IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES ASSOCIATION OF REPTILE KEEPERS, INC., *et al.*,	
Plaintiffs,	
v.	Civil No. 1:13-cv-2007-RDM
S.M.R. JEWELL *et al.*,	
Defendants.	

FEDERAL DEFENDANTS' SUPPLEMENTAL BRIEF REGARDING THE COURT'S MAY 12, 2015 ORDER

The Court has asked for supplemental briefing on whether a brief stay of a preliminary injunction is appropriate to allow defendants an opportunity to seek interim relief from the D.C. Circuit and whether the scope of any injunction should exclude transportation of reticulated pythons and green anacondas into Florida and Texas. ECF No. 52 ("Op.") at 49. The answer to the first question is yes. The Court should stay issuance of any injunction for 75 days to allow Federal Defendants to seek the necessary authorization from the Solicitor General to file an appeal. As for the Court's second question, although Federal Defendants do not believe that any injunction should issue, if the Court issues an injunction it should be extremely narrow, providing only that relief necessary to address Plaintiffs' demonstrated harms.

1. The Court Should Issue a Limited Stay Pending Appeal

Even if a preliminary injunction is warranted here, it should be stayed pending the filing of any appeal of the order issuing the injunction. Stay of an injunction pending appeal, like other types of interim injunctive relief, is "an extraordinary remedy that should be granted only when the party seeking the relief, by a clear showing, carries the burden of persuasion." *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004) (citation omitted). In the D.C. Circuit, "a court assesses four factors when considering a motion to stay an injunction pending appeal: (1) the moving party's likelihood of success on the merits of its appeal, (2) whether the moving party will suffer irreparable injury, (3) whether issuance of the stay would substantially harm other parties in the proceeding, and (4) the public interest." *Akiachak Native Cmty. v. Jewell*, 995 F. Supp. 2d 7, 12 (D.D.C. 2014) (citing *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1997)).

Since the Court issued its order on Tuesday, the Department of Justice and the Department of the Interior have begun the decision-making process to determine whether to file an appeal. As this Court is aware, any appeal filed by the United States must be authorized by the Solicitor General, based on the recommendations of the litigating components of the Department of Justice and, here, the Department of the Interior, and FWS. *See* 28 C.F.R. § 0.20(b). Thus, the decision-making process involves several different offices within both agencies and typically

takes several months to complete. Federal Defendants, however, will endeavor to complete the process in no more than 75 days and seek a temporary stay of any injunction until that time.

In short, given the limited stay requested, the strong public interest in favor of avoiding environmental harm, and the demonstrated risk of harm to the environment if the interstate transportation prohibition is enjoined, the equities weigh in favor of a limited stay of 75 days. The Court has already found that the public interest weighs in favor of the government. Op. at 48 (noting, "even though the harms Plaintiffs assert are more certain to come to pass than the risks identified by the government, the severity of the potential public harms here is great enough that the public interest and balance of equities favor Defendants."). This finding is well supported by the body of cases that find harm to the environment, like that posed by the establishment and spread of the green anaconda and the reticulated python within the continental United States, to be an irreparable injury. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987) ("[E]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often ... irreparable."); *Klayman v. Obama*, 957 F. Supp. 2d 1, 43-44 (D.D.C. 2013) (staying preliminary injunction order pending appeal because of the significant national security interests at stake in the case). Indeed, once these dangerous non-native snakes are released into the environment, the damage is done. They are fertile, hard to find, and extremely difficult to contain; and they wreak havoc on native ecosystems. Thus, if the Court decides that an injunction must issue, it should, at a minimum, stay that injunction while Federal Defendants decide whether to appeal.

