clearly has standing, the Court need not reach the question of the other organizations' standing. See Mass. v. Envtl. Prot. Agency, 549 U.S. 497, 518 (2007) ("[o]nly one of the [plaintiffs] needs to have standing").

Register, and that all "interested persons" "shall" be afforded an opportunity to submit "written data, views, or arguments with respect to the application," and that "[i]nformation received by the [FWS] 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) (emphasis added). Section 10(d) further provides that the FWS may grant a permit "only" if it finds "and publishes in the Federal Register" that "such exception" (1) "was 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 Act. Id. § 1539(d). The Legislative History emphasizes that these procedural requirements were included "to limit substantially the number of exemptions that may be granted under the Act." H. R. Rep. No. 93-412, at 17 (1973), reprinted in "A Legislative History of the Endangered Species Act of 1973," at 156 (1982) ("Legislative History") (Plaintiffs' Attachment ("Pl. Att.") A).

As demonstrated below, based on the testimony of Nicole Paquette and supporting exhibits, as well as the pertinent legal precedents, API has Article III standing in this case (and accordingly may seek relief with respect to the Pre-Act elephants), because FEI has never sought a permit to engage in any of the activities that plaintiffs allege "take" the Asian elephants, as required by Sections 9 and 10 of the ESA. As a direct result of FEI's failure to abide by the process mandated by Congress, API suffers informational injury because it is being deprived of all of the information to which the organization is statutorily entitled under ESA Sections 10(c) and (d), and their implementing regulations. 50 C.F.R. § 17.22. API also suffers related organizational injuries because, by virtue of FEI's failure to comply with the ESA, the organization is forced to spend resources on other means of acquiring such information, and on advocating the end to practices that constitute the unlawful "take" of an endangered species.[2]

[2] FEI has mistakenly asked the Court to draw significance from the fact that, in an unrelated case, some of the plaintiffs in this case had "[n]otably" not alleged that the treatment of elephants

ARGUMENT

To satisfy the "case or controversy" requirements of Article III, plaintiffs must demonstrate that: (1) without judicial relief they will suffer an "injury in fact"; (2) the injury is "fairly traceable" to the defendant's actions; and (3) a favorable judicial ruling will "likely" redress plaintiffs' injuries. Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., Inc., 528 U.S. 167, 180-81 (2000). As demonstrated below, API meets all of these requirements.

API Is Suffering Both Informational And Organizational Injuries As A Result Of FEI's Failure To Apply For And Obtain A Permit Under Section 10 of the ESA

API is suffering informational injury because, as a direct result of FEI's taking of Asian elephants without applying for a permit under Section 10 of the ESA, 16 U.S.C. § 1539, API is being deprived of information that it is statutorily entitled to receive and disseminate to its members. Indeed, it is important to emphasize that because FEI has taken the erroneous position that all of the Pre-Act elephants are automatically exempt from the "take" prohibitions and associated permitting requirements of the statute – a position which this Court ruled was incorrect as a matter of law, see DE 173 – FEI has never applied for or received a Section 10 permit with respect to any of these elephants.[3]

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who were being removed from the wild in Swaziland and who would be chained and trained with bull hooks would therefore be "taken" in violation of Section 9. See Def. Resp. to the Court's Inquiry of Feb. 6, 2009 (DE 417) at 8. However, unlike the Asian elephants at issue in this case, which are listed as "endangered" (thereby making any "take" of the species unlawful), the elephants at issue in the other case were African elephants – which are currently listed only as "threatened," and, by special regulation issued by the FWS, are not covered by the ESA's "take" prohibition. 50 C.F.R. § 17.40 (special rule governing prohibitions on the import and export of African elephant which does not include a prohibition on "take").

[3] On the other hand, the FEI elephants that were born in captivity are covered by the "captive-bred wildlife registration" system that the FWS promulgated under Section 10. It is because those elephants are already covered by a Section 10 permit that this Court ruled plaintiffs could not pursue a citizen suit with respect to those elephants. See DE 173 at 15-23.

