

March 20, 2023

Dr. Mary Cogliano
Manager, Branch of Permits, Division of Management Authority
U.S. Fish and Wildlife Service



Via online submission, [Docket No. FWS-HQ-IA-2021-0099](#)

Re: Revisions to the Section 4(d) Rule for the African Elephant

Dear Dr. Cogliano:

On behalf of Harvard Law School's Animal Law & Policy Clinic and the Performing Animal Welfare Society, which provides permanent refuge to four African elephants and three Asian elephants, we submit the following comments on the U.S. Fish & Wildlife Service's (FWS) proposed revisions to the Endangered Species Act (ESA) Section 4(d) rule for African elephants.

We strongly support the Service's proposal to require special purposes permits to limit commercial activity involving live elephants and suggest incorporating additional species-specific standards to ensure facilities obtaining elephants are "suitably equipped" to hold these cognitively and socially complex animals.

As the notice of proposed rulemaking acknowledges, recent years have seen a dramatic rise in the capture and trade in African elephants, due in significant part to the United States' own failure to use its ESA authority to limit trade to and within our borders. Capturing elephants for captive display is antithetical to the ESA's broad conservation mandate "to halt and reverse the trend toward species extinction, whatever the cost." So too is putting a price on elephants' heads and killing them for sport. We urge the FWS to strengthen the proposed rule by prohibiting the import of live elephants, elephant trophies, and elephant parts. We also offer feedback on the specific enhancement factors proposed, and request that the Service incorporate a notice and comment requirement to ensure that permit decisions are transparent and fully informed.

Thank you for your time and consideration.

Very truly yours,

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Elephant Sanctuary*



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Comments of the Harvard Animal Law & Policy Clinic and the Performing Animal Welfare Society on Revisions to the Section 4(d) Rule for the African Elephant

I. Oversight of interstate commerce in live African elephants is essential to accomplish the purposes of the ESA.

We welcome the FWS's proposal to regulate interstate commerce in live African elephants under 50 C.F.R. § 17.40(e)(10)(iii)-(iv), which reads:

(iii) Live African elephants may be sold or offered for sale in interstate commerce, and delivered, received, carried, transported, or shipped in interstate commerce in the course of a commercial activity, provided the Service finds that the proposed recipient is suitably equipped to house and care for the live elephant (see criteria in § 23.65 of this chapter), and a special purpose permit is issued under § 17.32 or a captive-bred wildlife registration is issued under § 17.21(g).

(iv) Each permit issued to authorize activity with a live African elephant under 50 CFR parts 17 or 23 must include a condition that the elephant and its offspring will not be sold or otherwise transferred to another person without a special purpose permit issued under § 17.32. Each special purpose permit for a live African elephant must also include the same condition. Each special purpose permit issued for a live African elephant will require a finding by the Service that the proposed recipient is suitably equipped to house and care for the live elephant (see criteria in § 23.65 of this chapter).

As acknowledged in the draft Environmental Assessment (“Draft EA”), “[t]he Service does not have any data on African elephants moved (loaned/sold) within the United States,” and “does not currently regulate or maintain data on the number and location of captive-held African elephants once within the United States.”¹ Indeed, there is no reliable, up-to-date public source for this information, although private individuals and organizations track this data using a variety of sources. Regardless, the FWS's estimate that there are 146 African elephants across 33 facilities in the United States is a significant undercount. We believe there are 175 (36 males and 139 females) African elephants located in 44 facilities across 26 states and Puerto Rico.²

¹ FWS, Int'l Affs. Prog., Div. of Mgmt. Auth., *Draft Environmental Assessment and Economic Analysis Revisions to the African Elephant Rule Under Section 4(d) of Endangered Species Act (50 C.F.R. 17.40(e))* 28-29 (Nov. 2022) (hereinafter “Draft EA”).

² Ex. 1, Spreadsheet of the U.S. African Elephant Population (Mar. 9, 2023).

The FWS’s lack of oversight of interstate commercial activity involving live African elephants has created a market for rare animals that actively undermines conservation and has likely hindered the rescue and retirement of elephants exploited for entertainment. For example, in 2018 a zoo negotiated with circus exhibitor Brian Franzen to purchase two African elephants from him for \$400,000³—a transaction that would have occurred without any federal oversight. Franzen ultimately backed out of the deal to continue touring with the animals, but the fact that the offer was even on the table ensured that Franzen would never *voluntarily* retire the elephants to a sanctuary that does not engage in commercial trade of animals.⁴ Indeed, Franzen has now leased the elephants to a zoo and an amusement park.⁵

The transfer of elephants between facilities in the U.S. is common. Prado-Oviedo et al. (2016) reviewed data on Asian and African elephants in the North American Regional Studbooks as of 2012. They found that, of the total population, more than 80% of elephants experienced at least one inter-zoo transfer during their lives, with imported African elephants transferred at a higher rate than imported Asian elephants.⁶ All imported elephants experienced at least one transfer (import to a zoo was counted as one), and “94% experienced at least one subsequent transfer post-importation. In contrast, 45% (33/73) of captive born individuals had not experienced a transfer event.”⁷

Of the recent imports of African elephants, several have been transferred to other zoos, as have their offspring. Out of 10 elephants imported in 2003 from Eswatini by the San Diego Zoo

³ E-mail from Chuck Wikenhauser, Dir., Milwaukee Cnty. Zoo, to Jodi Gibson (Oct. 3, 2018, 2:17 PM); E-mail from Tim Wild, Curator of Large Mammals, Milwaukee Cnty. Zoo, to Chuck Wikenhauser, Dir., Milwaukee Cnty. Zoo (Apr. 9, 2019, 11:40 AM).

⁴ See Glob. Fed’n of Animal Sanctuaries, *Position Statement: Acquisition of Animals*, <https://perma.cc/X52R-SCUA> (“A true sanctuary does not promote the commercial exploitation of the species, and animals are generally not acquired through purchase.”).

⁵ Fla. Fish & Wildlife Conservation Comm’n, *Captive Wildlife Rep.*, Brian Franzen, Sept. 20, 2022 (“2 elephants transferred out of state (leased to zoos)”). The terms of these leases, such as whether the zoos are paying Franzen for the elephants, is unknown.

⁶ Ex. 2, Natalia A. Prado-Oviedo, et al., *Evaluation of Demographics and Social Life Events of Asian (Elephas maximus) and African Elephants (Loxodonta africana) in North American Zoos*, PLoS ONE, July 2016, at 7-8, <https://doi.org/10.1371/journal.pone.0154750>.

⁷ *Id.*

Safari Park and Lowry Park Zoo, half have been transferred to other zoos (with one elephant returning to the original zoo). The Pittsburgh Zoo's International Conservation Center imported three female elephants from Botswana in 2011; one female was transferred to the Granby Zoo in Canada in 2019. For the most recent import of 17 elephants from Eswatini by the Dallas Zoo, Sedgwick County Zoo, and Omaha's Henry Doorly Zoo in 2016, two female elephants, a mother and daughter, were transferred to the Fresno Chaffee Zoo in California just two years after their import to the Dallas Zoo.

The San Diego Zoo Safari Park has, by far, seen the greatest number of elephant births (9 males and 5 females, with 8 surviving males and 4 females) as a result of the 2003 import. A significant number of the imported elephants' offspring has been transferred, with 8 elephants—all males—sent to other zoos (one recently returned to the Safari Park). One male has been moved twice. Only two males were transferred with their mother. The average age at transfer was 9.6 years (excluding calves transferred with mother). This represents the low end of age at dispersal from the family group for males, which is 9-18 years of age in African elephants.⁸

Moreover, San Diego displaced four elephants to make space for those it imported from Eswatini in 2003. It transferred Peaches, Tatima, and Wankie to the Lincoln Park Zoo in Chicago, whose frigid winters are inappropriate for African elephants. Within two years, Peaches and Tatima had died, leaving Wankie alone.⁹ When Lincoln Park transferred her to Utah's Hogle Zoo—another cold-climate facility—she collapsed during transport and was euthanized.¹⁰ The fourth elephant, Chico, was sent to a zoo in Texas.¹¹

⁸ Phyllis C. Lee & Cynthia J. Moss, *The Social Context For Learning and Behavioural Development Among Wild African Elephants*, in *Mammalian Social Learning: Comparative and Ecological Perspectives* 104 (Hilary O. Box & Kathleen R. Gibson eds., 1999).

⁹ Ex. 3, Marc Kaufman, *Elephant's Death Renews Debate*, Wash. Post (Jan. 21, 2005), <https://perma.cc/9BRN-96XP>.

