UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

REPLY IN SUPPORT OF DEFENDANT FELD ENTERTAINMENT, INC.'S MOTION FOR ENTITLEMENT TO ATTORNEYS' FEES

EXHIBIT 22

[ORAL ARGUMENT SCHEDULED FOR NOVEMBER 5, 2002]
No. 01-7166

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

American Society for the Prevention of Cruelty to Animals, *et al.*,

Appellants,

v.

Ringling Brothers and Barnum & Bailey Circus, *et al.*,

Appellees.

On Appeal From Rulings of The United States District Court
for the District of Columbia

BRIEF OF PLAINTIFFS-APPELLANTS

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July 24, 2002

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

American Society for the Prevention of Cruelty to Animals, *et al.*,	)	
Plaintiffs-Appellants,	)	
v.	)	No. 01-7166
Ringling Brothers And Barnum & Bailey Circus, *et al.*,	)	
Defendants-Appellees.	)	

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), plaintiffs-appellants submit the following statement.

A. **Parties**: The Plaintiffs in this case are the American Society for Prevention of Cruelty to Animals, Animal Welfare Institute, Fund for Animals, and Tom Rider. The Defendants are Ringling Brothers and Barnum & Bailey Circus, and Feld Entertainment, Inc.

B. **Rulings Under Review**: Plaintiffs seek review of a June 29, 2001 ruling by the District Court of the District of Columbia (Sullivan, J.) which granted defendants' motion to dismiss for lack of Article III standing, and they also seek review of the District Court's September 4, 2001 denial of plaintiffs' motion for reconsideration.

C. **Related Cases**: Plaintiffs-appellants know of no related cases.

Respectfully submitted,

Katherine A. Meyer
Eric R. Glitzenstein
Jonathan R. Lovvorn

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GLOSSARY

APA	Administrative Procedure Act
AWA	Animal Welfare Act
CBW	Captive Bred Wildlife
ESA	Endangered Species Act
FWS	Fish and Wildlife Service
USDA	United States Department of Agriculture

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STATEMENT OF JURISDICTION

The district court had jurisdiction over this case pursuant to the Endangered Species Act, 16 U.S.C. § 1540(g), the Administrative Procedure Act, 5 U.S.C. § 706, and 28 U.S.C. § 1331. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATUTES INVOLVED

The pertinent provisions of the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, are set forth in the Addendum to this brief.

ISSUE PRESENTED

Did the district court err in granting defendants' motion to dismiss, for lack of Article III standing, a case under the Endangered Species Act challenging the unlawful "harming" and "harassing" of endangered Asian elephants by defendant Ringling Brothers and Barnum & Bailey Circus, where plaintiffs include (1) a former Ringling Brothers employee who worked with the elephants and formed a strong personal attachment to them; and (2) organizational plaintiffs that have suffered informational injury by being deprived of information to which defendants are required by law to submit to the Fish and Wildlife Service under section 10 of the Endangered Species Act?

I. NATURE OF THE CASE

Plaintiffs-appellants the American Society for Prevention of Cruelty to Animals, the Fund for Animals, the Animal Welfare

Institute, and Tom Rider - a former Ringling Brothers employee - brought this case against defendant Ringling Brothers and Barnum & Bailey Circus ("Ringling Bros.") under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, which prohibits the "taking" of any "endangered species," including those held in captivity. The term "take" is defined by the Act to include the "harming" or "harassing" of any such species.

Plaintiffs allege that Ringling Bros. is in violation of this statutory prohibition because it routinely beats and hits its Asian elephants - an "endangered species" - keeps them chained for long periods of time, and forcibly removes the baby elephants from their mothers with the use of ropes and chains, as part of its overall effort to control the animals and train them to perform tricks.

On June 29, 2001, the district court (Sullivan, J.) granted Ringling Bros.' motion to dismiss the case for lack of Article III standing. Although the Complaint states that plaintiff Tom Rider worked for Ringling Bros. for 2 ½ years, formed a strong personal attachment to the elephants, had to quit his job because he could no longer tolerate the way the elephants were treated by defendants, and is unable to visit, observe, or work with the animals without suffering more aesthetic and emotional injury, the district court held that Mr. Rider had not alleged a

"presently suffered aesthetic injury." Memorandum Opinion and Order at 6; Joint Appendix (J.A.) at 114. The district court also ruled that the organizational plaintiffs lacked standing because any informational injury they suffered was caused by the federal agency responsible for enforcing the statute, not by defendants.

Plaintiffs moved for reconsideration on the grounds that, in its recent standing decision, Friends of the Earth, Inc. v. Laidlaw Environmental Servs., 528 U.S. 167 (2000), the Supreme Court ruled that individuals who used a particular river in the past, but had curtailed their recreational use of the river for fear that it was polluted by defendants' illegal discharge of pollutants, were suffering a present "injury-in-fact" for standing purposes. By the same token, plaintiffs asserted, an individual who, because of defendants' unlawful treatment of the animals, felt compelled to curtail his working with and enjoyment of the elephants that he had come to love, had standing to bring a challenge under the Endangered Species Act. Plaintiffs contended that, at a minimum, Mr. Rider's allegations were certainly sufficient to survive a motion to dismiss.

On September 5, 2001, the district court denied the motion for reconsideration on the grounds that Mr. Rider is not "prevented from using and enjoying public resources, as was the

case in Laidlaw." (J.A. 127). Plaintiffs have appealed both the grant of the motion to dismiss and the denial of the motion for reconsideration.

II. STANDARD OF REVIEW

Issues of standing are reviewed *de novo*. Navegar, Inc. v. United States, 103 F.3d 994,997(D.C. Cir. 1997).

III. STATEMENT OF THE CASE

To place plaintiffs' standing allegations in context, it is necessary to describe the applicable statutory and regulatory framework that applies to endangered species held in captivity, and to set forth the specific factual allegations in plaintiffs' Complaint.

A. The Statutory and Regulatory Framework

1. The Endangered Species Act

The Endangered Species Act is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." TVA v. Hill, 437 U.S. 153, 180 (1978). Finding that many species of wildlife "have been so depleted in numbers that they are in danger of or threatened with extinction," Congress has declared that these species "are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." 16 U.S.C. § 1531(a). Accordingly, the overall purpose of the statute is to

"conserve" endangered and threatened species - i.e., to use "all methods and procedures which are necessary" to bring these species back to the point at which they no longer need the protections of the Act to survive. 16 U.S.C. §§ 1531(c), 1532(3).

a) **The Prohibitions In Section 9 of the Act**

Section 9 of the Act prohibits the "taking" of any endangered species within the United States. 16 U.S.C. § 1538(a). An "endangered species" is "any species which is in danger of extinction," 16 U.S.C. § 1532(6), and the term "take" is broadly defined to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." 16 U.S.C. § 1532(19). The Fish and Wildlife Service ("FWS") - the agency that administers the statute - has further defined the term "harass" to mean "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering." 50 C.F.R. § 17.3.

Under section 9, it is also unlawful to "possess, sell, deliver, carry, transport, or ship" any endangered species that is unlawfully "taken," and it is likewise unlawful to "deliver, receive, carry, transport, or ship in interstate or foreign

commerce . . . in the course of a commercial activity, any such species." 16 U.S.C. §§ 1538(a)(1)(D)-(E). It is also unlawful to "violate any regulation pertaining to such species" that is promulgated by the FWS. Id. § 1538(a)(1)(G).

Under the plain language of the statute, all of the prohibitions of section 9 apply to both endangered animals living in the wild and those held in captivity. See, e.g., 16 U.S.C. § 1538(a)(1) (prohibits the taking of "any endangered species of fish or wildlife"); 16 U.S.C. § 1532(8) ("fish or wildlife" means "any member of the animal kingdom"). Thus, as the FWS itself has explained, "the Act applies to both wild and captive populations of a species," since "[c]aptive propagation and other uses of captive wildlife can benefit wild populations" by "[i]ncreasing the likelihood that captive breeding populations will be established as a source of known genetic stock to bolster or reestablish populations in the wild;" "[r]educing the need to take stock from the wild for scientific or other purposes;" and "[p]roviding opportunities for research that can lead to improved management of wild populations." 44 Fed. Reg. 30044-45 (May 23, 1979) (emphasis added) (J.A. 30-31); 63 Fed. Reg. 48634, 48636 (September 11, 1998)(J.A. 58)(explaining that "take" was defined by Congress to apply to endangered or threatened wildlife "whether wild or captive") (emphasis added).

b) Section 10 Permits For Acts That Are Otherwise Unlawful

Section 10 of the ESA affords the FWS limited authority to issue permits to allow 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). This limited exception allows what would normally be a "taking" or other prohibited act, where such activity will benefit the species in the wild - e.g., by breeding more of the endangered animals who can then be returned to the wild. See, e.g., H. Rep. No. 412, 93d Cong., 1st Sess. 17 (July 27, 1973), reprinted in "A Legislative History of the Endangered Species Act of 1973," 97th Cong., 2d Sess. (February 1982) at 156 ("Any such activities to encourage propagation or survival may take place in captivity . . . so long as this is found to provide the most practicable and realistic opportunity to encourage the development of the species concerned") (emphasis added).

