UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' MEMORANDUM REGARDING
RELEVANT STATUTORY AND REGULATORY AUTHORITY

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Plaintiffs are filing this brief to address the issues posed by the Court on February 6, 2009, i.e., (1) "what is the scope of any statutory or regulatory authority, if any, of any federal agency" with regard to "Asian elephants in captivity in American circuses"; and (2) how, if at all, that authority has been exercised with respect to the "take" allegations on which plaintiffs' claims are predicated here. Feb. 6, 2009 Trial Tr. at 69, 72-73. As discussed further below, because this case has properly been brought pursuant to the citizen suit provision of the Endangered Species Act ("ESA"), and because this Court has already held that the Asian elephants at issue are protected by the "take" prohibition embodied in that statute, see 8/23/07 Mem. Op. (DE 173) at 7-15, it is the U.S. Fish and Wildlife Service ("FWS") that has the relevant statutory and regulatory authority to implement the ESA. See Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 697 (1995) (affording Chevron deference to FWS's "reasonable" definition of the statute's prohibition on "harm[ing]" listed species). The FWS has exercised that authority by making clear that captive members of endangered species may not be "harmed," "wounded," "harassed," or otherwise taken without a permit issued under section 10 of the Act, and, although the FWS itself has not brought an enforcement action against defendant, Congress created the ESA's citizen suit provision precisely to ensure that the protection of listed species would ***not*** be dependent on such enforcement.

I. THIS IS AN ESA CASE.

The Court's inquiry can only sensibly be answered with reference to the specific statutory context within which plaintiffs' claims have been asserted. See Navarro v. Pfizer Corp., 261 F.3d 90, 99 (1st Cir. 2001). Despite FEI's persistent efforts to convert this lawsuit into an Animal Welfare Act ("AWA") case, the reality is that, as expressly authorized by Congress, plaintiffs have brought this case pursuant to the citizen suit provision of the ESA, which provides

that "***any person*** may commence a civil suit" in order to "enjoin ***any person*** . . . who is alleged to be in violation of ***any provision of this chapter or regulation issued under the authority thereof.***" 16 U.S.C. § 1540(g)(1)(A) (emphases added).

This capacious language indisputably encompasses plaintiffs' claim that FEI is "in violation" of section 9 of the ESA and that statute's implementing regulations. As the Supreme Court held in a unanimous ruling, the ESA citizen suit provision is "an authorization of remarkable breadth when compared with the language Congress ordinarily uses," and this plain language must be taken "at face value." Bennett v. Spear, 520 U.S. 154, 164-65 (1997). Further repudiating FEI's implication that plaintiffs' pursuit of this citizen suit is somehow foreclosed by the failure of the Executive Branch to initiate an enforcement action of its own, the Supreme Court also declared that the "obvious purpose of the [ESA's citizen suit provision] is to encourage enforcement by so-called 'private attorneys general.'" Id. (emphasis added).[1]

In short, plaintiffs are pursuing precisely the "private attorney general" role carved out by Congress, which made a policy choice ***not*** to rely exclusively (or even primarily) on Executive Branch enforcement of the ESA's take prohibition. Indeed, as explained by former D.C. Circuit

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[1] Hence, in Bennett, the Supreme Court refused to depart from the ESA's text by engrafting onto the citizen suit provision a limitation that Congress did not adopt (a "zone of interests" test). 520 U.S. at 164-66. That is essentially the same impermissible result for which FEI advocates here through its argument that the Court should decline to adjudicate plaintiffs' claim because an Executive Branch agency has not brought the very same enforcement action. There is simply no such limitation in the citizen suit provision or anywhere else in the ESA. To the contrary, the ESA forecloses pursuit of a citizen suit only where the government "has commenced action to impose a penalty" under the Act's civil penalty provisions. 16 U.S.C. § 1540(g)(3)(B) (emphasis added). The only other limitations that Congress adopted are that: (1) plaintiffs must give the government advance notice of a prospective claim (as plaintiffs have done here), see id. at § 1540(g)(2); and (2) in any citizen suit, the "Attorney General, at the request of the Secretary [of the Interior] may intervene on behalf of the United States as a matter of right," id. at § 1540(g)(3)(B) (emphasis added).