¹⁰ Ex. 4, Patricia Ward Biederman, *Last of 3 Elephants Sent From San Diego to Chicago Dies*, L.A. Times (May 3, 2005), <https://perma.cc/WE4R-6476>.

¹¹ Dan Koehl, *Chico African savanna elephant (Loxodonta africana) located at Caldwell Zoo in United States*, Elephant Encyclopedia, <https://perma.cc/VZ4Q-XRYH>.

It should not be surprising that inter-zoo transfers have been found to influence the health and behavior of elephants. Prado-Oviedo et al. found that imported elephants were transferred earlier in life and at higher rates than those who are captive-born.¹² When testing the number of transfers as a risk factor for stereotypic behavior rate performance, the researchers found it was significant for both captive-born and imported elephants.¹³ Clubb, et al. (2008) found that inter-zoo transfers reduced Asian elephant survivorship, an effect that lasted four years post-transfer.¹⁴

Male elephants, especially imported males, are transferred at a higher rate than females.¹⁵ They are also expected to be transferred more frequently over a shorter time period, likely because there are a “limited number of specialized facilities equipped to house bulls, so when young imported males reached reproductive age they may have been transferred to zoos with more appropriate facilities.”¹⁶ In the case of the San Diego Zoo Safari Park, captive-born males clearly were transferred to other zoos because of the overabundance of males at the facility. Imported male elephant Mabuhlane (“Mabu”), who sired all but one of 14 elephants born at the Safari Park and two at the Reid Park Zoo, has been moved five times (including import), with four moves taking place within a 10-year span between 2012 and 2022. It is expected that Mabu and other males born at the zoo will experience even more transfers in the future for breeding or for management purposes due to limited space for males in zoos. The Association of Zoos and Aquariums (AZA) Standards for Elephant Management and Care (2020) require that zoos planning new construction for elephants or modifying existing facilities must include facilities to hold adult males,¹⁷ however, space will continue to be a limitation given the large number of male births and the special care that males require.

¹² Ex. 3, Prado-Oviedo, et al., *supra* note 6, at 17.

¹³ *Id.*

¹⁴ Ex. 5, Ros Clubb, et al., *Compromised Survivorship in Zoo Elephants*, 322 *Sci.* 1649 (2008), <https://doi.org/10.1126/science.1164298>.

¹⁵ Ex. 3, Prado-Oviedo, et al., *supra* note 6, at 17.

¹⁶ *Id.*

¹⁷ Ex. 6, *AZA Standards for Elephant Management and Care*, Std. E.1.4.1.4 (2020), <https://perma.cc/9FQ9-ZNY7>.

The evidence shows that inter-zoo transfers have a serious effect on elephants and that imported elephants experience a greater number of transfers. Therefore, elephant welfare should be of special concern, especially for African elephants as they are the subject of recent imports. The FWS does not have data on African elephants loaned or sold within the United States,¹⁸ much less the effect of interstate transfers on elephants, and the conditions at the facilities to which they are being transferred. This makes it crucial for the agency to take even greater care when considering requirements for elephant transfers.

A. The FWS should adopt species-specific standards to assess whether a facility is suitably equipped to house and care for elephants.

Although we believe requiring a Section 10 *enhancement* permit for interstate transfers of African elephants is “necessary and advisable to provide for the conservation” of the species,¹⁹ we support the proposed special purposes permit requirement and the emphasis on making a “suitably equipped” finding for transfer destinations. Current “suitably equipped” factors in 50 C.F.R. § 23.65(c) and (e) are insufficient to address the needs of African elephants due to their extreme physical, social, and behavioral requirements, and the factors do not necessarily protect elephant health and welfare. The shortcomings of current “suitably equipped” factors dictate that the FWS should develop species-specific factors for African elephants. As detailed in the Draft EA, the CITES Animals Committee has developed factors for determining “suitably equipped” facilities, underscoring the importance of species-specific factors.²⁰

¹⁸ Draft EA at 49.

¹⁹ 16 U.S.C. § 1533(d); *see id.* § 1539(a)(1) (“The Secretary may permit, under such terms and conditions as he shall prescribe . . . any act otherwise prohibited by section 1538 of this title for scientific purposes or to enhance the propagation or survival of the affected species. . .”).

²⁰ Draft EA at 17-18.

Current operating guidelines for elephant care in the U.S. are provided by the AZA²¹ and the Global Federation of Animal Sanctuaries (GFAS).²² These guidelines are minimal at best, although GFAS guidelines generally exceed those of the AZA. Guidelines only apply to member facilities and are not legally binding. The following table is a comparison of key welfare areas for elephants:

Accrediting organization	Social group size	Age at separation from mother	Indoor area size	Outdoor area size
GFAS	No less than 3 females where possible.	In as much as possible, female offspring are not separated from their mothers.	Minimum dimension of 2600 ft ² (240 m ²) per 4 adult females, with an additional 860 sq. ft (80 m ²) per additional animal. Bull stalls/rooms, where used, are a minimum of 1200 ft ² (110 m ²) per animal.	Sufficient to allow walking of 7km/day.
AZA	Each zoo with elephants must have a minimum of three females (or the space to have three females), two males or three elephants of mixed gender.	Offspring remain with their mothers until they are at least three years old.	Minimum recommended stall space (i.e. temporary holding, overnight, etc.) is not less than 600 ft ² (56 m ²) for males or females with calves, and not less than 400 ft ² (37 m ²) for females.	Recommended minimum size for outdoor habitats is not less than 5400 ft ² (500 m ²) per elephant.

It is important to note that standards set forth by the British and Irish Association of Zoos and Aquariums (BIAZA) exceed those of the AZA and GFAS in terms of the areas noted above. For example, BIAZA requires that social groups have at least four compatible females over two years old. (Notably, the AZA standard allows for mixed-gender groups, meaning a single female elephant and two males could be held at a zoo even though the three may not share the same space,

²¹ Ex. 6, *AZA Standards*, *supra* note 17.

²² Ex. 7, GFAS, *Standards for Elephant Sanctuaries*, Std. W-6 (2019), <https://perma.cc/7Y6T-EXMM>.

leaving the female alone.) Indoor space for females/groups must provide at least 300 m² (3,229 ft²) for four elephants and increase the space by at least 80 m² for each additional elephant over age two. For male elephants, the minimum space requirement is 160 m² (1,722 ft²). Separate pens for veterinary and behavioral management purposes (and therefore temporary use) must provide males with at least 160 m² (1,722 ft²)—a size far larger than the AZA’s minimum size for everyday indoor stalls. Outdoor space for males and females (i.e., over two years of age) must provide a minimum shared space of 3,000 m² (32,292 ft²).²³

There is no scientific data to indicate the amount of space necessary for health and well-being in captivity.²⁴ In range countries, African elephant home ranges measure as large as 10,000 km². The AZA elephant standards cite Meehan, et al. (2016) in stating that facility size alone is not correlated with individual elephant welfare.²⁵ However, this study cautions that results were limited to findings from exhibits at participating zoos and that “future studies incorporating larger areas could potentially find associations between space and welfare outcomes.”²⁶ In fact, the researchers may not have found measurable differences in welfare related to space because zoos’ elephant enclosures are relatively similar in size—and several orders of magnitude smaller than elephants’ natural home ranges. Welfare studies conducted in much larger areas with suitable habitat would be more reflective of the conditions that are important for optimal elephant welfare.²⁷

To strengthen the “suitably equipped” factors in 50 C.F.R. § 23.65(c) and (e), we recommend the following species-specific requirements:

²³ BIAZA, *Management Guidelines for the Welfare of Elephants* (2019).

²⁴ Ex. 6, *AZA Standards*, *supra* note 17.

²⁵ See Ex. 8, Cheryl L. Meehan, et al., *Determining the Connections Between the Daily Lives of Zoo Elephants and Their Welfare: An Epidemiological Approach*, PLoS ONE, July 2016, <https://doi.org/10.1371/journal.pone.0158124>.

²⁶ *Id.* at 8.

²⁷ Ex. 9, Rob Atkinson & Keith Lindsay, *Expansive, Diverse Habitats are Vital for the Welfare of Elephants in Captivity* (2022), <https://perma.cc/CFA8-9UM4>.

1. Family groups should be kept together when transferring elephants from facility to facility.

Just as the proposed import regulations emphasize keeping family units together, the special purposes regulations should do the same, based on elephant biology and behavior.