The statute further provides that the FWS "shall publish notice in the Federal Register of each application for an exemption or permit," that each such notice "shall invite the submission from interested parties . . . of 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." 16 U.S.C. § 1539(c). Section 10 further provides that the FWS may "only" grant a permit if it finds "and publishes in the Federal Register" that the permit (1)"was applied for in good faith," (2) if granted and exercised, the permit "will not operate to the disadvantage of such endangered species," and (3) will be "consistent with the purposes and policy" of the Act. 16 U.S.C. § 1539(d).

c. **The Captive-Bred Wildlife Regulations**

The FWS has promulgated regulations that "apply to all permits" issued under the ESA. 50 C.F.R. § 13.3. They provide that captive wildlife subject to a permit must be maintained under "humane and healthful conditions," 50 C.F.R. § 13.41, and that "[a]ny person holding a permit . . . must comply with all conditions of the permit and with all applicable laws and regulations governing the permitted activity." 50 C.F.R. § 13.48 (emphasis added).

In addition, in 1979, the FWS issued special "captive-bred wildlife regulations" ("CBW regulations") that granted general permission under section 10 of the Act to any person to engage in activities otherwise prohibited by section 9 with respect to non-

native endangered and threatened animals that are bred in captivity, but only if "[t]he purpose of such activity is to enhance the propagation or survival of the affected species." 44 Fed. Reg. 54002, 54007 (September 17, 1979) ; 50 C.F.R. § 17.21(g)(ii)(emphasis added).

To further narrow the circumstances under which this general permit applies, the FWS defined the term "enhance the propagation or survival," when used in reference to captive wildlife, to include certain enumerated activities, but only "when it can be shown that such activities would not be detrimental to the survival of wild or captive populations of the affected species." 44 Fed. Reg. at 54006; 50 C.F.R. § 17.3. Those activities include "normal practices of animal husbandry needed to maintain captive populations that are self-sustaining and that possess as much genetic vitality as possible." Id.

To rely on the captive-bred wildlife regulations, an entity must register with the FWS and provide the agency with certain specified information concerning the "activities" that are exempted from the take prohibitions because they "enhance the propagation or survival of the species," 50 C.F.R. § 17.21(g). Ringling Bros. relies on the CBW permit on the grounds that it is both breeding Asian elephants for use in its circus and is also purportedly exhibiting these animals "in a manner designed to

educate the public about the ecological role and conservation needs of the affected species." See 50 C.F.R. § 17.3 (definition of "enhance the propagation or survival"). Each entity registered under the CBW program must also maintain accurate written records of the "activities conducted under the registration," id., and they must submit annual reports to the FWS of all "authorized activities." Id.; 44 Fed. Reg. at 54006.

However, anyone seeking lawfully to engage in any prohibited activity that is not permitted under the general CBW regulations, may only do so by obtaining a separate permit under section 10 of the Act. See, e.g., 58 Fed. Reg. 32632, 32637 (June 11, 1993) (FWS explains that prohibited activities not permitted by the CBW regulations require a separate section 10 permit); accord 63 Fed. Reg. 48634, 48635 (September 11, 1998).

In September 1998, the FWS amended its definition of "harass" as applied to captive wildlife to exclude "generally accepted animal husbandry practices, breeding procedures, and provisions of veterinary care that are not likely to result in injury to the animal." 63 Fed. Reg. 48634 (September 11, 1998); 50 C.F.R. § 17.3. In the preamble to that rule, the FWS explained that, although several commenters had suggested that the agency should amend the definition of "take" to apply only to animals in the wild, the agency could not do so because the

statute defined "take" to apply to all listed wildlife "whether wild or captive." 63 Fed. Reg. at 48636 (emphasis added). Thus, the agency further explained that, although the statutory definition could be "clarif[ied]" by the FWS as it applies to captive wildlife, "the statutory term cannot be changed administratively." Id.

The agency further stated that, "[s]ince captive animals can be subjected to improper husbandry as well as to harm and other taking activities, the Service considers it prudent to maintain such protections, consistent with Congressional intent." Id. The agency further explained that "maintaining animals in inadequate, unsafe or unsanitary conditions, physical mistreatment, and the like constitute harassment because such conditions might create the likelihood of injury or sickness," and "[t]he Act continues to afford protection to listed species that are not being treated in a humane manner." Id. at 48638 (emphasis added).

d) ESA Enforcement

The citizen suit provision of the ESA provides that "any person" may commence a civil suit "to enjoin any person . . . who is alleged to be in violation" of "any provision" of the Act or "any regulation" issued under the Act, and that the district courts "shall have jurisdiction . . . to enforce any such

provision or regulation." 16 U.S.C. § 1540(g)(1)(A), (C).

2. The Animal Welfare Act.

The Animal Welfare Act ("AWA"), 7 U.S.C. § 2131 et seq., requires that animals used in research and for exhibition - whether or not they are listed as endangered or threatened under the ESA - must be provided "humane care and treatment." An "exhibitor," such as Ringling Bros., is defined as "any person (public or private) exhibiting any animals . . . to the public for compensation." 7 U.S.C. § 2132(h).

The statute is enforced solely by the United States Department of Agriculture ("USDA") - i.e., unlike the ESA, the AWA does not contain a citizen suit provision. However, because the permitting requirements of the ESA require all permittees to comply with "all applicable laws and regulations governing the permitted activity," 50 C.F.R. § 13.48 (emphasis added), an exhibitor of a listed species who violates a standard issued under the AWA also necessarily violates the ESA's implementing regulations as well. See 2d Amended Complaint ¶¶ 44-46.

B. Ringling Brothers' Treatment Of Its Endangered Elephants

The Asian elephant is listed as an endangered species under the ESA. 50 C.F.R. § 17.11(h). Elephants are highly intelligent, social animals who form strong, permanent bonds with

their family units. 2d Amended Complaint (J.A. 5) ¶¶ 51-52. In the wild, baby elephants are not usually weaned from their mothers until they are between 2-4 years old or older and, even after that, female elephants remain with their mothers and the other members of the herd for the rest of their lives, while males stay with their families until they are between 9-15 years old when they go off to start their own families. Id. ¶ 51. Baby elephants stay with their mothers for many years to learn social and other survival skills, and female elephants remain for life with the family of their births. Id. In the wild, these animals walk many miles and forage for food for approximately 18 hours each day. Id. ¶¶ 49-50.

Ringling Brothers uses Asian elephants, including baby elephants, in its circus performances throughout the country. 2d Amended Complaint ¶ 54 (J.A. 18). It does so pursuant to the CBW regulations, which are the basis for Ringling Bros.' "permit" under section 10 of the ESA to engage in activities that are otherwise prohibited, including the "take" prohibitions. Ringling Bros. maintains that it is entitled to a CBW permit because it operates a "conservation" facility in Florida, where it breeds Asian elephants for use in its circus. Id. ¶ 54.

While the CBW regulations allow Ringling Bros. to engage in certain activities that "enhance the propagation and survival" of

the species, plaintiffs allege that they do not authorize Ringling Brothers to beat and hit its elephants with sharp bullhooks for the purpose of training or punishing them; to forcibly remove baby elephants from their mothers with the use of ropes and chains; or to keep the elephants in chains for up to 20 hours a day or longer. 2d Amended Complaint ¶¶ 56-60; see also 50 C.F.R. § 17.21(g) (the only activities allowed under the CBW regulations are those that "enhance the propagation or survival of the affected species"); 63 Fed. Reg. at 48638 (explaining that "physical mistreatment" of captive endangered wildlife is an unlawful "take").

Nevertheless, plaintiffs allege in the Complaint that Ringling Brothers regularly engages in precisely this prohibited conduct: it beats and hits the adult elephants in its possession with bullhooks to "train" them, "control" them, make them perform tricks, and punish them. 2d Amended Complaint ¶ 61. Plaintiffs further maintain that this treatment inflicts both physical wounds and severe psychological injuries on these animals, id. ¶¶62-63, and that it also significantly disrupts the elephants' normal behavioral patterns, including their social relationships with other elephants, and their reproduction. 2d Amended Complaint ¶ 64.

As alleged in the Complaint, Ringling Bros. also keeps the elephants in chains for long periods of time, i.e., up to 20 hours a day, or even longer when the elephants are traveling, id. ¶74, and it does so for the purpose of maintaining dominance over the animals to ensure that they will perform as required by defendants. Id. Plaintiffs have alleged that this chaining and confinement of the elephants for so many hours each day causes theme extreme physical discomfort, behavioral stress, and severe psychological harm. Id. ¶ 75-76.