Chief Judge Patricia Wald, when Congress creates such a citizen suit provision, it is acting on the premise that federal regulators and the entities they oversee "may work out 'agreements' that are not necessarily true to the spirit" of the law, and hence Congress ***wants*** the "citizen outsider [to] act[] as a goad in such cases." Patricia M. Wald, *The Role of the Judiciary in Environmental Protection*, 19 B.C. Envtl. Aff. L. Rev. 519, 525 (1992). As Congress contemplated, therefore, many citizen suits asserting unlawful "takings" under the ESA have been brought – and won – by private parties in the absence of any federal agency involvement. See, e.g., Loggerhead Turtle v. County Council of Volusia County, Fla., 896 F. Supp. 1170, 1180 (M.D. Fla. 1995) ("Enforcement of the [ESA] here does not require the resolution of any issues by the [FWS]."; Marbled Murrelet v. Pac. Lumber Co., 880 F. Supp. 1343 (N.D. Cal. 1995), aff'd, 83 F.3d 1060 (9th Cir. 1996). This lawsuit is in no fundamentally different legal posture than other cases in which courts have been called on to make de novo determinations of whether particular conduct "harms," "wounds," "harasses," or otherwise takes members of a listed species.[2]

This by no means suggests that a ruling by the Court would render the FWS's role in implementing the statutory scheme irrelevant. Rather, should the Court hold that defendant's practices do in fact harm, wound, or harass Asian elephants, ***then the permitting scheme that applies to such takings should come into play***, and the Service will thereby be called on to assess whether a permit should be issued and, if so, on what conditions. For example, FEI insists

[2] Indeed, the federal government has traditionally pursued very few section 9 claims of any kind since passage of the ESA. Accordingly, citizen suits by private parties have been the primary means of enforcement of the ESA's take prohibition. Courts have not declined to award appropriate relief in such cases – including those raising novel takings issues – merely because the Executive Branch did not pursue its own enforcement action. See, e.g., Strahan v. Coxe, 127 F.3d 155, 158 (1st Cir. 1997) (affirming district court holding that state officials were taking right whales simply by permitting gillnet and lobster pot fishing in Right whale habitat).

that its operations are somehow conserving Asian elephants in the wild. Although plaintiffs strongly disagree, that dispute has nothing to do with the threshold question of whether FEI is "taking" the elephants. It would however, be critical should the Court rule that disciplining the elephants with bull hooks and/or prolonged chaining of them on hard surfaces constitutes a take, because FEI would then be in the position of applying for a permit under section 10 of the ESA on the rationale that its are somehow necessary to "enhance the propagation or survival of the affected species." 16 U.S.C. § 1539(a)(1)(A). Such an approach would, in turn, result in a Congressionally mandated public notice and comment process, culminating in a judicially reviewable decision by the FWS. See Loggerhead Turtle, 896 F. Supp. at 1177 ("[T]he Court is called upon to ascertain whether the County's activities will likely result in future takings of protected sea turtles. This is no invasion of the [FWS's] expertise. The Service shall apply its expertise when it considers Volusia County's application" for a permit) (emphasis added).[3]

II. FEI'S CAPTIVE ASIAN ELEPHANTS ARE SUBJECT TO THE ESA'S TAKE PROHIBITION.

FEI's ongoing insistence that the ESA has nothing to do with its treatment of the endangered Asian elephants flies in the face of the Court's ruling that the ESA's take prohibition ***does*** apply to the "pre-Act" elephants at issue. As held by the Court, the ESA provides that certain of the Act's prohibitions – but ***not*** the take prohibition – "do not apply to any fish or

[3] Indeed, the Court, in a remedial order, could order defendant to apply for such a permit. See Strahan v. Coxe, 127 F.3d at 158 1997) (affirming remedial order requiring state officials to pursue a section 10 permit); see also Center for Biological Diversity v. Pirie, 201 F. Supp. 2d 113, 120-22 (D.D.C. 2002) (Sullivan, J.), vacated as moot, 2003 WL 179848 (D.C. Cir. Jan. 23, 2008) (recognizing the court's authority to order the Secretary of the Navy to apply to the FWS for a permit following a finding that the Navy was unlawfully taking migratory birds, but declining to frame relief in those terms because "in this case, the FWS has denied defendants' permit applications *at least twice*").

wildlife which was held in captivity" prior to the date the ESA was passed or the species was listed. DE 173 at 7 (emphasis added) (citing 16 U.S.C. § 1538(b)(1)). The necessary import of this ruling is that Congress knew well how to exempt particular captive members of listed species from the ESA's safeguards, but that it intentionally did ***not*** do so with respect to the take prohibition as applied to the elephants at issue here. Id. at 12.