Mother-daughter bonds form the core of elephant society. Females stay with their natal herd and their mother for the entirety of their lives.²⁸ These bonds are crucial for the normal development and survival of offspring. In captivity, the mother-daughter bond maintains its strength and importance even after years of separation.²⁹ Non-kin females in the wild and in captivity may also choose to form relationships that may include strong bonds.³⁰ The mother-offspring bond is essential for male calves as well, as they remain with their mother and family until adolescence, and separate from them only gradually.³¹ After leaving the family, males maintain complex social ties with conspecifics of all ages.³²

2. Male Elephants

The care and management of male elephants in captive facilities is challenging because of their size, strength, social needs, and greater likelihood of aggressive behavior during musth.³³ As a result, males require specially designed facilities, careful management, and accommodations for their complex social needs. Requirements for a special permit should reflect these points.

²⁸ Lee & Moss, *supra* note 8, at 105.

²⁹ E.g., Ryan Fahey, *Granny Never Forgot You! Adorable Moment Elephant Touches Trunks With her Daughter and Granddaughter at German Zoo After 12 years' Separation*, Daily Mail, Aug. 24, 2020, <https://perma.cc/9NK9-74KY>.

³⁰ Ex. 10, Sherman de Silva & George Wittemyer, *A Comparison of Social Organization in Asian Elephants and African Savanna Elephants*, 33 Int'l J. of Primatology 1125 (2012), <https://doi.org/10.1007/s10764-011-9564-1>; Ex. 11, Marion Garai, *Special Relationships Between Female Asian Elephants (Elephas maximus) in Zoological Gardens*, 90 Ethology 187 (1992).

³¹ Joyce H. Poole & Cynthia J. Moss, *Elephant Sociality and Complexity: The Scientific Evidence*, in *Elephants and Ethics: Toward a Morality of Coexistence* 71, 76 (Christen Wemmer & Catherine A. Christen eds., 2008); Ex. 12, Matthew Hartley, et al., *Facilitating the Social Behaviour of Bull Elephants in Zoos*, 53 Int'l Zoo Yearbook 62 (2019), <https://doi.org/10.1111/izy.12245>.

³² Ex. 12, Hartley, et al., *supra* note 31.

³³ *Id.*

Male offspring in the wild remain with their mother and family until adolescence, learning critical survival and social skills. The period between pubescence and adulthood is particularly vital to learning, exploration, and the development of social skills.³⁴ Males disperse from the maternal group between 9-18 years of age.³⁵ Yet, juveniles born to imported African elephants at the San Diego Zoo Safari Park have been transferred to other zoos at an average of 9.6 years of age, representing the low end of age at dispersal in the wild.

Once thought to be solitary, research shows that male elephants are social animals. Free-living male elephants socialize with conspecifics of all ages and both genders, and juveniles form social bonds with other elephants that will last throughout their lives.³⁶ In captive situations, males may have little to no interaction with conspecifics, and opportunities for social interactions with other bulls are greatly limited.³⁷ This affects opportunities for social learning, including social and reproductive behaviors,³⁸ and may contribute to incompatibility and conflict between elephants and poor reproductive success.³⁹ Of the 32 AZA-accredited zoos in the U.S. currently holding African elephants, about 69% house bulls (one zoo holds an all-male African elephant group). Ten of those zoos hold two or more bulls, and 12 zoos hold only one.⁴⁰

Another serious challenge to the confinement of male elephants is the fact that they experience musth, a period of heightened aggression, combativeness, and sexual drive found in all elephant species.⁴¹ This presents a serious risk to elephant keepers and other elephants. In the wild, male elephants have a strong inner drive to move and explore. They range even more widely than

³⁴ *Id.*

³⁵ Lee & Moss, *supra* note 8, at 104.

³⁶ *Id.*; Ex. 12, Hartley, et al., *supra* note 31.

³⁷ Lee & Moss, *supra* note 8; Hartley, et al., *supra* note 31.

³⁸ Ex. 13, Joyce Poole & Petter Granli, *Mind and Movement: Meeting the Interests of Elephants*, in *An Elephant in the Room: The Science and Well-Being of Elephants in Captivity* 21 (Debra L. Forthman et al. eds., 2009).

³⁹ *Id.*; Ex. 12, Hartley, et al., *supra* note 31.

⁴⁰ AZA, *Regional Studbook, African Elephant (Loxodonta Africana)* (2021).

⁴¹ Ex. 14, Chase A. LaDue, et al., *Musth and Sexual Selection in Elephants: A Review of Signalling Properties and Potential Fitness Consequences*, 159 *Behavior* 207 (2021), <https://doi.org/10.1163/1568539X-bja10120>.

family groups as they search for females in estrus.⁴² When in musth, wild male elephants are even more active, increasing exploration and movement, and they considerably expand their range size.⁴³ In zoos, males in musth also increase activity and movement but they are constrained by the limitations of their enclosure. This may contribute to an elevated stress response seen in captive males during musth, but not seen in wild males.⁴⁴

Because male elephants are transferred at a higher rate than females,⁴⁵ and many male offspring were born as a result of the 2003 import of African elephants by the San Diego Zoo Safari Park, we recommend that special purposes permits include the following requirements to specifically address male elephants' physical and social needs:

- Elephant breeding facilities must provide conditions (e.g., space) that allow a male calf to remain with his mother and family for as long as possible.
- Housing and management should provide access to a social group where possible.
- Males are provided with sufficient space to reflect their inclination toward greater movement.
- Males should only be managed in protected contact (see below).

3. Elephant Training and Management

Given elephants' great strength and the danger they present for serious injury and death, special purposes permits should require protected contact management. The protected contact management system relies on positive reinforcement training and a protective barrier between keeper and elephant, making this method far safer for keepers and more humane for elephants. As elephants can choose whether to participate in training sessions, protected contact management

⁴² *Id.*; Ex. 12, Hartley, et al., *supra* note 31.

⁴³ Ex. 15, Chase A. LaDue, et al., *Physical and Behavioral Indicators Associated with Hormonal Changes During Musth in Zoo-Housed and Free-Ranging Asian Elephants* (*Elephas maximus*), 1 *Theriogenology Wild* (2022), <https://doi.org/10.1016/j.therwi.2022.100011>; Ex. 16, Prithviraj Fernando, et al., *Ranging Behavior of the Asian Elephant in Sri Lanka*, 73 *Mammalian Biology* 2 (2009), <https://doi.org/10.1016/j.mambio.2007.07.007>.

⁴⁴ Ex. 16, Fernando, et al., *supra* note 43; Ex. 15, LaDue et al. (2022), *supra* note 43.

⁴⁵ Ex. 2, Prado-Oviedo, et al., *supra* note 6.

provides elephants with more choice and control over their environment, which is associated with improved welfare.⁴⁶ Other positive outcomes of this type of management include increased behavioral repertoire and significant reductions in aggression and conflict between elephants.⁴⁷

Historically, handlers have used the free contact management system in which they enter the enclosure and directly interact with the elephant. Free contact relies heavily on negative reinforcement, in which the elephant moves away from the bullhook to escape pain. Once trained, the elephant will respond to the bullhook in the same way, no matter how it is used.⁴⁸ Free contact also relies on positive punishment, which discourages unwanted behaviors by inflicting pain.⁴⁹ Unlike protected contact management, the elephant has no choice but to comply with commands. Today, bullhooks are considered an “antiquated tool no longer used for training in professional elephant care programs” especially as another management option exists.⁵⁰

The AZA has adopted a policy that mandates the complete phase-out of bullhook use (with some exceptions) by 2023,⁵¹ and GFAS requires protected contact management.⁵² Facilities that continue to use free contact management include circuses, traveling exhibitors, and tourism facilities that sell interactions and photo opportunities with the public.

Until the development of protected contact, elephant keepers were at high risk of serious injury and death. According to Gore et al. (2006), data suggests that a decrease in elephant injuries in North America may be attributed in part to the trend toward the protected contact management

⁴⁶ Ex. 17, Megan L. Wilson, et al., *Rates of Reinforcement and Measures of Compliance in Free and Protected Contact Elephant Management Systems*, 34 *Zoo Biol.* 431 (2015), <https://doi.org/10.1002/zoo.21229>.

⁴⁷ *Id.*; Ex. 12, Hartley, et al., *supra* note 31.

⁴⁸ Ex. 18, T. Desmond & Gail Laule, *The Politics of Protected Contact*, AAZPA Annual Conference Proceedings (1993).

⁴⁹ Ex. 19, Ros Clubb & Georgia Mason, *A Review of the Welfare of Zoo Elephants in Europe* 94 (2002), <https://perma.cc/9DVF-JBG3>.

⁵⁰ Ex. 6, *AZA Standards*, *supra* note 17, std. E.4.2.1.1.

⁵¹ Ex. 20, *AZA Board of Directors Policy Banning the Use of Bullhooks to Manage Elephants at AZA-Accredited Facilities* (2022), <https://perma.cc/UQ3P-UKLQ>.

