

PLAINTIFFS' EXHIBIT G
To Plaintiffs' Opposition to Defendants' Motion
For Summary Judgment
Civ. No. 03-2006 (EGS/JMF)

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

10
11 A

12 "It is well settled that plaintiffs may suffer injury as
13 a result of a denial of information to which they are statutorily
14 entitled." Fund for Animals, 295 F Supp 2d at 8. The Supreme
15 Court has found that purely informational injury may be sufficient
16 to confer standing where there is a statute that "seek[s]" to
17 protect individuals from "failing to receive particular information
18 about campaign-related activities," Federal Election Commission v
19 Akins, 524 US 11, 22 (1998), where a plaintiff "has specifically
20 requested, and been refused," information subject to mandatory
21 public disclosure, Public Citizen v Department of Justice, 491 US
22 440, 449 (1989), and where a specific statutory provision
23 "establish[es] an enforceable right to truthful information,"
24 Havens Realty Corp v Coleman, 455 US 363, 373 (1982). These cases
25 make clear that informational injury is implicated when plaintiffs
26 are effectively denied information to which they would otherwise be
27 entitled by statute. The first question, then, is whether § 10(c)
28 of the ESA creates a right to information. See Salt Institute v

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

5 In pertinent part, § 10(c) provides:

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

17 16 USC § 1539(c) (emphasis added).

18 Plaintiffs contend that the mandatory language of § 10(c) creates a
19 right to information upon which a claim of informational injury may
20 be predicated. Relying primarily upon the District of Columbia
21 Circuit's statement that standing by virtue of informational injury
22 arises only where a statute "explicitly create[s] a right to
23 information," Animal Legal Defense Fund, Inc v Espy, 23 F3d 496,
24 502 (DC Cir 1994), the Service argues that informational standing
25 does not exist in this case because the ESA creates no
26 informational rights.

27 The District of Columbia Circuit addressed the
28 obligations imposed by § 10(c) in Gerber v Norton, 294 F3d 173 (DC
Cir 2002). Gerber involved a challenge to the issuance of a § 10
permit authorizing the incidental taking of Delmarva fox squirrels
on a real estate community development site. Plaintiffs argued
that the Service violated § 10(c) by failing to make publicly
available the map of a parcel of land which the applicant had

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

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

17
18 B

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

26
27 1

28 The parties do not dispute that plaintiffs' first claim

1 arises under the APA and not the ESA's citizen-suit provision.
2 Accordingly, in addition to the immutable standing requirements of
3 Article III, the court must also determine "whether the interest
4 sought to be protected by [plaintiffs] is arguably within the zone
5 of interests to be protected or regulated by the statute in
6 question." Ass'n of Data Processing Serv Organizations, Inc v
7 Camp, 397 US 150, 153 (1970). The zone-of-interests test "denies a
8 right of review if the plaintiff's interests are so marginally
9 related to or inconsistent with the purposes implicit in the
10 statute that it cannot be reasonably be assumed that Congress
11 intended to permit the suit." Clarke v Securities Industry Ass'n,
12 479 US 388, 399 (1987). The inquiry is not "whether Congress
13 specifically intended to benefit the plaintiff." Nat Credit Union
14 Admin v First Nat Bank & Trust Co, 522 US 479, 492 (1998). Rather,
15 the court first discerns the interests arguably protected by the
16 statutory provision at issue and then determines whether the
17 plaintiffs' interest affected by the agency action falls among
18 them. Id.

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

1 informational interests of those who participate in that process.
2 Whether denial of the ability to participate meaningfully in the §
3 10 permit process is an injury that is "procedural" or
4 "informational" in nature, the court concludes it is sufficient to
5 support standing. Compare Earth Island Institute v Ruthenbeck, ___
6 F3d ___, 2006 WL 2291168, *4 (9th Cir Aug 11, 2006) (holding that
7 the loss of a right of administrative appeal under the Appeals
8 Reform Act was a sufficient injury to confer standing). But
9 information for information's sake is not within the zone of
10 interests served by § 10(c).

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