FEI's argument is also impossible to harmonize with other statutory language, the Supreme Court's rulings on how that language should be construed, and the FWS's own longstanding recognition that the ESA's take prohibition clearly applies to captive members of listed species. As plaintiffs have explained in prior briefing, see, e.g., DE 96 at 5, section 9 prohibits the take of "any endangered species of fish or wildlife," 16 U.S.C. § 1538(a)(1) (emphasis added), and the term "fish or wildlife" means "any member of the animal kingdom," regardless of where, or under what circumstances, it was born, id. § 1532(8) (emphasis added). There is no ambiguity in this expansive language, see, e.g., Dep't of Hous. & Urban Dev't v. Rucker, 535 U.S. 125, 131 (2002) ("the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind'" [(internal citation omitted)]), and, even if there were, the FWS's longstanding construction establishes that the "Act applies to both wild and captive populations of a [listed] species." 44 Fed. Reg. 30044 (May 23, 1979) (emphasis added); see also 63 Fed. Reg. 48634, 48636 (Sept. 11, 1998) (explaining that "take" was defined by Congress to apply to endangered or threatened species "whether wild or captive" and that the "statutory term cannot be changed administratively").[4]

[4] Other regulations issued by the FWS also recognize that the Act's take prohibitions apply to listed species in captivity. Indeed, there would have been no need for the Service to issue the "captive-bred wildlife regulations" on which FEI has relied for elephants born in

FEI's contention that the take prohibition should be construed so narrowly that anyone may harm, wound, harass, or even kill a captive member of a listed species with impunity under the ESA, also runs afoul of the Supreme Court's ruling that Congress intended to "provide comprehensive protection for endangered and threatened species," and specifically "stressed that '[t]ake' is defined . . . in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife.'" Sweet Home, 515 U.S. at 699, 704 (emphases added) (quoting S. Rep. No. 93-307 at 7 (1973)); see also id. ("The House Report stated that 'the broadest possible terms' were used to define restrictions on takings." [(quoting H.R. Rep. No. 93-412 at 15 (1973)]).[5]

Also groundless is FEI's notion that, because Congress did not specifically refer to the use of endangered species in circuses when it enacted the ESA, then this must mean that such animals are unprotected by the Act. That argument not only ignores how Congress ordinarily legislates – i.e., by enacting general requirements and prohibitions rather than enumerating each specific covered activity – but clearly runs afoul of the Supreme Court's landmark construction

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captivity if the take prohibition did not generally apply to Asian elephants in captivity. See 50 C.F.R. § 17.21(g); see also id. at § 17.40(c)(3) (creating a "special rule" delineating the circumstances under which captive chimpanzees listed as threatened may be taken); 71 Fed. Reg. 28881 (May 18, 2006) (requesting public comment on whether the Service should issue a "permit to include lethal take of up to twenty captive born white-collared mangabeys" per year for "the purpose of enhancement of the survival of the species").

[5] FEI's contention that its treatment of the Asian elephants does not implicate the ESA at all is predicated on its argument that "take" should be accorded its narrow common law meaning and that the various statutory words used to define take – i.e., harm, harass, wound, etc. – should likewise be construed narrowly to conform to that common law understanding. But that is precisely the approach to statutory construction that the Supreme Court rejected in Sweet Home. See 515 U.S. at 701 n.15 ("Because such conduct would not constitute a taking at common law, the dissent would shield it from § 9 liability, even though the words 'kill' and 'harm' in the statutory definition could apply to such deliberate conduct. We cannot accept that limitation.").

of the ESA in TVA v. Hill, 437 U.S. 153 (1978). In that case, the Attorney General argued that, notwithstanding the plain language of the ESA, Congress could not possibly have intended the Act to halt construction of a nearly completed $ 100 million public works project and that if Congress had desired that "curious" result then it would have specifically said so. Id. at 172.