⁵² Ex. 7, *GFAS Standards*, *supra* note 22, Std. W-6 (2020).

system.⁵³ Not surprisingly, they found that the greatest risk of being injured is when a keeper is in direct contact with an elephant.⁵⁴ It stands to reason that the same applies to members of the public allowed to come into direct contact with an elephant through petting, bathing, and photo opportunities. Given the danger that elephants present, the public should never be allowed to come into direct contact with them.

Chaining or tethering is used to restrain elephants in many facilities. Under the AZA Standards for Elephant Management and Care, for example, tethering is a temporary restraint; prolonged chaining (over two hours) is only allowed for veterinary purposes or transport.⁵⁵ BIAZA standards do not allow chaining for more than one hour, except for exceptional circumstances such as travel and veterinary treatment. Traveling shows, on the other hand, chain elephants for prolonged periods of time, including transport and during the time that elephants are not performing. Chaining is associated with degenerative joint disease⁵⁶ and stereotypic behavior.⁵⁷

To better protect the welfare of African elephants and assure public safety, we recommend the following permit conditions:

- Use of protected contact management only.
- Proven knowledge and expertise in protected contact by elephant handlers.
- Chaining/tethering cannot be used for routine husbandry. Prolonged chaining (in excess of two hours) is only used for transport and veterinary treatment.
- No direct contact between the public and elephants.
- No use of elephants for performances, rides, tricks, bathing, or entertainment.

⁵³ Ex. 21, Mauvis Gore, et al., *A Review of Injuries Caused by Elephants in Captivity: An Examination of Predominant Factors*, 40 Int'l Zoo Yearbook 51 (2006), <https://doi.org/10.1111/j.1748-1090.2006.00051.x>.

⁵⁴ *Id.*

⁵⁵ Ex. 6, *AZA Standards*, *supra* note 17, Std. E.3.3.2.7.

⁵⁶ Gary West, *Musculoskeletal System*, in *Biology, Medicine, and Surgery of Elephants* 266 (Murray Fowler & Susan Mikota, eds., 2006).

⁵⁷ Ex. 22, T.M. Gruber, et al., *Variation in Stereotypic Behavior Related to Restraint in Circus Elephants*, 19 Zoo Biology 209 (2000).

4. Consideration of Genetic Relatedness

Historically, few male African elephants in U.S. facilities have been known to sire offspring, and zoos overly rely on the same males for breeding. As a result, these males become genetically over-represented in the captive population. Despite the imports of wild caught African elephants, this situation continues. Currently, two males are grossly over-represented in the population: Jack (Pittsburgh Zoo/International Conservation Center) sired at least 17 offspring since 1999, with 10 still alive. Mabu (San Diego Zoo Safari Park) sired 15 offspring, with 13 remaining alive. Together, these two males sired about 57% (25% and 32%, respectively) of living African elephants born in the U.S. since 1999.⁵⁸ In addition, one of Jack's male offspring sired three elephants at Omaha's Henry Doorly Zoo, so Jack is even more represented in the population.

It is generally acknowledged that the population of captive African and Asian elephants in North America is significantly in decline and that zoos are unable to meet demographic goals without an unattainable increase in the number of annual births. In fact, directives from the AZA's Species Survival Plan (SSP) for Asian elephants states: "Although pairing males and females with similar mean kinships to avoid rare and common lineages remains the priority, in order to meet demographic goals some genetic management may need to be suppressed."⁵⁹ It stands to reason that the same approach would apply to African elephants, whose reproductive rate is also insufficient to sustain the captive population in the U.S. (Indeed, "population" is a grave misnomer, as captive elephants are held in small disparate groups by different owners and cannot freely intermingle.⁶⁰) Currently, the Fresno Chaffee Zoo in California is allowing the male elephant Mabu to breed with two females, even though the AZA Species Survival Plan's Population Analysis & Breeding and

⁵⁸ AZA, *Regional Studbook, African Elephant (Loxodonta Africana)* (2021). This figure excludes two births where imported females arrived pregnant.

⁵⁹ Ex. 23, AZA Population Mgmt. Ctr., *Population Analysis & Breeding and Transfer Plan. Asian Elephant (Elephas maximus)* 10, AZA Species Survival Plan Yellow Program (June 28, 2017).

⁶⁰ See 50 C.F.R. § 17.3 ("Population means a group of fish or wildlife in the same taxon below the subspecific level, in common spatial arrangement that interbreed when mature." (emphases added)).

Transfer Plan categorizes the consequences of these pairings as “very detrimental” to the genetic health of the population, presumably because there is a degree of relatedness (all of the elephants originated from a small population in Eswatini).⁶¹ The small number of male African elephants available for breeding increases the likelihood of inbreeding, yet zoos continue to rely on elephants like Jack and Mabu who are broadly represented. The drive to increase births and fill zoo displays does not justify breeding genetically related elephants. It is critical that zoos avoid breeding related animals to avoid genetic deficiencies.

To protect the health and welfare of captive African elephants in the U.S., a priority must be placed on preserving genetic diversity among the current captive population. For transfers of captive African elephants to other facilities for breeding, the special permit should require the following:

- Proof that the transfer of the elephant will significantly increase gene diversity retention.
- No pairings of genetically related males and females for breeding.

B. Animal Welfare Act licensure is only minimally relevant to the “suitably equipped” determination.

In its Draft EA, the FWS states that it is currently “unable to assess whether elephants held in captivity receive a standard of care beyond existing Animal Welfare Act [AWA] standards.”⁶² This appears to acknowledge that AWA compliance alone is not a sufficient measure of whether a facility is suitably equipped to house and care for live African elephants. We fully agree. AWA licensure is necessarily a pre-requisite for obtaining a special purposes permit because such licensure is required by law⁶³ and ensures a minimal level of accountability to the U.S. Department of Agriculture (USDA). However, AWA licensure does not provide meaningful assurance that elephants are

⁶¹ AZA Population Mgmt. Ctr., *Population Analysis & Breeding and Transfer Plan. African Elephant (Loxodonta africana)* 10, AZA Species Survival Plan Yellow Program (Apr. 28, 2020) (draft).

⁶² Draft EA at 49.

⁶³ 7 U.S.C. § 2134; 9 C.F.R. § 2.1.

receiving an adequate level of care. This underscores the need for the FWS to use this rulemaking to adopt its own species-specific standards to use when assessing whether an applicant is suitably equipped to hold African elephants.

The AWA's standards could be described—at best—as survival standards, although experience has shown that even this characterization might be too generous.⁶⁴ They require licensees to provide animals with the basics of subsistence: food, water, shelter, minimal space, cleanliness, and occasional veterinary care.⁶⁵ Yet the same standards that apply to elephants also apply to such disparate species as bats, tigers, sloths, kangaroos, and most other AWA-covered taxa.⁶⁶ Because these standards lack any species-specific considerations, they do not ensure that licensees provide animals with a high quality of life or conditions that allow them to thrive.⁶⁷ For example, solitary confinement is psychologically devastating for social animals such as elephants, yet the USDA does not require licensees to provide social animals with companionship. Likewise, separating elephant calves and their mothers and breaking apart elephant social groups is traumatic,⁶⁸ yet the AWA places no express restrictions on this common practice, which also arguably violates the ESA.⁶⁹ Nor does the USDA expressly prohibit confining elephants on concrete or holding them in chains—practices that actively damage elephants' bodies and wellbeing⁷⁰ and exist purely for human

⁶⁴ These standards were adopted in 1971 and remain largely unchanged in the last 40 years despite broad strides in our understanding of animal welfare. *See* 36 Fed. Reg. 24917, 24925 (Dec. 24, 1971).

⁶⁵ *See* 9 C.F.R. §§ 3.125-3.133, 2.40.

⁶⁶ *Id.*

⁶⁷ The agency recently published an advanced notice of proposed rulemaking soliciting comment on its plan to establish standards to address environmental enrichment for animals. However, the notice suggests that the agency will use “performance standards,” which are not easily enforced because they fail to provide adequate guidance to inspectors and licensees. Wild and Exotic Animal Handling, Training of Personnel Involved with Public Handling of Wild and Exotic Animals, and Environmental Enrichment for Species, 88 Fed. Reg. 1151 (Jan. 9, 2023).

⁶⁸ *See* Ex. 24, Comments of PAWS, PETA, ALDF Opposing Capture and Import of Elephants from Swaziland, FWS Docket No. FWS-HQ-IA-2015-0157, at 18-20 (Nov. 23, 2015), <https://perma.cc/UQ3P-UKLQ>.