Plaintiffs further allege that Ringling Bros. also regularly beats and hits the baby elephants in its possession with bullhooks to train, control, and "break" them, and to punish them, id. ¶66, and that this treatment inflicts physical harm and wounds on the baby elephants, as well as severe psychological damage. Id. ¶¶ 67-68. Plaintiffs specifically allege that two baby elephants who died recently were routinely beaten by Ringling Bros. employees, and that this treatment contributed to the animals' untimely deaths. Id. ¶¶ 53, 69-73.

Plaintiffs also allege that, as part of what Ringling Bros.' own employees have referred to as the company's "routine" separation process, Ringling Bros. forcibly removes baby elephants from their mothers with the use of ropes and chains before they are 2 years old - long before they would even be

normally weaned in the wild, id. ¶¶ 77-83 - and that Ringling Bros. does this to establish dominance over the baby elephants in furtherance of its overall objective of ensuring that these animals will perform as desired by defendants. Id. As alleged in plaintiffs' Complaint, in 1999, the United States Department of Agriculture, which administers the Animal Welfare Act's standards applicable to "exhibitors" of animals, informed Ringling Bros. that its forcible removal of baby elephants from their mothers violates AWA regulations and causes the animals "trauma, behavioral stress, physical harm and unnecessary discomfort." 2d Amended Complaint ¶ 83 (J.A. 21).

Plaintiffs further allege that baby elephants who are beaten, forcibly removed from their mothers and confined for long periods of time are physically, psychologically, and socially injured, 2d Amended Complaint ¶ 84, and that this treatment also causes the mother elephants severe emotional and psychological injury. 2d Amended Complaint ¶¶ 87-88.

C. Proceedings Below

1. Plaintiffs

Plaintiffs include an individual and three animal welfare organizations. Plaintiff Tom Rider worked for Ringling Bros. for 2 ½ years tending the barns where the elephants were kept and as a "handler" for the elephants. 2d Amended Complaint ¶ 18 (J.A.

11). Mr. Rider spent many hours with the elephants and knows all of them by name. Id. During his work with the animals, Mr. Rider grew extremely fond of them and formed a strong personal and emotional attachment to these elephants, whom he refers to as his "girls." Id.; ¶ 20.

While working for Ringling Bros., Mr. Rider saw other elephant handlers and trainers routinely beat the elephants, including the baby elephants, and he saw these Ringling Bros. employees routinely hit and wound the elephants with sharp bull hooks. 2d Amended Complaint ¶19. These beatings were done throughout the country, wherever Ringling Bros. performed, on a routine daily basis. Id. Mr. Rider saw and heard baby elephants cry in pain from their beatings. Id. He also saw elephants, including babies, confined and kept in chains each day for most of the day, throughout the country, and he has seen both the baby and adult elephants engage in stressful "stereotypic" behavior as a result of defendants' mistreatment of them. Id.

Mr. Rider further alleges that he stopped working for the circus because he could no longer tolerate the way the elephants were being treated by defendants. 2d Amended Complaint ¶ 21. He alleges that he would "very much like to visit the elephants in defendants' possession so that he can continue his personal relationship with them, and enjoy observing them." 2d Amended

Complaint ¶ 22. He would also like to work with these elephants again. Id. However, at present, he cannot visit or even observe these animals "without suffering more aesthetic and emotional injury." Id.

The three organizational plaintiffs are the American Society for the Prevention of Cruelty to Animals - the oldest animal welfare organization in the country - the Animal Welfare Institute, and the Fund for Animals. They are all dedicated to eliminating the abuse and neglect of animals. 2d Amended Complaint ¶¶ 3, 8, 13, 18. They spend resources each year advocating better treatment of animals; they all routinely send submissions to the federal government concerning the treatment of animals; and they also regularly file submissions with the government in response to requests for public comments concerning animal welfare issues. 2d Amended Complaint ¶¶ 4, 9, 14, 19.

The organizations also all publish regular newsletters for their members, and they all operate websites for the purpose of reporting to their members and the general public about animal welfare issues, including regulatory matters affecting animals used in entertainment, and they keep their members informed about actions that can be taken to promote the protection and humane treatment of animals. 2d Amended Complaint ¶¶ 5, 10, 15, 20.

2. **Plaintiffs' Claims**

Plaintiffs, who brought this case under the ESA's citizen suit provision, challenge Ringling Bros.' beating and chaining of elephants and the forcible removal of babies from their mothers as violations of the "taking" prohibitions of section 9 of the ESA. They also contend that Ringling Bros. is violating the prohibitions in section 9 against the possession and transportation of endangered species that have been, and continue to be, "unlawfully taken," and that Ringling Bros. has also violated the prohibition against the transportation of an endangered species in interstate commerce in the course of a commercial activity, except as permitted by the FWS. 2d Amended Complaint ¶ 91.

Plaintiffs further allege that Ringling Bros.' mistreatment of the elephants also violates the FWS's general permit regulations - including the provisions that require compliance "with all applicable laws" governing the permitted activity," 50 C.F.R. § 13.48 - which includes both the ESA and the Animal Welfare Act - as well as the CBW regulations upon which Ringling Bros. relies to engage in activities that are otherwise prohibited by section 9. Id. ¶ 92.

Plaintiffs seek declaratory and injunctive relief, including an order enjoining Ringling Bros. from "beating, wounding and

injuring endangered elephants, forcibly separating babies from their mothers, 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." 2d Amended Complaint at 20. Alternatively, plaintiffs seek an order directing defendants to forfeit possession of the endangered elephants in their possession. Id.

3. **The District Court's Rulings**

On June 29, 2001, the district court granted defendants' motion to dismiss on the grounds that the plaintiffs had failed to allege a sufficient "injury in fact" for purposes of Article III standing. (J.A. 109). Citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992), the court held that Mr. Rider "has not alleged a presently suffered aesthetic injury" because he is no longer employed by Ringling Bros., and that he also was not faced with an "imminent" future injury, since, according to the court, Mr. Rider had "state[d]" in the Complaint that he "is precluded from" visiting or working with the elephants "as long as the alleged mistreatment of the animals persists." Slip Op. at 3, 6 (J.A. 111, 114).

The court further held that "a plaintiff who alleges to have left his or her employment in order to escape continued exposure

to an aesthetic harm" does not allege a sufficient "current" injury in fact, and that "[s]uch a finding would stretch the definition of continuing injury beyond the breaking point." Id. at 7-8. Because the court also found that the organizational plaintiffs lacked standing, it dismissed the case without prejudice. Id.

On July 16, 2001, plaintiffs moved for reconsideration on the grounds that, although they had relied heavily on the Supreme Court's recent standing analysis in Friends of the Earth, Inc. v. Laidlaw Environmental Servs., 528 U.S. 167 (2000) to demonstrate that Mr. Rider had alleged a sufficient current injury because he felt compelled to refrain from visiting and working with the elephants with whom he had formed a personal relationship in order to avoid subjecting himself to additional aesthetic and emotional harm, the district court had failed to address the relevance of that ruling to these particular standing allegations.[1]

On September 4, 2001, the court denied the motion for reconsideration on the grounds that it had already "found" in its original ruling that Laidlaw "does not save plaintiffs' claims."

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[1]The district court's only mention of Laidlaw in its initial decision was in a footnote as authority for the rules governing the associational standing of the organizational plaintiffs. See Slip Op. at 4, note 1 (J.A. 112).

Order (J.A. 126). The court further stated that Laidlaw does not apply because Mr. Rider has "no means of associating with the elephants in defendants' possession" - a factual assertion that had been made by defendants, but was contrary to the allegations in plaintiffs' Complaint. Order at 2 (J.A. 127). Hence, the court ruled, Mr. Rider is "not prevented from using and enjoying public resources, as was the case in Laidlaw." Id. (emphasis added).

SUMMARY OF THE ARGUMENT

1. Plaintiffs have alleged sufficient grounds for standing to survive a motion to dismiss. The Complaint alleges that Mr. Rider has formed a strong personal and emotional attachment to the endangered Asian elephants, that he had to stop working for the circus because he could no longer tolerate the way the elephants were being treated by defendants, and that he wants to visit these animals again to continue his personal relationship with them, but is "unable to do so without suffering more aesthetic and emotional injury." 2d Amended Complaint ¶22 (J.A. 8). In light of these allegations, it is clear that Mr. Rider has alleged sufficient present and continuing Article III injuries under Animal Legal Defense Fund v. Glickman, 154 F.3d 426 (D.C. Cir. 1998) (*en banc*), cert. denied, 526 U.S. 1064 (1999), and the Supreme Court's decision in Laidlaw, certainly

for purposes of surviving a motion to dismiss.