If the Solicitor General reaches a decision in less than 75 days, we will timely notify the Court.[1] Should the Solicitor General authorize an appeal, we may move for a further stay pending appeal at that time. If no appeal is authorized, we will confer with Plaintiffs and present

[1] Federal Defendants interpret the Court's order to seek argument on a motion for a stay pending appeal in the context of this supplemental brief. We will provide a formal motion and full briefing on this issue if this was a misinterpretation of the order.

the Court a proposed schedule for summary judgment briefing.[2]

2. Scope of an Injunction

The Court should not grant a preliminary injunction. The significant harm that these injurious snakes pose to the environment and the strong public interest in stemming the spread of invasive species embodied in the final rule are sufficient to tip the scale against injunctive relief, notwithstanding the Court's finding of a likelihood of success on the merits. *Winter v. Natural Resources Def. Council*, 555 U.S. 7, 32 (2008) ("An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course."). Indeed, the Court found that the public interest and the equities weigh in favor of Federal Defendants because of the threat of significant environmental impacts if these large, predatory, invasive species become established in the wild. Op. at 48; *id.* at 45-48; *see also* ECF No. 32 ("Fed. Defs.' TRO Opp.") at 37-44 (discussing why the equities lean against an injunction). Federal Defendants agree. As explained in Jeffrey Underwood's declaration, the Burmese python presents a cautionary tale of the devastating impacts large, non-native constrictor snakes pose to

[2] Federal Defendants likewise seek a stay of the district court proceedings pending any decision to appeal to the D.C. Circuit and, if an appeal is authorized, during the appeal in the interest of judicial economy and to save expense and time for the litigants. "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North Am. Co.*, 299 U.S. 248, 255 (1936). "A trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case." *See IBT/HERE Emp. Representatives' Council v. Gate Gourmet Div. Americas*, 402 F. Supp. 2d 289, 292 (D.D.C. 2005) (quotation omitted); *see also Allina Health Servs. v. Sebelius*, 756 F. Supp. 2d 61, 71 (D.D.C. 2010) (staying proceedings pending a relevant decision by the D.C. Circuit). A district court has "broad discretion" in determining whether to stay proceedings. *SEC v. Deloitte Touche Tohmatsu CPA Ltd.*, 928 F. Supp. 2d 43, 47 (D.D.C. 2013) (quoting *Clinton v. Jones*, 520 U.S. 681, 706 (1997)). Here, a stay will serve the interests of judicial and party economy. Any D.C. Circuit ruling on the Court's Preliminary Injunction Opinion will dramatically impact the course of future proceedings and concurrent proceedings before this Court would force unnecessary briefing on issues that could be overtaken by the Circuit court's ruling. For these reasons, Federal Defendants ask for a stay of the district proceeding to avoid unnecessarily burdening the Court's schedule with filings that may be overtaken by any appeal decision regarding the Opinion.

native wildlife, including to threatened and endangered species. *See* ECF No. 32-1 ("Underwood Decl.") ¶¶ 19-21, 12-15. And, the primary risk of these snakes entering the wild is through escapes or releases from owners who purchased them from the commercial pet and hobby trade industry, such as Plaintiffs. *Id.* at ¶ 22-24.

Additionally, Federal Defendants explained why the environmental harm caused by the further spread of the green anaconda and the reticulated python is irreparable. Fed. Defs.' TRO Opp. at 38-39. The green anaconda and reticulated python are effective predators of wildlife, including threatened and endangered species, and once released are very difficult to contain because they are difficult to find and are very fecund. Fed. Defs.' TRO Opp. at 39-40. The federal government alone spends thousands of dollars annually on addressing impacts from constrictor snakes, in part to prevent extinction of the Key Largo woodrat and other threatened and endangered species. Fed. Defs.' TRO Opp. at 41.

A ban on interstate transport is the only effective approach currently available to FWS to prevent these invasive snakes from being introduced into the wild and then spreading throughout those areas of the continental United States where they can survive and establish populations. 80 Fed. Reg. at 12,709. Allowing the rule to be enjoined will expose sensitive wild areas and species to irreparable consequences and, therefore, no injunction should be entered. *See Am. Motorcyclist Ass'n v. Watt*, 714 F.2d 962, 966 (9th Cir. 1983) (injunction of implementation of Bureau of Land Management's California Desert Conservation Plan "would leave fragile desert resources vulnerable to permanent damage"); *Alpine Lakes Prot. Soc'y v. T.A. Schlapfer*, 518 F.2d 1089, 1090 (9th Cir. 1975) (injunction against timbering would lead to damage of timber by insects, rendering it worthless).