⁶⁹ *See People for Ethical Treatment of Animals, Inc. v. Wildlife in Need & Wildlife in Deed, Inc.*, 476 F. Supp. 3d 765, 782 (S.D. Ind. 2020) (holding that prematurely separating big cat cubs from their mothers harms and harasses them under the ESA).

⁷⁰ *See, e.g.,* Ex. 19, Clubb & Mason, *supra* note 49, at 51, 186–87; West, *supra* note 56 (“Chaining elephants for prolonged periods limits their movement and may also contribute to the development of DJD [degenerative joint disease]. Animals that constantly pull or resist chaining may cause joint damage.”); Murray E. Fowler, *Foot Disorders, in* Biology, Medicine,

convenience and profit. Moreover, although AWA regulations prohibit the use of “physical abuse”⁷¹ to train or control animals, the USDA has never interpreted this term to restrict the use of bullhooks—weapons used to beat and control elephants that are prohibited by GFAS, the AZA, and two states and many localities.⁷²

AWA enforcement is also notoriously poor and the agency has prioritized the interests of animal-exploiting businesses over the welfare of animals.⁷³ In *nine* audits conducted over the last three decades, the USDA’s own Office of Inspector General has unrelentingly criticized the agency’s weak and poorly managed enforcement of the AWA.⁷⁴ Moreover, a recent Reuters exposé reveals that in 2022, the leadership of USDA Animal Care was ordered to appear before a federal grand jury investigating the agency’s failure to take action against an animal research breeder despite extensive

and Surgery of Elephants, *supra* note 56, at 287 (“Lack of exercise, housing on hard surfaces, and tethering are frequently brought forward as causes of DJD[.]”); Carol Buckley, *Captive Elephant Foot Care: Natural Habitat Husbandry Techniques*, in *The Elephant’s Foot: Prevention and Care of Foot Conditions in Captive Asian and African Elephants* 54 (Blair Csuti, et al., eds, 2001) (“Chaining has many negative effects on foot health. Not only are elephants forced to stand in their own excrement, but they also rock and sway unnaturally. This movement applies torque pressure on feet and nails, which can cause tissue damage as well as irregular wear and thin foot pads.”); Alan Roocroft, *Indoors Natural Substrates for Elephants & Medical Issues Associated with Hard Surfaces*, 32 *Animal Keepers Forum* 480, 481 (2005) (Captive elephants face “[a]rthritis, foot abscesses, pressure sores on cheeks and hips, knee calluses that are sensitive to the touch and swellings at the knee joints, etc.,” as a “direct result of being housed on hard, unyielding, cold and continuously draughty and damp surfaces.” They can also develop stereotypic swaying behaviors out of boredom.); M. Haspeslagh, et al., *A survey of foot problems, stereotypic behaviour and floor type in Asian elephants (Elephas maximus) in European zoos*, 22 *Animal Welfare* 437 (2013) (finding that elephants confined to concrete “were significantly more likely to have foot problems.”).

⁷¹ 9 C.F.R. § 2.131(b)(2)(i).

⁷² *E.g.*, 4 R.I. Gen. Laws Ann. § 4-1-43; Cal. Fish & Game Code § 2128.

⁷³ Ex. 25, Letter from Rachel Mathews, PETA, to Thomas J. Vilsack, Sec’y of Ag. 5 (June 3, 2021), <https://perma.cc/D6JX-2RT8>; *see also, e.g.*, Ex. 26, Rachel Fobar, *USDA accused of ignoring animal welfare violations in favor of business interests*, Nat. Geo. (Oct. 13, 2021), <https://perma.cc/M273-7EF2>; Ex. 27, Rachel Fobar, *Toothless and ‘paltry’: Critics slam USDA’s fines for animal welfare violations*, Nat. Geo. (Dec. 12, 2022), <https://perma.cc/Z4T6-UYDZ>.

⁷⁴ Ex. 28, Office of the Inspector Gen., USDA, Audit no. 33601-0002-31, *Animal Care Program Oversight of Dog Breeders* 6-7 (2021); Ex. 29, Office of the Inspector Gen., USDA, Audit no. 33601-0003-23, *Follow-Up to Animal and Plant Health Inspection Service’s Controls Over Licensing of Animal Exhibitors* 4-6, 8-9 (2021); Ex. 30, Office of the Inspector Gen., USDA, Audit no. 33601-0001-31, *APHIS: Animal Welfare Act – Marine Mammals (Cetaceans)* 4-11, 16-19 (2017); Ex. 31, Office of the Inspector Gen., USDA, Audit no. 33601-0001-41, *Animal and Plant Health Inspection Service Oversight of Research Facilities* 13-26 (2014); Ex. 32, Office of the Inspector Gen., USDA, Audit no. 33601-10-Ch, *Controls Over APHIS Licensing of Animal Exhibitors* 6-19 (2010); Ex. 33, Office of the Inspector Gen., USDA, Audit no. 33002-4-SF, *Animal and Plant Health Inspection Service Animal Care Program Inspections of Problematic Dealers* 1-2 (2010); Ex. 34, Office of the Inspector Gen., USDA, Audit no. 33002-3-SF, *APHIS Animal Care Program Inspection and Enforcement Activities* 5-6, 10-11 (2005); Ex. 35, Office of the Inspector Gen., USDA, Audit no. 33601-0001-Ch, *Animal and Plant Health Inspection Service Licensing of Animal Exhibitors* 15-26 (1996); Ex. 36, Office of the Inspector Gen., USDA, Audit no. 33600-1-Ch, *Animal and Plant Health Inspection Service Enforcement of the Animal Welfare Act* 5-8, 16-25, 30-32 (1995); Ex. 37, Office of the Inspector Gen., USDA, Audit Report No. 33002-0001-CH, *Animal & Plant Health Inspection Service Implementation of the Animal Welfare Act* 11-16 (1992).

evidence of egregious animal welfare violations.⁷⁵ The U.S. Department of Justice eventually raided and seized more than 4,000 beagles from the facility after finding hundreds of dogs in “acute distress.”⁷⁶

As a result of the USDA’s regulatory and enforcement failures, circuses, roadside zoos, and other facilities may remain licensed under the AWA even while holding captive elephants in extraordinarily inhumane conditions. For these reasons, the FWS cannot rely on AWA licensure—or even a record of AWA compliance—as a meaningful indication that a facility is suitably equipped to house and care for African elephants. The agency must instead develop its own species-specific criteria.

C. Requiring a special purpose permit for subsequent transfers of African elephants, including intrastate transfers, is well supported and a valid exercise of the FWS’s authority.

We support the obligatory permit condition proposed in 50 C.F.R. § 17.40(e)(10)(iv), which would require African elephant permit holders to obtain a special purposes permit for any *subsequent* transfer of the African elephant or their offspring to another person regardless of whether that transfer is interstate or intrastate. This permit condition is well within the FWS’s authority under the ESA.⁷⁷

To best accomplish the goal of this rulemaking, which is to “ensure the conservation and long-term survival of elephants in the United States” by verifying that elephants “are going only to facilities that are suitably equipped to house and care for them,”⁷⁸ we propose the following revision:

⁷⁵ Ex. 38, Sarah Lynch & Rachael Levy, *Exclusive: US Probe of Dog Breeder Scrutinizes Why USDA Left Thousands of Beagles to Suffer*, Reuters (Mar. 9, 2023), <https://perma.cc/M5TK-QLKL>.

⁷⁶ *Id.*

⁷⁷ Courts have regularly found that regulation of purely intrastate species is a valid exercise of FWS’s authority. *See, e.g., People for Ethical Treatment of Prop. Owners v. FWS*, 852 F.3d 990, 1006-08 (10th Cir. 2017) (“Every one of our sister circuits that has addressed this issue has agreed that regulation of purely intrastate species is an essential part of the ESA’s regulatory scheme.”).

⁷⁸ Endangered and Threatened Wildlife and Plants; Revision to the African elephant 4d rule, 87 Fed. Reg. 68975, 68985 (Nov. 17, 2022).

Each permit issued to authorize activity with a live African elephant under 50 CFR parts 17 or 23 must include a condition that the elephant and its offspring will not be sold or otherwise transferred to another person or location without a special purpose permit issued under § 17.32.

Adding a requirement that the permittee obtain a new permit when the animal is transferred to another *location* (i.e., to a facility located on a different premises) will add clarity to the permit condition and ensure that a broad variety of potential transactions are subject to FWS oversight.