The district court's conclusion that, because Mr. Rider was no longer employed by Ringling Bros., he "has not alleged a presently suffered aesthetic injury," ignored the nature of Mr. Rider's specific allegations - i.e., that he is suffering a present, continuing injury because he feels compelled to forego visiting, observing, and working with the elephants with whom he has formed a special relationship if he wants to avoid the additional injury that would result from viewing the mistreated elephants. The court also ignored the Supreme Court's ruling in Laidlaw, which held that individuals who had used a particular river in the past, but had "curtailed" their recreational use of that waterway because of their concerns that it was polluted, had standing to challenge the alleged polluters' violations of the Clean Water Act.

2. In response to plaintiffs' motion for reconsideration, the district court ruled that Laidlaw did not apply here because, unlike the river at issue there, the elephants with whom Mr. Rider has formed a personal attachment are not a "public resource" to which he has access. However, in so ruling the district court not only ignored plaintiffs' allegations that the circus is a public exhibition - to which all members of the public, including Mr. Rider, have access - but also ALDF v.

Glickman, where this Court held that a plaintiff had standing to complain about the way animals were maintained at a commercial "game farm."

Furthermore, there is no requirement in standing jurisprudence that a plaintiff have a legal right of access to a "public resource" in order to be aesthetically injured by a violation of the law that applies to that "resource." On the contrary, in Association of Data Processing Serv. Organizations v. Camp, 397 U.S. 150, 153 (1970), the Supreme Court long ago abolished the rule that a plaintiff must have a legal "right" to demonstrate Article III standing, and instead adopted the "injury in fact" standard - which is clearly met here.

3. Because Mr. Rider has alleged sufficient standing, it is not necessary for this Court to reach the standing of the other plaintiffs, ALDF v. Glickman, 154 F.3d at 445. Nevertheless, the district court also erroneously held that the organizational plaintiffs lacked standing. While the district court acknowledged that these plaintiffs could suffer informational injury because they are deprived of information that is required to be made public under section 10 of the ESA - and this point is also well established by the Supreme Court's ruling in Federal Election Commission v. Akins, 524 U.S. 11 (1998) - the district court held that any such injury was caused

not by Ringling Bros., but, rather, by the United States Department of Agriculture ("USDA"). However, since the USDA does not issue permits under the ESA, this part of the court's ruling is a *non sequitur*.

Even if the Court meant to say that plaintiffs' informational injury was caused by the FWS - the agency that does issue permits under section 10 of the ESA - this would also be incorrect. Because the court was deciding a motion to dismiss, it was required to accept plaintiffs' allegations on this point, which are that defendants have failed to apply for and obtain the permits that are required, and that this violation of the statute necessarily deprives plaintiffs of information that is automatically made public by operation of law. See 16 U.S.C. § 1539(c).

ARGUMENT

Introduction

To survive a motion to dismiss on standing grounds, the plaintiffs need only allege, but not prove at this stage of the proceeding, the elements of Article III standing. Lujan v. Defenders of Wildlife, 504 U.S. at 561. Therefore, plaintiffs must allege that (1) they suffer an "injury in fact" that is concrete and particularized; (2) the injury is fairly traceable to the challenged action of the defendant; and (3)it is likely

that the injury will be redressed by a favorable decision. Laidlaw, 528 U.S. at 180. In addition, as long as one plaintiff has alleged sufficient Article III standing, it is not necessary for the Court to decide the standing of the other plaintiffs. ALDF v. Glickman, 154 F.3d at429.

It is also well settled that a court may grant a motion to dismiss only when the moving party has shown "beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Moreover, the court "must accept as true all material allegations of the complaint," Warth v. Seldin, 422 U.S. 490, 501 (1975), and "the complaint must be 'liberally construed in favor of the plaintiff[s],' who must be granted the benefit of all inferences that can be derived from the facts alleged." Shuler v. United States, 617 F.2d 605, 608 (D.C. Cir. 1979), quoting, Jenkins v. McKeithen, 395 U.S. 411, 421-422 (1969); see also Lujan, 504 U.S. at 561 (at the pleading stage, the court must "presum[e] that general allegations embrace those specific facts that are necessary to support the claim").

I. MR. RIDER HAS ALLEGED SUFFICIENT STANDING TO SURVIVE A MOTION TO DISMISS.

A. Mr. Rider Alleges Present, Continuing Injuries.

As this Court stressed in its *en banc* ruling in ALDF v. Glickman, "[t]he Supreme Court has repeatedly made clear that injury to an aesthetic interest in the observation of animals is sufficient to satisfy the demands of Article III standing." 154 F.3d at 432 (emphasis added). Thus, as the Supreme Court recognized in Lujan v. Defenders of Wildlife, 504 U.S. at 562-63, and recently reiterated in Laidlaw, 528 U.S. at 182, "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purposes of standing" (emphasis added). As the Supreme Court has further emphasized, it is also "clear that the person who observes or works with a particular animal" suffers injury in fact when that animal is harmed. Lujan, 504 U.S. at 566 (emphasis added).

These principles apply with full force to the allegations of injury by plaintiff Tom Rider, who has worked with, and alleges that he formed a strong personal and emotional attachment to, the endangered Asian elephants in Ringling Bros.' possession. 2d Amended Complaint ¶¶ 18-20 (J.A. 11). In addition, Mr. Rider has suffered aesthetic and emotional harm from seeing the elephants beaten and chained on a daily basis. Id. ¶ 20.

Indeed, Mr. Rider alleges that he had to stop working for the circus "because he could no longer tolerate the way the elephants were being treated by defendants." Id. ¶ 21. Thus, although Mr. Rider wants to visit the elephants "so that he can continue his personal relationship with them, and enjoy observing them," and he also wants to "work with these animals again," he is unable to do so "without suffering more aesthetic and emotional injury," which will continue "unless and until the animals are placed in a different setting or are otherwise no longer routinely beaten, chained for long periods of time, and otherwise mistreated." Id. ¶ 22.

These injuries fall squarely within the kinds of "injury in fact" that this Court deemed sufficient for purposes of Article III standing in ALDF v. Glickman. Indeed, in that case, the Court stressed that the plaintiff, who challenged the USDA's failure to promulgate standards to protect primates exhibited in zoos, had standing because he was deprived of the ability to enjoy "particular animals" who were "free from 'inhumane treatment'" - precisely the kind of injury that Mr. Rider alleges here. See 154 F.3d at 433 (explaining that "[t]he key requirement . . . is that the plaintiff have suffered injury in a personal and individual way - for instance, by seeing with his own eyes the particular animals whose condition caused him

aesthetic injury," and that "people have a cognizable interest in 'view[ing] animals free from . . . 'inhumane treatment'") (internal citations omitted) (emphasis added).

Mr. Rider's allegations of injury are also very similar to those found adequate for standing in Laidlaw, where the Supreme Court held that individuals who used a particular river in the past, but had "curtail[ed] their recreational use of that waterway" because of their "concerns" that it was polluted by defendants' illegal discharge of pollutants, had standing to pursue their claims. 528 U.S. at 184 (emphasis added). Thus, the Court held that such individuals' "reasonable concerns about the effects of those discharges, directly affected [their] recreational, aesthetic, and economic interests." Id.

Indeed, in contrast to the present case, in Laidlaw, the defendants had not merely moved to dismiss, but, rather, had moved for summary judgment on the standing question, and hence, were required to prove their standing. See Lujan, 504 U.S. at 561. Nevertheless, even applying the far more stringent summary judgment standard, the Court held that the plaintiff organizations had satisfied the injury-in-fact requirement of Article III because members of those groups had stated that they were "refraining" from using the river because they did not want to expose themselves to aesthetic, recreational, and economic

injury. See 528 U.S. at 184 ("we see nothing 'improbable' about the proposition that a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms") (emphasis added).

Standing cases decided since Laidlaw have relied on that decision to find similar injuries where the plaintiffs felt compelled to avoid an activity to escape suffering either environmental or economic harm caused by an alleged violation of the law. See Ecological Rights Foundation v. Pacific Lumber Co., 230 F.3d 1141, 1144 (9th Cir. 2000) (relying on Laidlaw, court finds standing for plaintiffs who were "avoid[ing] some activities they would otherwise enjoy in and around Yeager Creek . . . because they fear that runoff from Pacific Lumber's two facilities is damaging the creek and its wildlife . . .") (emphasis added); Friends of the Earth v. Gaston Copper Recycling, Corp., 204 F.3d 149 (4th Cir. 2000) (*en banc*) (under Laidlaw, individuals who were refraining from using a lake because of their concerns about pollution satisfied the injury in fact component of Article III); Natural Resources Defense Council v. Southwest Marine, Inc., 236 F.3d 985, 994 (9th Cir. 2000) (organizations have standing where members testified that "they

derived recreational and aesthetic benefit from their use of the Bay . . . but that their use has been curtailed because of their concerns about pollution, contaminated fish, and the like") (emphasis added); Becker v. FEC, 230 F.3d 381, 386-87 (1st Cir. 2000) (under Laidlaw, plaintiff has Article III standing to challenge Presidential debates where he is forced to change his campaign strategy to avoid participating in allegedly illegal debates).