Accordingly, if plaintiffs are correct that routinely striking the elephants with bull hooks and keeping them chained on hard surfaces for many hours each day, and for days at a time when they travel on the train, constitute the unlawful "take" of these elephants, FEI could only engage in such practices by obtaining a permit under Section 10 that would allow some or all of these activities to continue. See also Pl. Complaint at 21 (requesting an order from the Court "enjoining defendants from beating, wounding and injuring endangered elephants . . . and keeping elephants on chains for most of the day, unless and until it obtains permission to do so from the FWS pursuant to the procedural and substantive requirements of section 10 of the ESA") (emphasis added).

In turn, Section 10 of the Act provides that notice of "each application" for such a permit "shall" be published in the Federal Register, and that all "[i]nformation received by the [FWS] as part of any application shall be available to the public." 16 U.S.C. § 1539(c) (emphasis added). In Gerber v. Norton, 294 F.3d 173 (D.C. Cir. 2002), the Court of Appeals held that these affirmative disclosure requirements are mandatory, as the words of the statute clearly dictate. Id. at 179-82. Section 10(d) further provides that the FWS may not grant any permit under that provision without making and publishing in the Federal Register certain "findings," including that the permit will be consistent with the purposes and policies of the ESA. 16 U.S.C. § 1539(d).

Therefore, here, because FEI "takes" endangered Asian elephants by "wounding," "harming," and "harassing" them, see id. § 1532(19) (definition of "take"), without making any effort to comply with the statutory permitting process, API has been denied all of the information to which it is statutorily entitled under both Sections 10(c) and (d), as well as the information that is required by the regulations that further implements those requirements. See e.g., 50 C.F.R. § 17.22(a)(1)(vii) (requiring a permit applicant to submit "[a] full statement of the reasons why the applicant is justified in obtaining a permit

including the details of the activities sought to be authorized by the permit"); id. § (vi) (also requiring a "complete description [of the] facilities to house and/or care for the wildlife and a resume of the experience of those persons who will be caring for the wildlife").

The Supreme Court held in both Federal Election Commission v. Akins, 524 U.S. 11 (1998), and Public Citizen v. U.S. Dep't of Justice, 491 U.S. 440 (1989), that informational injury is implicated when plaintiffs are effectively denied information to which they would otherwise be entitled by statute. Thus, in Akins, the Court held that plaintiffs were injured by the fact that a certain entity was not filing information that is required of all "political committees" under the Federal Election Campaign Act, and which the plaintiffs had a statutory right to obtain. See 524 U.S. at 20. Similarly, in Public Citizen, the Court noted that individuals who are denied information under the Federal Advisory Committee Act suffer informational injury – and hence have standing to challenge that denial of information – based simply on the fact that they were denied information to which they are entitled under the statute. 491 U.S. at 449. Even further, in Havens Realty Corp. v. Coleman, 455 U.S. 363, 373-74 (1982), the Supreme Court held that individuals had suffered informational injury for purposes of satisfying Article III when they were provided false information about the availability of housing in violation of the Fair Housing Act.

Likewise, here, by taking members of a listed species without even applying for a Section 10 permit with respect to the Pre-Act elephants now at issue, FEI has deprived API of its statutory right to all of the information that must be disclosed under ESA Section 10(c) and Section 10(d). This is indistinguishable from the kind of informational injury deemed to suffice for standing under Akins, Public Citizen, and Havens Realty. Indeed, under analogous circumstances where the plaintiff's "injury in fact [wa]s the denial of information he believes the law entitles him to," the Court of Appeals recently ruled

that such a plaintiff "plainly has standing under FEC v. Akins." Shays v. FEC, 528 F.3d 914, 923 (D.C. Cir. 2008).