But if the Court finds that an injunction must issue, any injunctive relief must be narrowly tailored. As the Court noted, longstanding equitable principles require an injunction to be narrowly tailored and "no more burdensome to the defendant than necessary to provide complete relief *to the plaintiffs*." Op. at 49 (emphasis added); *see also Califano v. Yamasaki*, 442 U.S. 682, 704 (1979); *Dep't of Def. v. Meinhold*, 510 U.S. 939 (1993) (staying nationwide

injunction insofar as it "grants relief to persons other than" named plaintiff); *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 (5th Cir. 2014) (modifying district court's overbroad preliminary injunction to enjoin enforcement only "against the plaintiffs in this case."). The principle that equitable relief should be limited to that necessary to provide relief to the plaintiffs before the court is particularly important when, as here, the Court is deciding the scope of a preliminary injunction in an Administrative Procedure Act ("APA") case. The APA specifically addresses interim relief and provides that a court "*may* issue" orders to "preserve status or rights pending conclusion of the review proceedings," but only "*to the extent necessary to prevent irreparable injury*." 5 U.S.C. § 705 (emphasis added).

The Court has already recognized specific limitations on the scope of any preliminary injunction. First, the Court recognized that the U.S. Fish and Wildlife Service ("FWS") "has the authority to prohibit the importation of 'injurious species.'" Op. at 1. Consequently, the Court found that its holding will not affect the ban on importation of the four snake species into the United States or its territories, the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States. Op. at 2-3 (noting that the Lacey Act, as amended in 1960, forbids the importation of species); 18 U.S.C. § 42(a)(1). Second, consistent with the plain language of the Lacey Act, Plaintiffs did not question FWS's ability to restrict the transportation of injurious species between the continental United States (as a single entity) and the District of Columbia, Hawaii, the Commonwealth of Puerto Rico, or any possession of the United States. Op. at 11. Finally, the Court found a likelihood of success on the merits only with respect to Plaintiffs' argument that the Lacey Act provides no authority to prohibit interstate transportation of the four snakes included in the final rule. *See* Op. at 11 (presenting both parties' arguments). The sufficiency of FWS's determinations that the four snakes qualify as injurious was not raised in Plaintiffs' motion, let alone the sufficiency of injurious determinations for other species.

Any injunctive relief that may issue must be further circumscribed based on Plaintiffs' showing of harm to themselves. Plaintiffs have presented no cognizable interest in delaying implementation of the final rule as to the Beni anaconda and the DeSchauensee's anaconda, Op.

at 46 n.11, so no injunction may be entered regarding those snakes. It is axiomatic that proof of irreparable injury caused by the alleged violation is an essential prerequisite to obtaining injunctive relief. *Amoco Prod. Co.*, 480 U.S. at 542; *see also Friends of the Earth v. Laidlaw Envtl. Servs. (TOC),* 528 U.S. 167, 180-81, 185 (2000) (a plaintiff must demonstrate standing separately for each form of relief sought). Consequently, any injunction may at most apply to the interstate transportation of the reticulated python and green anaconda between states within the continental United States, excluding the District of Columbia. *See* Op. at 49.

Any injunction must be limited to redressing these Plaintiffs' injury, to the extent that they have proved to the Court that they are irreparably harmed during the pendency of these proceedings. *See, e.g.*, *Virginia Soc'y for Human Life, Inc.* v. *FEC*, 263 F.3d 379, 392-394 (4th Cir. 2001), *overruling on other grounds recognized by The Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 551 (4th Cir. 2012); *Lever Bros. Co. v. United States*, 981 F.2d 1330 (D.C. Cir. 1993) (limiting injunction to the relief requested by plaintiffs, which only extended to certain trademarks, and declining to extend injunction to other companies or to other trademarks). The Court has already found that only a few of Plaintiffs' declarants have been able to make that showing. *See* Op. at 43 n.9 (citing declarations where the harms asserted are not directly tied to the final rule). Standing is determined at the time plaintiffs file suit, *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 571 n.4 (1992) ("The existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed.") (emphasis in original, citation omitted), and the Court only has power to issue an injunction over those properly before it. Thus, any injunction must be limited to: (1) those individually-named plaintiffs who are not members of the U.S. Association of Reptile Keepers ("USARK") that have provided declarations to the Court showing irreparable harm tied to the interstate transportation prohibition in the final rule; and (2) members of USARK who were members in good standing when the Second

Amended Complaint was filed and who actually possessed green anacondas and reticulated pythons at that time.[3] *Meinhold,* 510 U.S. 939; *Jackson Women's Health Org.*, 760 F.3d at 458.