However, in its ruling granting defendants' motion to dismiss, the district court did not even discuss the applicability of Laidlaw and these other precedents to Mr. Rider. Instead, the court relied on a case that was decided by this Court six years before Laidlaw, which held that a researcher complaining about the way laboratory animals were treated could not show any "imminent" future injury when she "had been outside the research field for the past six years, during which time she had not suffered these injuries, and that the plaintiff would not be subjected to such injuries unless she were to make an affirmative decision to subject herself to those conditions again." Slip Op. at 5 (J.A. 113), citing Animal Legal Defense Fund v. Espy, 23 F.3d 496, 500 (D.C. Cir. 1994).

Thus, stating that "[t]he instant case is factually similar" to ALDF v. Espy, the district court held that Mr. Rider "has not

been employed by Ringling Brothers for the past two years," and that "[d]uring this time he has not been exposed to the elephants' alleged mistreatment." Slip Op. At 6. Hence, the court stated, Mr. Rider "has not alleged a presently suffered aesthetic injury." Id. (emphasis added). The court further held that Mr. Rider also could not establish any imminent future injury, because his contention that he "wishes to return to elephant training," is too "speculative and uncertain," especially when, according to the court, Mr. Rider "admits that he has no intention of returning to the circus unless the elephants in question are transferred to an undetermined sanctuary or other setting." Slip Op. at 6.

However, these statements by the district court simply do not accurately reflect the actual allegations that are contained in the Complaint, let alone "liberally construe" those allegations to give plaintiffs the "benefit of all inferences that can be derived from the facts alleged," as required in deciding a motion to dismiss. Shuler, 617 F.3d at 608. Thus, tracking the same kind of injury that was sustained in Laidlaw, the Complaint does allege a "presently suffered aesthetic injury" by stating that Mr. Rider desires to visit, observe, and even work with these animals again, but is unable to engage in any of these activities without subjecting himself to additional

aesthetic injury. Indeed, even in ALDF v. Espy, 23 F.3d at 506 n.3, Judge Williams of this Court explained in his concurring decision - cited with approval in ALDF v. Glickman, 154 F.3d at 432 - that, if the researcher plaintiff in that case had demonstrated that she "left the laboratory environment to avoid exposure to the suffering of animals," the alleged unlawful conduct would be "inflicting a current injury, forcing her to choose between a sacrifice of career goals and continued exposure to inhumane treatment." However, as Judge Williams further noted, in that case, the plaintiff had not made any such allegations of present injury, and hence, the Court could not rely on such injury as the basis for its Article III jurisdiction. Id. Here, however, Mr. Rider makes precisely these kings of allegations of harm.

Moreover, contrary to the district court's summation of plaintiffs' allegations, Mr. Rider certainly did not "admit" that he has "no intention of returning to the circus unless the elephants in question are transferred to an undetermined sanctuary or other setting." Slip Op. at 6. Indeed, not only is such a statement nowhere in the Complaint, but it is also internally inconsistent - i.e., there would be no reason for Mr. Rider to "return[] to the circus" to see the elephants if they were no longer there. On the contrary, the Complaint clearly

states that Mr. Rider cannot visit or observe the elephants without suffering additional injury "unless and until these animals are placed in a different setting, or are otherwise no longer routinely beaten, chained for long periods of time, and otherwise mistreated" - precisely the remedies plaintiffs seek in their Complaint. 2d Amended Complaint ¶22 (emphasis added); see also Claims for Relief at 19-20.

In fact, Mr. Rider's allegations of injury are far stronger than those that were deemed sufficient in Laidlaw to survive a motion for summary judgment. First, as Justice Scalia noted in his dissent in that case, the individuals whom the majority held had a sufficient injury-in-fact had not even used the river in question for many years prior to filing the Complaint. See Laidlaw, 528 U.S. at 200 (noting that Linda Moore "testified in her deposition that she had been to the river only twice, once in 1980 . . . and once after the suit was filed," and that "Kenneth Lee Curtis, who claimed that he was injured by being deprived of recreational activity at the river, admitted that he had not been to the river since he was 'a kid'") (emphasis added).

Indeed, one of the individuals whom the majority found had a sufficient injury in fact submitted an affidavit in which he testified that he had never even been to the area of the river that was allegedly polluted, and would not canoe in that part of

the river because of his concern that it is polluted. See Affidavit of Sierra Club member Norman Sharp, submitted in Laidlaw (attached to plaintiffs' Motion for Reconsideration) ¶4 (J.A. 124) ("I do not canoe in [the] area of the North Tyger River near where Laidlaw discharges because I am concerned that the water in that portion of the North Tyger River contains harmful pollutants. If the River were not polluted, I would canoe in the River closer to Laidlaw's discharge point") (emphasis added); 528 U.S. at 183 (Sierra Club has standing because a member "had canoed approximately 40 miles downstream of the Laidlaw facility and would like to canoe in the North Tyger River closer to Laidlaw's discharge point").

Here, in sharp contrast, Mr. Rider very recently worked with these elephants for almost two and a half years, and "formed a strong, personal attachment to them." 2d Amended Complaint ¶18, And, just like the individuals in Laidlaw asserted with respect to their use of the river, Mr. Rider stated that, although he would "very much" like to visit, observe, and work with these animals again, he is "unable to do so without suffering more aesthetic and emotional injury." 2d Amended Complaint ¶ 22.[2]

[2]Citing Humane Soc'y v. Babbitt, 46 F.3d 93, 98 (D.C. Cir. 1998) and Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 485 (1982), the district court also held that Mr. Rider's alleged "emotional harm" was not a cognizable injury in fact. Slip Op. at 8 (J.A. 116).

Second, although the plaintiffs in Laidlaw did not even know whether their enjoyment of the river would in fact be impaired by the defendants' alleged unlawful conduct - but were merely "concerned" that it would be, see 528 U.S. at 198 - here, Mr. Rider has specifically alleged that Ringling Bros.' unlawful conduct will cause him severe aesthetic injury, because it already has done so on numerous occasions. See 2d Amended Complaint ¶19 ("Mr. Rider saw and heard baby elephants cry in pain from their beatings," and has "seen both the baby elephants and the adult elephants engage in stressful 'stereotypic' behavior as a result of defendants' mistreatment of them") (emphasis added).

However, in those cases the plaintiffs had not actually observed the tangible effects of the allegedly unlawful conduct with their "own eyes." ALDF v. Glickman, 154 F.3d at 433. See Humane Soc'y, 46 F.3d at 98 (noting that the plaintiffs' members "never state that they have seen or visited [the animal] in the past, or that they intend to do so in the future"); Valley Forge, 454 U.S. at 485 (individuals who merely "observe" conduct with which they disagree by reading an article in the newspaper cannot establish injury in fact based on the "psychological consequence" of such observation because they have "fail[ed] to identify any personal injury suffered . . . *as a consequence* of" the alleged violation of law) (emphasis in original). Here, however, Mr. Rider actually witnessed defendants' mistreatment of the animals on a routine, daily basis. 2d Amended Complaint ¶19. Therefore, as this Court explained in ALDF v. Glickman, to demonstrate injury-in-fact "the key requirement . . . is that the plaintiff has suffered his injury in a personal and individual way - for instance, by seeing with his own eyes the particular animals whose condition caused him aesthetic injury." 154 F.3d at 433 (emphasis added).

Indeed, as Mr. Rider further alleges, he stopped working for the circus because he "could no longer tolerate the way the elephants were treated by defendants." Id. ¶ 21. Accordingly, unlike the individuals with standing in Laidlaw, who merely complained of "concerns" that they would be aesthetically or recreationally harmed by their use of the river, the Complaint here alleges, in no uncertain terms, that Mr. Rider actually suffers both aesthetic and economic injury because of defendants' unlawful conduct.

Third, in Laidlaw, the district court had ruled, as a matter of fact, that the defendants' activities did not actually harm the river, 528 U.S. at 181, yet the Supreme Court nonetheless ruled that the fact that members of the plaintiff organizations were refraining from using the river based on their "concerns" was sufficient for standing, even at the summary judgment stage. Therefore, it is difficult to see how the plaintiffs here can lose on standing grounds at the motion to dismiss stage, where, once again, the court was required to accept the validity of Mr. Rider's allegations that Ringling Bros. beats and otherwise mistreats its elephants on an ongoing basis in violation of section 9 of the Endangered Species Act, and that this conduct is causing Mr. Rider to avoid animals with whom he has formed a

special, personal relationship. See 2d Amended Complaint ¶¶ 18, 20. Indeed, even Justices Scalia and Thomas, who dissented in Laidlaw, recognized that the allegations of harm made there would have been sufficient to survive a motion to dismiss. 528 U.S. at 198 (noting that such "general allegations of injury may suffice at the pleading stage, but at summary judgment plaintiffs must set forth 'specific facts' to support their claims) (citing Lujan).