The Court rejected that approach, explaining that "[i]t is not for us to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated." Id. at 185. Rather, because "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities," the Court was obligated to apply the Act's safeguards to the situation before it. Id. at 194. Since that analysis was applied in Hill to a massive public works project that Congress continued to fund after enactment of the ESA, and the blocking of which would impose a "burden on the public through the loss of millions of unrecoverable dollars," id. at 187, there is certainly no legitimate reason why the Court should read defendant's treatment of its endangered elephants out of the Act's protections here.[6]

III. CONGRESS DELEGATED AUTHORITY TO ISSUE REGULATIONS IMPLEMENTING THE ESA'S TAKE PROHIBITION TO THE FWS.

Because this case arises under the ESA, and because the elephants at issue are protected by that Act, the FWS is the only federal agency with any statutory or regulatory authority pertinent ***to this case***. Indeed, as FEI flatly admits, "Congress vested FWS with the authority to implement the ESA." FEI's Pretrial Brief (DE 362) at 32 (emphasis added). Accordingly, under

[6] Indeed, the Court in Hill further observed that "[v]irtually all dealings with endangered species, including taking, possession, transportation, and sale were prohibited [by the ESA] . . . except in extremely narrow circumstances." 437 U.S. at 180 (emphasis added).

elementary administrative law principles, because the FWS is the agency to which Congress delegated "administrative and interpretive power" over endangered species such as the Asian elephant, Sweet Home, 515 U.S. at 708, it is the FWS – and ***only*** the FWS – to which the Court could look for any interpretive guidance should the Court perceive some ambiguity in how the ESA's take prohibitions apply to the conduct at issue. See Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842 (1984) (a court may defer only to an agency's interpretation of an ambiguous "statute which it administers").[7]

This analysis is not altered by the fact that one part of one of the FWS's regulations elaborating on the meaning of one of the take definitions (that of "harass") makes reference to standards of the United States Department of Agriculture ("USDA") implementing the AWA. See 50 C.F.R. § 17.3. Plaintiffs' take claim focuses on three distinct parts of the take definition, any one of which, if satisfied, is sufficient for plaintiffs to prevail in this case. As to "wound[ing]," the FWS has adopted no regulatory definition, and hence under basic principles of statutory construction, the dictionary definition of that word applies. See, e.g., Pub. Citizen v. U.S. Dep't of Health & Human Serv., 332 F.3d 654, 662-63 (D.C. Cir. 2003). As for "harm," the FWS has defined that word to mean "an act which actually kills or injures wildlife," 50 C.F.R. §

[7] Because the evidence clearly demonstrates that FEI's routine chaining practices and bullhook use have "harmed," "harassed," and "wounded" the animals – within the plain meaning of those terms, as well as within their regulatory definitions – there is no need for the Court to consider the views of any Executive Branch agency to resolve this citizen suit. However, if the Court does consider soliciting the views of the FWS, plaintiffs suggest that the Court do so only ***after*** making factual findings but before issuing any legal conclusions, so that any input the agency provides on the meaning or application of the ESA to the facts of this case is based on the same record off which the Court is operating. Cf. Auer v. Robbins, 519 U.S. 452, 461 (1997) (soliciting Secretary of Labor's views regarding the correct application of regulations to the factual record compiled in the lower courts in litigation between non-federal litigants).

17.3, and the regulatory definition makes no mention of AWA standards.