The Court has suggested that the balance of equities would tip in Plaintiffs' favor, if an injunction were limited to exclude application to Florida and Texas. Op. at 48. Based on current climate matching science, within the continental United States the reticulated python and the green anaconda appear to be most suited to the climates of Florida and Texas, and they have already been observed in the wild in Florida. *See* Fed. Defs.' TRO Opp. at 39. But the potential significant environmental risk posed by these snakes supports prohibiting their transportation to all states. The ability of FWS to prevent these species from reaching Florida and Texas is significantly undermined if persons can transport these species without restriction throughout the remainder of the continental United States.[4]

Dated: May 15, 2015 Respectfully submitted,

[3] A nationwide injunction is not appropriate in this case, given that the case is at the preliminary injunction stage, that some of Plaintiffs have not shown that their harm flows from the final rule, and there is no national class. *See, e.g.*, *Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir. 1984) (citation omitted) (remanding injunction so that it is "limited to apply only to the individual plaintiffs unless the district judge certifies a class of plaintiffs." (citation omitted)); *Everhart* v. *Bowen*, 853 F.2d 1532, 1539 (10th Cir. 1988), *rev'd on other grounds sub nom*. *Sullivan* v. *Everhart*, 494 U.S. 83 (1990); *Brown* v. *Trustees of Boston Univ.*, 891 F.2d 337, 361 (1st Cir. 1989) (holding injunction overbroad insofar as it extended beyond that necessary to redress the plaintiff 's injury, and explaining that "[o]rdinarily, classwide relief * * * is appropriate only where there is a properly certified class"). *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399 (D.C. Cir. 1998) is not to the contrary. There, the D.C. Circuit upheld, on the merits, a nationwide injunction of a rule under the Clean Water Act. That decision does not control this case because it was a merits decision that was not governed by 5 U.S.C. § 705 of the APA, which addresses the proper scope of a *preliminary* injunction pending judicial review, as noted in text. Thus, any preliminary injunction issued in this case should be limited to agency action that irreparably injures USARK members.

[4] The Court questioned whether shipments of the reticulated python and green anaconda into Florida and Texas might be restricted by the effect of 16 U.S.C. § 3372(a). Op. at 48. This provision in theory might serve as a basis for an enforcement action if the two steps in the statute can be proven. *See United States v. Carpenter*, 933 F.2d 748, 750-51 (9th Cir. 1991). However, each case is very fact specific because you have to get the two steps to line up with a violation of an underlying law. Even assuming such a violation could be shown, it would not necessarily prevent the introduction of these species into Florida and Texas and would not provide the same level of protection as the interstate transportation prohibition in the final rule.

JOHN C. CRUDEN
Assistant Attorney General
Environment & Natural Resources Division

/s/ Meredith L. Flax
Meredith L. Flax
Senior Trial Attorney (D.C. Bar 468016)
U.S. Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
Ben Franklin Station, P.O. Box 7611
Washington, D.C. 20044-7611
Phone: (202) 305-0404
Fax: (202) 305-0275
Email: meredith.flax@usdoj.gov

/s/ Clare M. Boronow
Clare M. Boronow
Trial Attorney (Admitted to the Maryland Bar)
U.S. Department of Justice
Environment & Natural Resources Division
Natural Resources Section
Ben Franklin Station, P.O. Box 7611
Washington, D.C. 20044-7611
Phone: (202) 305-0492
Fax: (202) 305-0506
Email: clare.boronow@usdoj.gov

Attorneys for Federal Defendants