As discussed above, it is common for zoos to maintain ownership of an elephant whom they loan or lease to another facility for breeding purposes. Take the example of Mabu, whom the San Diego Zoo Safari Park imported from Eswatini in 2003. The zoo has moved him at least five times in the last 10 years, without ever transferring ownership: to Reid Park Zoo in Tucson in 2012, then back to San Diego in 2016, then back to Reid Park in 2018, and finally to Fresno Chaffee Zoo in 2022.⁷⁹ Under the proposed language of 50 C.F.R. § 17.40(e)(10)(iv), there is some ambiguity as to whether similar transfers would require a permit, which could lead to a resource-intensive legal battle. One could argue that an elephant *loaned* to another zoo has simply been moved to a new location but has not been transferred to another person because ownership has not changed. Indeed, a similar argument was at issue in a lawsuit challenging a zoo's failure to obtain an ESA permit to loan two endangered Asian elephants to another zoo.⁸⁰ In that case, the FWS took the position that a permit was *not* needed for an interstate loan, in line with a longstanding (and legally suspect) interpretation of the ESA's definition of "commercial activity" that is likely to influence the interpretation of this permit condition (*see* Section II, *infra*).⁸¹

⁷⁹ Donna Parham, *Have You "Herd"? Catch Up With The Safari Park Elephant Herd's Latest Goings On*, <https://perma.cc/4N7L-WND6>; *New African Elephant Joins Herd at Central California Zoo*, San Diego Trib. (Nov. 13, 2022), <https://perma.cc/A3PM-FDTN>.

⁸⁰ *Elephant Justice Project v. Woodland Park Zoo*, No. C15-0451-JCC, 2015 WL 12564233, at *3 (W.D. Wash. Apr. 7, 2015).

⁸¹ *Id.* at *3 n. 3.

In another example, circus exhibitor Brian Franzen recently transferred African elephant Kosti to the Memphis Zoo, evidently under a lease agreement.⁸² There is little question that Franzen has failed to maintain elephants in humane conditions. He has a long history of AWA violations, and he controls elephants with violent use of the bullhook, chains them, and forces them to give rides and perform tricks.⁸³ Returning an elephant to his circus would undoubtedly harm her and undermine the ESA's conservation goals. This is exactly the kind of transfer the FWS should seek to avoid under proposed subsection (e)(10)(iv). Yet under the proposed language, there is some ambiguity as to whether the *owner* of an animal leased to another person would require a special purposes permit to regain possession of the animal. Even more concerning are exhibitors that travel with elephants to fairs, circuses, film sets, weddings, parties, and parades. Such exhibitors, for commercial gain, routinely transport elephants to other *locations*, none of which are safe or appropriate for elephants. However, because those exhibitors maintain ownership and possession of the animals, they arguably would not need to obtain a special purposes permit under subsection (e)(10)(iv) as currently written.⁸⁴

To avoid these ambiguities and better accomplish the goals of the rulemaking, the FWS should revise the language of subsection (e)(10)(iv) to clarify that each special permit to transfer an elephant must include a condition that the elephant and its offspring will not be sold or otherwise transferred to another person *or location* without a special purpose permit.

⁸² Lucas Finton, *New Ears on the Block: Memphis Zoo Introduces Kosti, a Newly Arrived Elephant, to New Home*, Memphis Commercial Appeal, July 16, 2022, <https://perma.cc/8C3S-3BG4>; Fla. FWC, *supra* note 5 (“2 elephants transferred out of state (leased to zoos)”).

⁸³ PETA Factsheet, Franzen Bros. Circus, <https://perma.cc/23AW-NPZP>.

⁸⁴ These examples are meant as hypotheticals drawn from real scenarios; we understand that subsection 17.40(e)(10)(iv) creates a permit condition that relates to *subsequent* elephant transfers by a special purposes permittee.

II. The proposed rule underscores the need to eliminate the FWS’s definition of “industry or trade.”

The FWS’s current interpretation of “industry or trade” within the definition of “commercial activity” is unlawful and will restrict the proposed rule’s intended limitations on the use of live elephants in interstate commerce in the course of a commercial activity.

Under the ESA and its implementing regulations, it is illegal for any person to “deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity” any endangered or threatened species.⁸⁵ Congress defined “commercial activity” as “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 exhibitions of commodities by museums or similar cultural or historical organizations.”⁸⁶ The FWS has further defined the phrase “industry or trade” [*sic*] as “the actual or intended transfer of wildlife or plants from one person to another person in the pursuit of gain or profit.”⁸⁷ Thus, under the FWS’s current regime, no Section 10 permit is required to transfer an endangered species across state lines unless the transfer is essentially a sale. Facilities that use protected species in the pursuit of gain or profit have taken advantage of this loophole for years to transfer endangered species as a “gift” or “loan” when the transferring entity cannot demonstrate that the transfer will “enhance the propagation or survival of the species” as required by Section 10.⁸⁸ Likewise, traveling circuses have never been required to obtain Section 10 permits for interstate transport of ESA-protected species, despite using these animals to make millions.

⁸⁵ 16 U.S.C. § 1538(a)(1)(E). The text of the ESA applies to endangered species, and Section 4(d) of the law authorizes the Secretary to adopt regulations to “prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) of this title.” *Id.* § 1533(d). The proposed rule would make it unlawful to deliver, receive, carry, transport, or ship live African elephants in interstate commerce in the course of a commercial activity.

⁸⁶ *Id.* § 1532(2) (emphasis in original).

⁸⁷ 50 C.F.R. § 17.3.

⁸⁸ 16 U.S.C. § 1539(a)(1)(A). In some cases, “gifts” are used to conceal sales. *See, e.g.*, Ex. 39, Karin Brulliard, *The Trouble With Tigers in America*, Wash. Post (July 12, 2019), <https://perma.cc/YV55-LUQ5> (describing convicted wildlife trafficker Joseph Maldonado-Passage’s practice of marking illegal sales of ESA protected big cats as “donations” on certificates of veterinary inspection, which a witness described as “standard practice in this industry.”).

A. The FWS’s definition of “industry or trade” is contrary to the plain meaning of the ESA and violates the FWS’s affirmative conservation duties under Section 7(a)(1).

The FWS’s definition of “industry or trade” is unlawful and should be eliminated for at least two reasons.

First, the definition runs contrary to the plain meaning of the ESA. The most natural reading of the statute includes every economic use of a protected species, which is much broader than the FWS’s impermissibly narrow definition. The ESA’s definition of “commercial activity” includes “*all* activities of industry and trade.”⁸⁹ The dictionary definition of “all” is “the whole amount, quantity, or extent of; as much as possible,”⁹⁰ indicating that Congress intended the term “*all* activities of industry and trade” “to be given the broadest interpretation possible.”⁹¹ The broad scope of “industry and trade” is also clear from the language “including, but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling.”⁹² The phrase “including, but not limited to” “typically indicates a *partial* list.”⁹³ Thus, the “buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling” is indicated to be only a partial list of *possible* “activities of industry and trade.” The FWS’s definition of “industry or trade” as the “*transfer* of wildlife . . . from one person to another in the pursuit of gain or profit”⁹⁴ is limited to only one type of activity: sales. This ignores other potentially profitable business transactions among animal exhibitors, including exhibitions, leases, loans, performance contracts, breeding contracts, trades, barter, gifts, and more. The FWS’s

⁸⁹ 16 U.S.C. § 1532(2) (emphasis added).

⁹⁰ *All*, Merriam-Webster, <https://perma.cc/XLG9-JMVY>.

⁹¹ *New W. Materials LLC v. Interior Bd. of Land Appeals*, 398 F. Supp. 2d 438, 446 (E.D. Va. 2005), *aff’d*, 216 F. App’x 385 (4th Cir. 2007) (referring generally to the use of “all”).

⁹² 16 U.S.C. § 1532(2).

⁹³ *Including*, Black’s Law Dictionary (11th ed. 2019) (emphasis added).