B. The District Court Erroneously Held That Mr. Rider Lacks Standing Because There Are No "Public Resources" Involved In This Case.

In its September 4, 2001, denial of plaintiffs' motion for reconsideration, the district court held that Laidlaw did not apply here because that case involved the use of a "public resource." Denial of Reconsideration at 2 (J.A. 127). Thus, the district court explained, "[t]he factual dissimilarities between this case and *Laidlaw* render the specific holding in that case inapplicable," because "[p]laintiffs here have no means of associating with the elephants in defendants' possession," and, accordingly, "[p]laintiffs are not prevented from using and enjoying public resources, as was the case in Laidlaw." Id. (emphasis added).

It is not clear whether the court's ruling on this point was meant to address Mr. Rider's injury-in-fact or whether the court

was raising a new ground for dismissing the case on standing grounds - i.e., that Mr. Rider lacks sufficient redressability because he has no means of ever seeing these elephants again. In either event, however, the court's effort to distinguish Laidlaw is completely unfounded for several reasons.

First, as this Court explained in Mountain States Legal Foundation v. Glickman, 92 F.3d 1228, 1233 (D.C. Cir. 1996), the suggestion that an individual must show an impairment to some legal "right" to demonstrate an Article III injury was long ago abandoned by the Supreme Court in Association of Data Processing Serv. Organizations v. Camp, 397 U.S. 150, 153 (1970) in favor of the "injury-in-fact" standard. Thus, as the Court held in Data Processing, whether a plaintiff has a "legal interest" in the subject of the lawsuit goes to the merits, not to standing. Id. However, for standing purposes, the question is whether the plaintiff alleges that the challenged action has in fact caused him some kind of injury, "economic or otherwise." 397 U.S. at 152; see also Mountain States Legal Foundation, 92 F.3d at 1233 (federal timber companies need not establish any "right" to a particular timber contract to establish injury in fact, "any more than a 'right' to view crocodiles in foreign sites would have been necessary to establish standing in Lujan [v.Defenders of Wildlife").

Indeed, in ALDF v. Glickman, this Court held that the plaintiff had standing because his ability to view animals "free from inhumane treatment" was impaired at a private "game farm" - an entity that is indistinguishable in kind from the Ringling Bros. circus. Thus, the plaintiff in that case certainly had no more right to "associate" with those animals than Mr. Rider has here. Nevertheless, because this Court found that the plaintiff had an established interest in visiting "particular animals" who were kept at the game farm, this was sufficient to demonstrate an "injury in fact" to his aesthetic enjoyment of those animals. 154 F.3d at 431-32. Similarly, here, because Mr. Rider has formed a strong personal attachment to the Ringling Bros. elephants, he is injured because he must forego visiting or otherwise seeing these animals to avoid suffering additional aesthetic and emotional harm.

Second, by accepting defendants' factual contention that Mr. Rider has "no means of associating with the elephants," see Defendants' Opposition to Plaintiffs' Motion for Reconsideration at 3 (emphasis added), the district court violated the cardinal rule that, in deciding a motion to dismiss, it must accept all of plaintiffs' allegations as fact. Shuler, 617 F.2d at 608. Here, the district court did the opposite: it not only accepted defendants' completely unsubstantiated factual assertion on this

point, but completely ignored several of plaintiffs' contrary allegations.

To begin with, while this Court can certainly take judicial notice of the fact that Ringling Bros.' circus is an exhibition open to any member of the general public who purchases a ticket, this fact is also alleged throughout the Complaint. See, e.g., 2d Amended Complaint ¶54 (Ringling Bros.'circus performances "are held throughout the country"); ¶28 (to gain publicity for their circuses, Ringling Bros. "parades" the elephants through the streets); see also ALDF v. Glickman, 154 F.3d at 444 ("[t]he very purpose of animal exhibitions is, necessarily, to entertain and educate people") (emphasis added). Therefore, Mr. Rider has at least the same "means of associating" with these elephants as any other member of the public.

Indeed, to enjoy the imprimatur of both the ESA and the Animal Welfare Act, Ringling Bros. is required to exhibit these animals publicly. See 50 C.F.R. § 17.3 (to rely on the Captive Bred Wildlife Permit, the permittee must exhibit the animals in a way that "educate[s] the public about the ecological role and conservation needs of the affected species") (emphasis added); 7 U.S.C. § 2132(h) (the term "exhibitor" means any person exhibiting animals "to the public" for compensation) (emphasis added).

Furthermore, the Complaint states that Mr. Rider wishes to "enjoy observing" the elephants again, and also that he would "visit them as often as possible" if they are "placed in a different setting," "or are otherwise no longer routinely beaten, chained for long periods of time, and otherwise mistreated" - the very remedies that plaintiffs have requested here. 2d Amended Complaint ¶ 22, Prayer for Relief. Therefore, clearly, Mr. Rider has also amply met the requirements for redressability. See also Steel Co., 523 U.S. 83,108 (1998)(where a plaintiff alleges a continuing violation of the law, "the injunctive relief requested would remedy that alleged harm"); Mountain States Legal Foundation v. Glickman, 92 F.3d at 1233 ("the redressability inquiry simply [is] whether, if plaintiffs secured the relief they sought, it would redress their injury")(emphasis added.[3]

[3] Contrary to the position urged by defendants below, Mr. Rider is not required to "identify" the specific sanctuary where the animals will be relocated if he prevails and defendants are ordered to forfeit possession of the animals, nor was he required to "explain how the elephants would be placed there and how he would then gain access to them." Defendants' Opposition to Plaintiffs' Motion for Reconsideration at 4. In fact, in ALDF v. Glickman - a case decided on cross motions for summary judgment - this Court held that the plaintiff who sought better regulations governing the treatment of animals at a "game farm" had sufficient redressability because such new regulations would allow plaintiff either to visit the animals under "more humane" conditions at the same Game Farm, or, "if the Game Farm's owners decide[d] to close rather than comply with higher legal standards, to possibly visit the animals he has come to know in their new homes within exhibitions that comply with the more exacting regulations." 154 F.3d at 443 (emphasis added).

II. THE ORGANIZATIONAL PLAINTIFFS HAVE ALSO ALLEGED SUFFICIENT STANDING.

Although, in light of the legal sufficiency of Mr. Rider's allegations, this Court need not reach the standing of the other plaintiffs, ALDF v. Glickman, 154 F.3d at 445, it is clear that the organizational plaintiffs have also made adequate standing allegations to survive a motion to dismiss.

As alleged in the Complaint, the organizational plaintiffs suffer informational injury because they have been deprived of information that they are entitled to receive and disseminate to their members, as a result of defendants' failure to apply for and obtain a section 10 permit for all of the activities that constitute a "take" of these endangered animals, but are not authorized by the CBW regulations. Thus, plaintiffs challenge defendants' failure to apply for and obtain a permit under section 10 of the ESA to engage in otherwise prohibited activities -- i.e., the routine beating and prolonged chaining of elephants, the forcible removal of baby elephants from their mothers, and other mistreatment that plaintiffs contend constitutes a prohibited "taking" under the ESA.

As plaintiffs have explained, supra at 9-11, the CBW regulations upon which Ringling Bros. relies for its breeding and exhibition of these endangered animals simply do not allow

defendants to engage in any of these additional, otherwise unlawful, activities. Accordingly, under the plain language of the statute, defendants must apply for and obtain a separate permit under section 10 to engage in any of these activities. See 16 U.S.C. § 1538(a)(1) (stating that "[e]xcept as provided" in section 1539 (section 10) of the Act, it is unlawful to "take" "any endangered species"); see also 58 Fed. Reg. at 32637 (explaining that prohibited activities not permitted by the CBW regulations require a separate section 10 permit).

As plaintiffs have also explained, section 10 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 addition, the FWS may not grant any such permit without making and publishing in the Federal Register certain "findings," including that the exception (1) was applied for in good faith; (2) if granted and exercised will not operate to the disadvantage of the endangered species; and (3) will be consistent with the purposes and policies of the ESA. 16 U.S.C. § 1539(d).