Finally, as to "harass," the FWS has defined that word to mean conduct which "creates the likelihood of injury" by "significantly disrupt[ing] normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering." Id. However, the FWS has also provided that "[t]his definition, when applied to captive wildlife, does not include" certain activities, including "generally accepted [] [a]nimal husbandry practices that meet or exceed the minimum standards for facilities and care" under the AWA. Id. Thus, before the AWA standards would even be consulted, a particular activity would ***first*** have to be deemed a "generally accepted animal husbandry practice" for the particular listed species at issue.[8]

In any event, the mere fact that FWS opted to cross-reference the AWA standards has no bearing on which Executive Branch agency has statutory or regulatory authority with regard to the proper application of the legislative scheme before the Court. See, e.g., Paralyzed Veterans of America v. D.C. Arena, L.P., 117 F.3d 579, 585 (D.C. Cir. 1997) (deferring to Justice Department's interpretation of implementing regulations that had been copied verbatim from another agency because the statute at issue made the regulations solely "the Justice Department's responsibility"); Sec'y of Labor v. Excel Mining, LLC, 334 F.3d 1, 7 (D.C. Cir. 2003) (following Paralyzed Veterans); Navarro, 261 F.3d at 92, 99 (although the Secretary of Labor, in implementing the Family and Medical Leave Act ("FMLA") "simply co-opted existing

[8] It is plaintiffs' position that routinely striking Asian elephants with bullhooks, and chaining them in railroad cars and on concrete surfaces for prolonged periods, are not even "husbandry practices," let alone "generally accepted" practices. See DE 96 at 35-38. Indeed, in adopting this definition of harassment, the FWS emphasized that the ESA would ***never*** permit the "physical mistreatment" of captive animals, or any other conditions that "might create the likelihood of injury or sickness," or result in animals "not being treated in a humane manner." 63 Fed. Reg. 48634, 48638 (Sept. 11, 1998) (emphasis added).

definitions by a different agency [the EEOC] for use in a different statute," the court declined to afford any Chevron deference to the EEOC's interpretations of the definitions because the "EEOC itself has been granted no rulemaking power under the FLMA, and therefore its interpretive guidance is certainly not entitled to deference"); cf. Aeronautical Repair Station Ass'n, Inc. v. FAA, 494 F.3d 161, 176 (D.C. Cir. 2007) (refusing to defer to an agency's interpretation of a statute that the agency "does not administer").[9]

[9] Accordingly, FEI's position that the Court should invoke the doctrine of "primary jurisdiction" by deferring to the USDA's enforcement of the AWA is groundless. USDA has ***no***, let alone "primary," jurisdiction, over the ESA take prohibition. See United States v. Philadelphia Nat. Bank, 374 U.S. 321, 352-54 (1963) (the doctrine allows a court only to defer review "in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme") (emphasis added). Further, the doctrine only comes into play when ongoing administrative proceedings are pending before an agency, see Envtl.Def. Fund v. EPA, 852 F.2d 1316, 1330-31 (D.C. Cir. 1988), or where there is some formal process whereby the plaintiff may seek relief from the agency. Local Union No. 189, Amalgamated Meat Cutters and Butcher Workmen of N. Am., AFL-CIO v. Jewel Tea Co., 381 U.S. 676, 687-88 (1965). Neither is the case here; to the contrary, although USDA investigators have routinely documented serious violations of the AWA in connection with FEI's treatment of its endangered elephants, FEI has in the past been highly successful in persuading high-ranking USDA officials to avoid enforcement actions entirely or to settle for minor penalties that FEI merely regards as a cost of doing business. See ASPCA *et. al*, *Government Sanctioned Abuse: How the [USDA] Allows Ringling Brothers Circus to Systematically Mistreat Elephants* (Sept. 2003) (excerpts attached as Ex. A); see also Pf. WC Ex. 53 (Ex. B). Unfortunately, this pattern of non-enforcement is commonplace when it comes to the AWA; recent investigations by USDA's own Inspector General have found that the agency "is not aggressively pursuing enforcement actions against violators of the AWA," and has generally imposed "minimal" fines that do not effectively deter repeat violations. USDA Office of Inspector General, Report. No. 33002-3-SF, Audit Report, APHIS Animal Care Program Inspection and Enforcement Activities, Exec. Summ. (Sept. 2005) (available at http://www.usda.gov/oig/webdocs/33002-03-SF.pdf. (Pl. WC Ex. 89). Not surprisingly, therefore, in the entire history of the AWA, only two elephants have been confiscated by the USDA and plaintiffs are aware of only two elephant exhibitors who have lost their licenses for even the most egregious AWA violations. See http://www.elephants.com.

Respectfully submitted,

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