⁹⁴ 50 C.F.R. § 17.3 (emphasis added).

definition of “industry or trade” is thus contrary to the plain meaning of the statute, which encompasses every economic use of a protected species.⁹⁵

Second, the FWS’s affirmative conservation duty under Section 7(a)(1) of the ESA requires the agency to eliminate its definition of “industry or trade.” Section 7(a)(1) provides that “[t]he Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter.”⁹⁶ Those purposes include conservation—i.e., recovery of the species⁹⁷—or, as the Supreme Court has put it, “to halt and reverse the trend toward species extinction, whatever the cost.”⁹⁸ Courts have thus found that Section 7(a)(1) imposes an affirmative duty on the FWS to use its programs, including the ESA, to conserve species.⁹⁹ Though the FWS has some discretion in how to implement programs under Section 7(a)(1), it “must in fact carry out a program to conserve.”¹⁰⁰ Therefore, the agency violates its 7(a)(1) duty if the program is entirely nonexistent or provides an “insignificant” effect.¹⁰¹

The FWS’s definition of industry and trade violates its affirmative 7(a)(1) duty. The current definition fails to ensure that *all* interstate, commercial movements of endangered species “enhance

⁹⁵ The ESA’s legislative history reflects Congress’s intent to carefully limit the commercial exploitation of endangered species. For example, a joint House and Senate report clarified lawmakers’ understanding that “commercial activity” included activities “*undertaken in the pursuit of any gain or profit.*” Ex. 40, H.R. Rep. No. 93-740, at 24 (1973) (emphasis added). An FWS official even testified, “We are not in business to have people make profits on these species. It is the seeking of profit that makes it a commercial activity. . . . [P]ursuit of gain and profit includes those cases where you do not make any money, or simply make the market value. It is the nature of the activity, not the degree of success.” Ex. 41, Endangered Species Oversight: H. Subcomm. on Fisheries & Wildlife Conservation & the Env’t of the House Comm. on Merchant Marine & Fisheries, 94th Cong. 240 (Oct. 1975) (Statement of Richard Parsons, FWS Special Agent in Charge, Regulations and Rules, Division of Law Enforcement).

⁹⁶ 16 U.S.C. § 1536(a)(1).

⁹⁷ *Id.* § 1532(3) (defining “conservation” as “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. . . .”).

⁹⁸ *Tenn. Valley Authority v. Hill*, 437 U.S. 153, 184 (1978).

⁹⁹ *Carson-Truckee Water Conservancy District v. Clark*, 741 F.2d 257, 261-62 (9th Cir. 1984) (finding that the Secretary of the Interior must “use programs under his control for conservation purposes where threatened or endangered species are involved.”); *Defenders of Wildlife v. Secretary, U.S. Department of the Interior*, 354 F. Supp. 2d 1156, 1173-74 (D. Or. 2005) (finding that the 7(a)(1) affirmative duty applies to the FWS just as it applies to other agencies).

¹⁰⁰ *Florida Key Deer v. Paulison*, 522 F.3d 1133, 1147 (11th Cir. 2008) (finding that the Federal Emergency Management Agency had violated its 7(a)(1) duty because no participants had joined its purely voluntary species conservation program, meaning it had “no effect whatsoever”).

¹⁰¹ *Id.*; see also *Red Wolf Coalition v. FWS*, 346 F. Supp. 3d 802, 813-15 (E.D.N.C. 2018) (finding that the FWS violated its 7(a)(1) duty by abandoning all aspects of a previously-successful recovery plan for the red wolf).

the propagation or survival of the species.”¹⁰² Interstate commercial movement of endangered species is prohibited by the ESA unless it is accompanied by a Section 10 permit, meaning that the FWS has verified the activity meets the enhancement requirement.¹⁰³ Yet under the current definition, the FWS allows broad swaths of interstate commerce to proceed without a Section 10 permit, including exhibitions by traveling circuses; “donations,” loans, leases, or trades of endangered species between facilities that exhibit animals for money; and animal rentals or other exhibits for-hire. The FWS has therefore violated its Section 7(a)(1) duty because it has entirely failed to utilize the Section 10 program to regulate these activities “in furtherance of the purposes of [the Endangered Species Act].”¹⁰⁴ This will extend to transactions conducted under the proposed African elephant 4(d) rule, which will require a permit prior to any interstate transfer of elephants in the course of a commercial activity for the specific purpose of ensuring that the recipient of the animal is “suitably equipped to house and care for the live elephant.” Commercial transactions where ownership of an animal does not change—such as when a renaissance fair hires an exhibitor to transport elephants to the fair and sell rides—will evade much-needed scrutiny.

The definition of “industry or trade” also violates the FWS’s affirmative 7(a)(1) duty by undermining the purposes of the ESA, including by facilitating illegal wildlife trafficking, which is a major threat to the ESA’s conservation objectives.¹⁰⁵ Potential poachers, smugglers, and buyers can avoid permitting requirements by claiming that endangered or threatened wildlife are “donations,” “rentals,” or other types of commerce that the definition does not cover.¹⁰⁶ This accords with research on the global wildlife trade, which shows that legal trade pathways often mask and facilitate

¹⁰² 16 U.S.C. § 1539(a)(1)(A).

¹⁰³ *Id.* §§ 1538(a)(1)(E), 1539(a)(1)(A).

¹⁰⁴ *Id.* § 1536(a)(1). *See also Florida Key Deer*, 522 F.3d at 1146 (“Total inaction is not allowed.”).

¹⁰⁵ *See, e.g., Ex. 42, Pedro Cardoso et al., Scientists’ Warning to Humanity on Illegal or Unsustainable Wildlife Trade*, 263 *Biological Conservation* 2 (2021) (“illegal or unsustainable wildlife trade . . . represents one of the five major drivers of biodiversity loss and extinction at global scale”).

¹⁰⁶ *See Ex. 39, Brulliard, supra* note 88.

illegal ones.¹⁰⁷ Indeed, Missouri-based Carden International Circus sold two Asian elephants to Myakka Elephant Ranch in Florida in 2019 without obtaining an ESA permit or, evidently, facing any penalties from the FWS.¹⁰⁸ There is little doubt that this sale occurred openly and without the FWS's interest because the agency has otherwise entirely ignored the interstate commercial use of endangered species by circuses under its interpretation of "industry or trade."

The definition of this term also undermines the purposes of the ESA by facilitating takes of listed species by enterprises allowed to operate without permits. For example, the FWS's failure to require circuses to obtain permits prior to transporting elephants across the country for performances and rides means that the agency does not evaluate whether these businesses—or their various performance destinations—are suitably equipped to house and care for elephants. The agency therefore disregards circus practices that are known to cause elephants physical and psychological trauma, such as confining them to small spaces and using chains and bullhooks to subjugate them.¹⁰⁹

¹⁰⁷ One well-known example is how legal ivory trade can lead to a boom in illegal ivory trade. Ex. 43, Solomon Hsiang & Nitin Sekar, *Does Legalization Reduce Black Market Activity? Evidence From a Global Ivory Experiment and Elephant Poaching Data* 3-4, 33 (Nat'l Bureau of Econ. Rsch., Working Paper No. 22314, 2016), <https://doi.org/10.3386/w22314>. Captive breeding programs have also been used to launder wild animals into the global exotic pet trade. See, e.g., Ex. 44, Jessica A. Lyons & Daniel J.D. Natusch, *Wildlife Laundering Through Breeding Farms: Illegal Harvest, Population Declines, and a Means of Regulating the Trade of Green Pythons (*Morelia viridis*) from Indonesia*, 144 *Biological Conservation* 3073, 3073 (2011), <https://doi.org/10.1016/j.biocon.2011.10.002> (finding that "at least 80% of green pythons exported from Indonesia annually" were sold as "captive-bred" but were in fact illegally taken from the wild). The FWS has acknowledged the need to increase oversight of legal trade in African elephants, finding that this will "help prevent illegal and detrimental trade." 87 Fed. Reg. at 68985-86.

¹⁰⁸ See PETA, *10 Roadside Zoos That Have Exploited Elephants for Painting, Bathing, or Rides*, <https://perma.cc/PBG6-R62M> ("The Barreda family, which runs the ranch, used an African elephant named Lou in circuses for many years before pivoting to using her for hands-on encounters. They then bought Asian elephants Carol and Patty from the Carden International Circus in 2019." Documentation of the sale is on file with PETA.).

¹⁰⁹ See Ex. 45, Jay Pratte, *Shrine Circus Animal Welfare Report: James Cristy Cole Circus* (2018), <https://perma.cc/S52A-G98C> (detailing abusive animal practices at the Shrine Circus); Ex. 46, PETA, *Lions and Tigers and Joe Exotic: Big Cats Suffer in Traveling Acts* (2021), <https://perma.cc/6LMA-VHNI> (detailing abusive practices of big cats in circuses and traveling exhibitors).

Finally, the current definition undermines the purposes of the ESA by enabling the exploitation of endangered species for entertainment, thus fostering public misperception that these species are not in jeopardy.¹¹⁰

For each of these reasons, the definition of “industry or trade” actively undermines the ESA’s conservation purposes. This violates the FWS’s Section 7(a)(1) duties.¹¹¹ Therefore, the definition should be eliminated.

B. The proposed rule illustrates why the definition of “industry or trade” should be eliminated.

The current definition of “industry or trade” will continue to thwart the FWS’s efforts to protect the African elephant even if the proposed rule is implemented.