Therefore, because Ringling Bros. has failed even to request permission from the FWS to engage in any of the unlawful activities at issue here - as plaintiffs allege it is required to

do under the plain language of the statute - it has necessarily deprived the organizational plaintiffs of their statutory right to all of the information that is required to be submitted to the FWS and automatically disclosed to the public under section 10. The organizations, in turn, are impaired in their ability to collect and disseminate such information to their members and the rest of the public. See 2d Amended Complaint ¶¶ 6, 11, 16, 21; see also id. ¶¶ 4-5, 9-10, 14-15, 19-20 (stating that the organizational plaintiffs spend resources each year advocating protection for endangered and threatened animals, that they all regularly file submissions with the federal government concerning these matters, and that they keep their membership and the general public informed about these matters with newsletters and websites).

Plaintiffs' informational injury is well established by Federal Election Commission v. Akins, 524 U.S. 11(1998), where the Court held that voters had standing to challenge the Federal Election Commission's decision that a particular lobbying organization was not a "political committee" within the meaning of the Federal Election Campaign Act, and hence, that it was not required to file certain disclosure statements with the agency that would then be available to the public. In ruling that the voters had the requisite Article III standing, the Court

explained that their "injury in fact" was their "inability to obtain information" that, under plaintiffs' view of the law, is required by the statute to be made public. 524 U.S. at 20.

Thus, as the Supreme Court further explained, it has previously held that "a plaintiff suffers an 'injury in fact' when the plaintiff is unable to obtain information which must be publicly disclosed pursuant to a statute." Id. at 21 (emphasis added), citing Public Citizen v. Department of Justice, 491 U.S. 440, 449 (1989) (failure to obtain information subject to disclosure under the Federal Advisory Committee Act); Havens Realty Corp. v. Coleman, 455 U.S. 363, 373-74 (1982) (deprivation of information about housing availability constitutes "specific injury" for standing). Here, just as the voters in Akins who suffered informational injury when they were denied access to the information required to be submitted and then disclosed under the FEC Act, the organizational plaintiffs allege that they suffer injury when they are deprived of information that the ESA requires a party to provide for public disclosure before it may lawfully engage in otherwise prohibited acts.

In its ruling granting the motion to dismiss, the district court acknowledged that plaintiffs may indeed suffer informational injury because they have been denied information to which they are statutorily entitled. See Slip Op. at 11 (J.A. 119),

citing Animal Legal Defense Fund v. Espy, 29 F.3d 720,724 (D.C. Cir. 1994).[4] However, the district court ruled that the organizational plaintiffs had not alleged sufficient standing because "[p]laintiffs' alleged injury is in fact the result of the USDA's administration of the AWA [Animal Welfare Act] and its permitting process." Slip Op. at 11 (J.A. 119). The court further stated that "[t]hus, plaintiffs' alleged injury is the result of an act of the USDA, a party not properly before the Court," and that "standing based on an informational injury is only applicable in suits brought against [the] agency that failed to enforce the regulation in question." Slip Op. at 11-12 (J.A. 119-20). Thus, the court held, plaintiffs had failed to demonstrate that their informational injury was caused by defendants, as opposed to the USDA. Id.

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[4]In ALDF v. Espy the Court nevertheless held that the plaintiffs were not within the "zone of interests" of that statute for purposes of prudential standing, since the statute in question - the Animal Welfare Act - placed the "general information and educative interests in animal welfare upon which the organizations base their suit" in the province of the oversight committees established pursuant to that statute. Here, by contrast, there is no "zone of interest" problem with this case brought under the ESA, since plaintiffs allege that they have been deprived of information that, pursuant to section 10, must be disclosed to the general public and because the ESA's citizen suit provision expressly authorizes "any person" to bring suit. See 16 U.S.C. § 1539(c) - (d); see also Bennett v. Spear, 520 U.S. 154, 155 (1997) (inclusion of "any person" language in the citizen suit of the ESA "negates" the zone-of-interest test).

However, the USDA does not even issue "permits" under the Animal Welfare Act and hence, plaintiffs made no allegations whatsoever regarding defendants' failure to comply with the "permitting process" under that statute. Rather, again - as is clear from the face of the Complaint - plaintiffs complain about defendants' failure to apply for and obtain a permit under section 10 of the Endangered Species Act - an entirely different statute that is administered by the Fish and Wildlife Service. Therefore, this part of the district court's decision is simply wrong.

In addition, if the district court meant to say that plaintiffs' harm is caused by the FWS - the agency that issues permits under the ESA - there are two reasons why this conclusion would also not supply a basis for granting the motion to dismiss on causation grounds. First, since the court is required to accept all of plaintiffs' allegations as true at this stage of the proceeding, it must accept the organizational plaintiffs' allegations that defendants are required to apply for a permit under section 10 to engage in the "taking" of an endangered animal, and that such application necessarily leads to the public disclosure of information, as required by that provision of the ESA. See 2d Amended Complaint ¶¶ 41-43; 16 U.S.C. § 1539(c) (the Secretary "shall publish notice in the

Federal Register of each application for an exemption or permit," "[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," and the Secretary may only grant such permits if he publishes certain findings "in the Federal Register"); see also Gerber v. Norton, ___ F.3d ___, 2002 WL 1407033 (D.C. Cir. 2002) (under section 10(c), all information submitted in support of a permittee's application "ha[s] to be made available to the public") (emphasis added).

Thus, contrary to the district court's summary rejection of their claims, plaintiffs certainly are not complaining about "a third party's interpretation of the applicable statute." Slip Op. at 12 (J.A. 120). On the contrary, as plaintiffs have explained, see supra at 10, the FWS has made it absolutely clear that persons wishing to engage in "take" activities that are not authorized by the CBW regulations must apply for a separate permit under Section 10.

Second, whether or not the FWS opts to enforce these provisions against Ringling Bros. is completely irrelevant here, since the ESA contains a citizen suit provision precisely for the purpose of allowing "any person" to bring a suit "to enjoin any person . . . who is alleged to be in violation" of the ESA or its

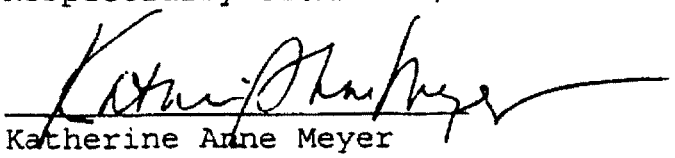
implementing regulations. 16 U.S.C. § 1540(g); see also Bennett v. Spear, 520 U.S. at 165 ("the obvious purpose of [this] particular provision . . . is to encourage enforcement by so-called 'private attorneys general'") (emphasis added).

This is precisely what plaintiffs have done here with respect to their allegations that defendants have failed to seek the permits that are required by section 10 of the Act, and their request for an order "[e]njoining defendants from beating, wounding and injuring endangered elephants, forcibly separating babies from their mothers, 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." 2d Amended Complaint at 20 (emphasis added). Accordingly, in granting defendants' motion to dismiss, the district court again completely ignored several key allegations made by plaintiffs, as well as their prayer for relief.

CONCLUSION

For all of the foregoing reasons, the district court's rulings should be reversed.

Respectfully submitted,



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July 24, 2002

CERTIFICATE OF WORD LIMITS

I certify that the foregoing brief complies with the type volume and word limitation set forth in Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a)(1).

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I certify that, on July 24, 2002, copies of the foregoing brief of plaintiffs-appellants and the Joint Appendix were served by hand on counsel for defendants-appellees:

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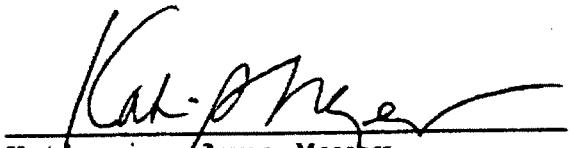

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ADDENDUM

ENDANGERED SPECIES

ENDANGERED SPECIES ACT OF 1973 [ESA § ——]

(16 U.S.C.A. §§ 1531 to 1544)

CHAPTER 35—ENDANGERED SPECIES

§ 1531. Congressional findings and declaration of purposes and policy

[ESA § 2]

(a) Findings

The Congress finds and declares that—

(1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;

(2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;

(3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;

(4) the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to—

(A) migratory bird treaties with Canada and Mexico;

(B) the Migratory and Endangered Bird Treaty with Japan;

(C) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere;

(D) the International Convention for the Northwest Atlantic Fisheries;

(E) the International Convention for the High Seas Fisheries of the North Pacific Ocean;

(F) the Convention on International Trade in Endangered Species of Wild Fauna and Flora; and

(G) other international agreements; and

(5) encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants.

(b) Purposes

The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

(c) Policy

(1) It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.

(2) It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.

(Pub.L. 93-205, § 2, Dec. 28, 1973, 87 Stat. 884; Pub.L. 96-159, § 1, Dec. 28, 1979, 93 Stat. 1225; Pub.L. 97-304, § 9(a), Oct. 13, 1982, 96 Stat. 1426; Pub.L. 100-478, Title I, § 1013(a), Oct. 7, 1988, 102 Stat. 2315.)

