**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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

**PLAINTIFFS' NOTICE OF RECENT AUTHORITY**

Plaintiffs hereby give notice of a recent decision by the Court of Appeals for the D.C. Circuit that is relevant to plaintiffs' standing arguments in this case. In *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, No. 08-5490 (D.C. Cir. Oct. 9, 2009) (copy attached), the court held that the plaintiff had alleged sufficient Article III standing under the Federal Advisory Committee Act ("FACA") because it suffered informational injury as a result of being denied information that must be provided to it under FACA. The advisory committee itself was not named as a defendant to the lawsuit, which was instead brought pursuant to the Administrative Procedure Act against the federal agency that was unlawfully relying on that committee for advice. The court held that the causation and redressability prongs of standing were met because, under FACA, the agency itself is subject to an FACA obligations that are "entirely within its power to discharge," Slip. Op. at 3-4, and compliance with which would result in the plaintiff organization receiving information that is required by statute.

Similarly here, plaintiff Animal Protection Institute ("API") has demonstrated that it suffers informational injury as a direct result of defendant Feld Entertainment Inc.'s practice of

engaging in practices that require a permit under the Endangered Species Act ("ESA") – i.e., taking the Asian elephants in violation of section 9 of that statute – without obtaining such a permit. Because plaintiffs have proven that defendant's conduct cannot take place without a permit, and because the ESA regulations plainly require FEI to obtain a permit under those circumstances, API's deprivation of information required by the section 10 permitting process is caused directly by FEI's conduct. See 50 C.F.R. § 13.1 ("[e]ach person intending to engage in an activity for which a permit is required by this subchapter B shall, before commencing such activity, obtain a valid permit authorizing such activity") (emphasis added). In short, API has demonstrates that FEI has failed to apply for and obtain a valid permit with respect to its bull hook and chaining practices, which clearly "take" the endangered elephants, and that, as a result, API has been denied information to which it is entitled under section 10 of the Act, 16 U.S.C. § 1539(c). See Supplemental Complaint (Docket No. 55) at ¶ 6 ( "Defendants 'taking' of elephants without permission from the Fish and Wildlife Service pursuant to the process created by section 10 of the Endangered Species Act violates API's and its members' statutory right to obtain the information generated by the section 10 process").

Accordingly, as in the *Judicial Watch* case, plaintiffs have sued the entity that is causing its informational injury under the pertinent statutory and regulatory schemes. In *Judicial Watch*, the federal agency caused the injury by allegedly relying on an illegal advisory committee. Here, no federal agency has authorized FEI to take the endangered Asian elephants without a permit, and hence API's informational injury cannot step from conduct of an agency. Rather, here, the informational injury can only be attributed to FEI because it refuses to apply for the permit that is required under 50 C.F.R. § 13.1 and sections 9 and 10 of the ESA. Thus, by operation of law,

50 C.F.R. § 13.1, if this Court agrees that any of the challenged activities at issue here constitute a "take" of the endangered elephants because they "wound, harm, or harass" the elephants, FEI is required to apply for a permit under section 10, and API is entitled to obtain all of the information that is submitted as a part of that application "at every stage of the proceeding." 16 U.S.C. 16 U.S.C. § 1539(c). Hence, as in *Judicial Watch*, application for such a permit – which in turn triggers the Section 10 process – is "entirely within [FEI's] power to discharge." *Judicial Watch*, Slip Op. at 3-4.

*Judicial Watch* is also relevant for another reason. There, the government argued that the case should be dismissed because, pursuant to the Freedom of Information Act, the defendant agency had provided plaintiff with some of the information it sought under FACA. The Court of Appeals rejected that argument because the scope of information that was obtainable under FACA was broader than what the plaintiff could obtain under FOIA. See Slip Op. at 4-5. Here, similarly, there is no basis to FEI's contention that API cannot show any informational injury because it has been able to obtain information about FEI's practices through discovery in this case. The information that FEI must provide to the FWS to obtain a section 10 permit, including e.g., a demonstration that FEI's practices that "take" the endangered elephants are necessary to "enhance the propagation or survival" of this species, 16 U.S.C. § 1539(a)(1)(A), is very different than the information plaintiffs obtained in discovery to demonstrate that FEI's practices in fact "take" the elephants in myriad ways.

Respectfully submitted,

*/s/ Katherine A. Meyer*
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