Moreover, in another case involving Section 10 of the ESA, Chief Judge Vaughn Walker of the Northern District of California ruled that such an informational injury is cognizable under section 10(c) of the ESA. See Cary v. Hall, Civ. No. 06-04363 (N.D. Ca. Oct. 3, 2006), Slip. Op. at 18-23 (Pl. Att. B). Thus, based on the plaintiffs' averments that they follow and participate in the Section 10 permitting process, and use the information made available through that process in their work, the court found that the plaintiffs in that case had standing to pursue their claim. Id. The evidence now before the Court concerning API similarly demonstrates that organization's standing here. See Trial Testimony of Nicole Paquette (Feb. 19, 2009) (afternoon session) ("2/19/09 Tr. Test.").[4]

Thus, Ms. Paquette's testimony demonstrates that API is being injured in at least two distinct, but related, ways by FEI's failure to comply with its obligation to apply for a Section 10 permit. First, API is hampered in its ability to keep its members and the public informed about what FEI is doing with respect to the Asian elephants. As she explained, the purpose of the organization's public education work is to "educate our members about what goes on within the animal circuses," including the "general abuse that goes on with the use of the bull hook and the chains," because the use of elephants in the circus is an issue that API's members "care deeply about." See 2/19/09 Tr. Test. at 4-5. Ms. Paquette further testified that API spends considerable resources on disseminating such information to their

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[4] While Judge Walker left open the issue of whether plaintiffs also suffer informational injury because of the elimination of the "findings" required by section 10(d), see Cary, Slip Op. at 24, API clearly also suffers that injury here, since the Section 10(d) "findings" that the FWS must publish in the Federal Register are integral to the entire Section 10 process – i.e., they require the agency to articulate the basis for each of its decisions to grant an exception to the prohibitions of the statute by explaining how granting the requested exception is "consistent with the purposes" of the ESA. 16 U.S.C. § 1539(d).

members and the public in general. Id. at 6-25. She also testified that API regularly monitors the Federal Register and submits comments on applications for permits under the ESA, id. at 28, and that if API had access to the information that is required by Section 10, it would definitely use that information in its advocacy work. Id. at 34.

Accordingly, as in Cary, as a consequence of FEI's refusal to apply for a permit under Section 10 of the ESA, API is being deprived of exactly the information Congress intended to afford when it adopted the Section 10 process. API is therefore suffering a cognizable Article III injury.

The mere fact that API has obtained some of this information through the discovery that has been afforded by this lengthy litigation – as suggested by FEI's attorney at the trial last week, see id. at 82 – does not undermine API's statutory right to all of the information that is generated by the Section 10 process. Moreover, this litigation (and hence the discovery) is focused on the threshold issue of whether a "take" is occurring; in sharp contrast the permitting process would focus on whether that take should be authorized, and if so, under what conditions. It also cannot substitute for API's right, under the statute, to present its views to the FWS regarding the matter. See 50 C.F.R. § 17.22(a)(2)(V). Thus, FEI's self-serving presentation of its activities cannot legally substitute for the statutory "findings" that would result from the permitting process under Section 10, including a "finding" by the expert agency, after compiling an Administrative Record, that FEI's practices are "consistent" with the policies of the ESA. See 16 U.S.C. § 1539(d); see also Loggerhead Turtle v. County Council of Volusia County, Fla., 896 F. Supp. 1170, 1180 (M.D. Fla. 1995).

Indeed, FEI's argument highlights the second way in which API is injured here – as a direct consequence of FEI's unlawful practices, and failure to abide by the statutory scheme, API spends its own resources advocating for the elephants, and also obtaining as much information as it can about the

circus through alternative means, which in turn results in a "concrete drain on [its] time and resources." See Spann v. Colonial Village, Inc., 899 F.2d 24, 29 (D.C. Cir. 1990); see also 2/19/09 Tr. Test. at 38-39. Thus, the Supreme Court recognized in Havens Realty that a nonprofit organization "suffered injury in fact" due to unlawful and discriminatory housing practices that "impaired" the organization's "ability to provide counseling and referral services for low-and-moderate-income home seekers." 455 U.S. at 379 (internal citations omitted). The Court further held that the "concrete and demonstrable injury to the organization's resources" from this practice was "far more than simply a setback to the organization's abstract social interests," thus establishing the necessary concrete injury required by Article III. Id.