§ 1532. Definitions

[ESA § 3]

For the purposes of this chapter—

(1) The term "alternative courses of action" means all alternatives and thus is not limited to original project objectives and agency jurisdiction.

(2) The term "commercial activity" means all activities of industry and trade, including, but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling: *Provided, however*, That it does not include exhibition of commodities by museums or similar cultural or historical organizations.

(3) The terms "conserve", "conserving", and "conservation" mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

(6) The term "endangered species" means any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man.

(a) Generally

(1) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

(2) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of plants listed pursuant to section 1533 of this title, it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from, the United States;

(B) remove and reduce to possession any such species from areas under Federal jurisdiction; maliciously damage or destroy any such species on any such area; or remove, cut, dig up, or damage or destroy any such species on any other area in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law;

(C) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(D) sell or offer for sale in interstate or foreign commerce any such species; or

(E) violate any regulation pertaining to such species or to any threatened species of plants listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

(b) Species held in captivity or controlled environment

(1) The provisions of subsections (a)(1)(A) and (a)(1)(G) of this section shall not apply to any fish or wildlife which was held in captivity or in a controlled environment on (A) December 28, 1973, or (B) the date of the publication in the Federal Register of a final regulation adding such fish or wildlife species to any list published pursuant to subsection (c) of section 1533 of this title: *Provided*, That such holding and any subsequent holding or use of the fish or wildlife was not in the course of a commercial activity. With respect to any act prohibited by subsections (a)(1)(A) and (a)(1)(G) of this section which occurs after a period of 180 days from (i) December 28, 1973, or (ii) the date of publication in the Federal Register of a final regulation adding such fish or wildlife species to any list published pursuant to subsection (c) of section 1533 of this title, there shall be a rebuttable presumption that the fish or wildlife involved in such act is not entitled to the exemption contained in this subsection.

(2)(A) The provisions of subsection (a)(1) of this section shall not apply to—

(i) any raptor legally held in captivity or in a controlled environment on November 10, 1978; or

(ii) any progeny of any raptor described in clause (i);

until such time as any such raptor or progeny is intentionally returned to a wild state.

(B) Any person holding any raptor or progeny described in subparagraph (A) must be able to demonstrate that the raptor or progeny does, in fact, qualify under the provisions of this paragraph, and shall maintain and submit to the Secretary, on request, such inventories, documentation, and records as the Secretary may by regulation require as being reasonably appropriate to carry out the purposes of this paragraph. Such requirements shall not unnecessarily duplicate the requirements of other rules and regulations promulgated by the Secretary.

§ 1539. Exceptions

[ESA § 10]

(a) Permits

(1) The Secretary may permit, under such terms and conditions as he shall prescribe—

(A) any act otherwise prohibited by section 1538 of this title for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to, acts necessary for the establishment and maintenance of experimental populations pursuant to subsection (j) of this section; or

(B) any taking otherwise prohibited by section 1538(a)(1)(B) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

(2)(A) No permit may be issued by the Secretary authorizing any taking referred to in paragraph (1)(B) unless the applicant therefor submits to the Secretary a conservation plan that specifies—

(i) the impact which will likely result from such taking;

(ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;

(iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and

(iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.

(B) If the Secretary finds, after opportunity for public comment, with respect to a permit application and the related conservation plan that—

(i) the taking will be incidental;

(ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;

(iii) the applicant will ensure that adequate funding for the plan will be provided;

(iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and

(v) the measures, if any, required under subparagraph (A)(iv) will be met;

and he has received such other assurances as he may require that the plan will be implemented, the Secretary shall issue the permit. The permit shall contain such terms and conditions as the Secretary deems necessary or appropriate to carry out the purposes of this paragraph, including, but not limited to, such reporting requirements as the Secretary deems necessary for determining whether such terms and conditions are being complied with.

(C) The Secretary shall revoke a permit issued under this paragraph if he finds that the permittee is not complying with the terms and conditions of the permit.

(b) Hardship exemptions

(1) If any person enters into a contract with respect to a species of fish or wildlife or plant before the date of the publication in the Federal Register of notice of consideration of that species as an endangered species and the subsequent listing of that species as an endangered species pursuant to section 1533 of this title will cause undue economic hardship to such person under the contract, the Secretary, in order to minimize such hardship, may exempt such person from the application of section 1538(a) of this title to the extent the Secretary deems appropriate if such person applies to him for such exemption and includes with such application such information as the Secretary may require to prove such hardship; except that (A) no such exemption shall be for a duration of more than one year from the date of publication in the Federal Register of notice of consideration of the species concerned, or shall apply to a quantity of fish or wildlife or plants in excess of that specified by the Secretary; (B) the one-year period for those species of fish or wildlife listed by the Secretary as endangered prior to December 28, 1973 shall expire in accordance with the terms of section 668cc–3 of this title; and (C) no such exemption may be granted for the importation or exportation of a specimen listed in Appendix I of the Convention which is to be used in a commercial activity.

(g) Citizen suits

(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf—

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or

(B) to compel the Secretary to apply, pursuant to section 1535(g)(2)(B)(ii) of this title, the prohibitions set forth in or authorized pursuant to section 1533(d) or 1538(a)(1)(B) of this title with respect to the taking of any resident endangered species or threatened species within any State; or

(C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be. In any civil suit commenced under subparagraph (B) the district court shall compel the Secretary to apply the prohibition sought if the court finds that the allegation that an emergency exists is supported by substantial evidence.

(2)(A) No action may be commenced under subparagraph (1)(A) of this section—

(i) prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation;

(ii) if the Secretary has commenced action to impose a penalty pursuant to subsection (a) of this section; or

(iii) if the United States has commenced and is diligently prosecuting a criminal action in a court of the United States or a State to redress a violation of any such provision or regulation.

(B) No action may be commenced under subparagraph (1)(B) of this section—

(i) prior to sixty days after written notice has been given to the Secretary setting forth the reasons why an emergency is thought to exist with respect to an endangered species or a threatened species in the State concerned; or

(ii) if the Secretary has commenced and is diligently prosecuting action under section 1535(g)(2)(B)(ii) of this title to determine whether any such emergency exists.

(C) No action may be commenced under subparagraph (1)(C) of this section prior to sixty days after written notice has been given to the Secretary; except that such action may be brought immediately after such notification in the case of an action under this section respecting an emergency posing a significant risk to the well-being of any species of fish or wildlife or plants.

(3)(A) Any suit under this subsection may be brought in the judicial district in which the violation occurs.

(B) In any such suit under this subsection in which the United States is not a party, the Attorney General, at the request of the Secretary, may intervene on behalf of the United States as a matter of right.

(4) The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

(5) The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Secretary or a State agency).

§ 17.3 Definitions.

In addition to the definitions contained in part 10 of this subchapter, and unless the context otherwise requires, in this part 17:

Enhance the propagation or survival, when used in reference to wildlife in captivity, includes but is not limited to the following activities when it can be shown that such activities would not be detrimental to the survival of wild or captive populations of the affected species:

(a) Provision of health care, management of populations by culling, contraception, euthanasia, grouping or handling of wildlife to control survivorship and reproduction, and similar normal practices of animal husbandry needed to maintain captive populations that are self-sustaining and that possess as much genetic vitality as possible;

(b) Accumulation and holding of living wildlife that is not immediately needed or suitable for propagative or scientific purposes, and the transfer of such wildlife between persons in order to relieve crowding or other problems hindering the propagation or survival of the captive population at the location from which the wildlife would be removed; and

(c) Exhibition of living wildlife in a manner designed to educate the public about the ecological role and conservation needs of the affected species.

Harm in the definition of "take" the Act means an act which actual kills or injures wildlife. Such act m include significant habitat modific tion or degradation where it actual kills or injures wildlife by significant impairing essential behavioral pa terns, including breeding, feeding sheltering.

(g) *Captive-bred wildlife.* (1) Notwithstanding paragraphs (b), (c), (e) and (f) of this section, any person may take; export or re-import; deliver, receive, carry, transport or ship in interstate or foreign commerce, in the course of a commercial activity; or sell or offer for sale in interstate or foreign commerce any endangered wildlife that is bred in captivity in the United States provided either that the wildlife is of a taxon listed in paragraph (g)(6) of this section, or that the following conditions are met:

(i) The wildlife is of a species having a natural geographic distribution not including any part of the United States, or the wildlife is of a species that the Director has determined to be eligible in accordance with paragraph (g)(5) of this section;

(ii) The purpose of such activity is to enhance the propagation or survival of the affected species;

(iii) Such activity does not involve interstate or foreign commerce, in the course of a commercial activity, with respect to non-living wildlife;

(iv) Each specimen of wildlife to be re-imported is uniquely identified by a band, tattoo or other means that was