Similarly, in Action Alliance of Senior Citizens v. Heckler, 789 F.2d 931 (D.C. Cir. 1986), an organization that worked to "improve the lives of elderly citizens" "through informational, counseling, referral, and other services" had standing to challenge "HHS-specific" regulations that deprived them of information that otherwise would have been available under the agency's "general regulations." Id. at 937. The organization "adequately alleged a direct, adverse impact on its activities," because the "HHS-specific regulations" "cut short" the "information secured by the general regulations," thus, impacting the organization's "capacity" to counsel and refer its members when they were unlawfully discriminated against. Id.

More recently, upon observing that it "has applied Havens Realty to justify organizational standing in a wide range of circumstances," the Court of Appeals held that an organization that "assist[ed] its members and the public in accessing potentially life-saving drugs" through "counseling, referral, advocacy, and educational services" had standing to challenge Food and Drug Administration regulations that prevented terminally ill patients from receiving potentially life saving drugs that had not

undergone the agency's rigorous approval process. Abigail Alliance for Better Access to Dev. Drugs v. Eschenback, 469 F.3d 129, 133 (D.C. Cir. 2006). The Court held that the organization had demonstrated sufficient injury in fact because, as a result of the regulations, it had "to divert significant time and resources from [its] activities toward helping its members and the public address the unduly burdensome requirements that the FDA imposes on experimental treatments." Id. at 132-33.

Likewise, here, as a result of FEI's circumvention of the Section 10 permitting process, API has shifted time and resources used to carry out other activities that further its organizational goals to its advocacy efforts for these elephants, and to obtaining information on the Ringling Bros. circus and the manner in which FEI treats the endangered Asian elephants in its custody. See 2/19/09 Tr. Test. at 29-39. This diversion of resources therefore harms API's "capacity" to provide its members with the services upon which they rely. Action Alliance, 789 F.2d at 937. These injuries – both the deprivation of information and the drain on the organizations' resources – are precisely the kinds of perceptible "injuries in fact" that the Supreme Court and the D.C. Circuit have long recognized are sufficient for purposes of Article III. See Akins, 524 U.S. at 20; Shays, 528 F.3d at 923; Havens Realty, 455 U.S. at 379; Action Alliance, 789 F.2d at 937.

Moreover, because API's informational and organizational injuries are both "fairly traceable" to defendant's conduct, Bennett v. Spear, 520 U.S. 154, 167 (1997), and would be remedied if FEI would comply with the statutory scheme, API has also demonstrated sufficient causation and redressability for purposes of Article III. See Meese v. Keene, 481 U.S. 465, 476-77 (1987). Indeed, the relief that plaintiffs have requested will redress the organizational plaintiffs' injuries because it will mean that FEI will either be precluded from treating the Asian elephants in a way that "takes" them, or it will have to obtain authorization from the FWS to engage in practices that constitute a "take" of the

animals, in which case the agency may either deny the permit or place important restrictions on how FEI treats these animals in the future. See, e.g., 50 C.F.R. § 13.41 ("[a]ny live wildlife possessed under a permit must be maintained under humane and healthful conditions"); id. § 13.47 ([a]ny person holding a permit . . . shall allow the Director's agent to enter his premises at any reasonable hour to inspect any wildlife"); see also Gerber v. Norton, 294 F.3d at 185-86 (observing that conditions may be imposed on the permitted "incidental take" of the endangered fox squirrel to mitigate the impacts from the take). Any of these results will reduce the amount of resources API and the other organizational plaintiffs will need to spend monitoring defendant's treatment of Asian elephants; reporting their findings to their members, the public, and regulatory authorities; and advocating better treatment of these endangered animals.[5]

CONCLUSION

For all of these reasons, API has standing to pursue the claims in this suit.

Respectfully submitted,

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[5] As plaintiffs have noted, the Court could, as part of a remedial order, direct FEI to apply for a permit. Such relief would also redress Mr. Rider's aesthetic injuries, because it would mean that the elephants he knows would receive the protections provided by the statutory scheme in order to authorize and appropriately mitigate actions that "take" listed species.

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