At best, implementing the proposed rule will cause confusion concerning whether it prohibits certain practices that the FWS has otherwise long allowed under its current (unlawful) definition of “industry or trade.” For example, zoos have engaged in extensive transfers of elephants across state lines and have structured many of those transfers as breeding loans to avoid having to demonstrate that they meet the ESA’s enhancement requirement.¹¹² Because these transactions are not sales and ownership of the animals does not change, the FWS has long found under its definition of “industry or trade” that these transfers do not constitute “commercial activity.”¹¹³ Yet the purpose of captive breeding is to stock zoo exhibits that display these animals for profit, and, in

¹¹⁰ See, e.g., Ex. 47, Stephen R. Ross et al., *Inappropriate Use and Portrayal of Chimpanzees*, 319 Science 1487, 1487 (2008), <https://doi.org/10.1126/science.1154490> (finding that the most common reason among survey respondents for not believing that chimpanzees were endangered was “was that chimpanzees were commonly seen on television, advertisements, and movies and, therefore, *must not be in jeopardy*”).

¹¹¹ See *Center for Biological Diversity v. Vilsack*, 276 F.Supp.3 1015, 1031-32 (finding that the USDA’s violation of its 7(a)(1) duties was “especially true” because its program had a “negative impact” on wildlife).

¹¹² See, e.g., *Elephant Just. Project v. Woodland Park Zoological Soc’y, Inc.*, No. C15-0451-JCC, 2015 WL 12564233, at *3 (W.D. Wash. Apr. 7, 2015) (“Defendants claim that ‘because WPZS is not selling the elephants, but is instead loaning them to the OKC Zoo, the transfer does not reflect an ‘intent to profit or gain.’”).

¹¹³ *Id.*

fact, the exhibition of baby elephants is extremely lucrative.¹¹⁴ At least one court has suggested that the FWS's narrow interpretation of commercial activity is wrong and should include breeding loans.¹¹⁵ Now, the proposed rulemaking seems to suggest its special purposes permit requirements *will* apply to breeding loans—a policy that we support.¹¹⁶ But facilities with African elephants would understandably be confused about how to comply with these contradictory rules.

At worst, these facilities may decide to use the “industry or trade” definition to circumvent the proposed rule altogether. By claiming that their transfers of elephants are loans, gifts, or otherwise fall outside the FWS's narrow definition of “industry or trade,” facilities could escape the protections intended by the proposed rule's permit program. Their actions would simply become another case study of how the definition of this term undermines the conservation purposes of the ESA, and why it should therefore be rescinded.

The proposed rule, when read together with the definition of “industry or trade,” also creates a dual regime for African elephant welfare. While the proposed rule may protect elephants transferred among zoos, elephants in circuses and traveling exhibitions will be left with virtually no oversight and protection because of the “industry or trade” loophole. Thus, the FWS will not be fulfilling the ESA's conservation objectives with respect to all African elephants until the “industry or trade” definition is eliminated or revised to be inclusive of transfers for any commercial purpose.

Commenters have repeatedly pointed out that the FWS's definition of “industry or trade” is unlawful, but the FWS has refused to take action and given unreasoned, arbitrary responses.¹¹⁷ When

¹¹⁴ See, e.g., Deborah Shaar, *Sedgwick County Zoo Breaks Attendance Record*, KMUW 89.1 (Dec. 19, 2016), <https://perma.cc/6WJL-M8D7> (crediting the addition of six elephants from Africa with record-breaking attendance).

¹¹⁵ *Elephant Just. Project*, 2015 WL 12564233, at *3-*4 (“it appears axiomatic that the transfer [of elephants for breeding] would be, at least in part, carried out in ‘the pursuit of gain or profit’”).

¹¹⁶ 87 Fed. Reg. at 68985 (noting in the discussion of the need for increased oversight of elephant transfers that “[t]hese animals and their offspring may be moved for breeding purposes, public display, space requirements, or other reasons”).

¹¹⁷ Compare, e.g., Ex. 48, George Washington University Law School Animal Welfare Project, Comment on Proposed Rule to List all Chimpanzees as Endangered (July 26, 2013), <https://www.regulations.gov/comment/FWS-R9-ES-2010-0086-17598>, with Endangered and Threatened Wildlife and Plants; Listing All Chimpanzees as Endangered Species, 80 Fed. Reg. 34500, 34519 (responding that “the comment is outside the scope of this agency action”).

this issue was raised in a previous African elephant rulemaking, the FWS declined to set aside the definition of “industry or trade,” arguing that the rule had been in place “for many years” and had been promulgated “in accordance with the Administrative Procedure Act.”¹¹⁸ This argument is unreasoned and arbitrary. Whether the appropriate procedure was followed and how long the rule has been in place have nothing to do with whether the regulation in fact violates the plain language of the statute, as well as its overall conservation purpose. The FWS has also asserted that it would not be “appropriate” to amend its definition of industry and trade in rulemakings pertaining to specific species.¹¹⁹ Yet the definition itself was first adopted in the similarly “inappropriate” context of a rulemaking related to alligators.¹²⁰ It is entirely appropriate for agencies engaging in rulemaking to use the opportunity to remove or revise existing regulations that are not supported by the law. Thus, the FWS can and should reinforce its efforts to protect African elephants by eliminating, or substantially revising, the “industry or trade” definition in this rulemaking. Indeed, the agency has acknowledged that it would be appropriate to “revisit this issue in the future if the existing definition appears to allow activities that may be contrary to the spirit or plain language of the ESA.”¹²¹ The FWS should do so now.

III. The import of wild-caught live African elephants undermines conservation of the species and should be prohibited.

For nearly two decades, the International Union for the Conservation of Nature (IUCN) African Elephant Specialist Group (AfESG) has opposed “removal of African elephants from the wild for any captive use” because captive uses provide “no direct benefit for in situ conservation of

¹¹⁸ Endangered and Threatened Wildlife and Plants; Revision of the Section 4(d) Rule for the African Elephant, 81 Fed. Reg. 36388, 36400 (June 6, 2016).

¹¹⁹ *Id.*; *see also*, Listing All Chimpanzees as Endangered Species, 80 Fed. Reg. at 34519 (June 16, 2015) (“the comment is outside the scope of this agency action”).

¹²⁰ Reclassification of the American Alligator and Other Amendments, 40 Fed. Reg. 44412, 44416 (Sept. 26, 1975).

¹²¹ Revision of the Section 4(d) Rule for the African Elephant, 81 Fed. Reg. at 36400.

African elephants.”¹²² This global conservation authority affirmed its position as recently as 2019.¹²³ We emphatically support this position, and add that holding elephants in captivity is also harmful to their welfare, because it severely limits their liberty, space, activity, environment, and social and familial lives. It also removes them from their ecosystems and families, which can have serious ecological impacts. We urge the FWS to reconsider adopting a regulation that will further entrench the capture of, and market for, African elephants; instead, the United States should be a global leader in *opposing* this cruel and controversial live trade. As the agency makes clear in the notice of proposed rulemaking, “section 4(d) provides the Secretary with wide latitude of discretion to select and promulgate appropriate regulations tailored to the specific conservation needs of the threatened species. The second sentence grants particularly broad discretion when adopting the prohibitions under section 9.”¹²⁴ The agency should use this discretion to *ban* the import of wild-sourced live African elephants.

A. The proposal conflates the FWS’s enhancement finding with the exporting country’s non-detriment finding.

The FWS’s approach to making an enhancement finding proposed in subsection (e)(10)(ii) will incentivize the ongoing capture of African elephants by authorizing the import of wild-sourced animals and according a high level of deference to the judgments of the elephant-exporting countries that stand to gain financially from ongoing live trade. This subsection raises two primary concerns: first, the FWS is conflating its own enhancement finding with the range states’ non-detriment findings; and second, the proposed rule will partially outsource the agency’s enhancement finding to the range countries themselves.

¹²² 87 Fed. Reg. at 68983; Ex. 49, Statement from the African Elephant Specialist Group of the IUCN Species Survival on the Removal of African Elephants for Captive Use (Dec. 2003).

¹²³ Ex. 50, CITES CoP19 Doc. 66.4.1, International Trade in Live African Elephant Specimens: Proposed Revision of Res. Conf. 10.10 (Rev.CoP18) ¶ 6 (Nov. 2022), <https://perma.cc/P4SW-F2ZR>.

¹²⁴ 87 Fed. Reg. at 68978.

The proposed subsection (e)(10)(ii) states:

To make an enhancement determination for the import of wild-sourced live African elephants under paragraph (e)(10)(i) of this section and § 17.32, the Service must possess a properly documented and verifiable certification by the government of the range country dated no earlier than 1 year prior to the date the following determinations are made . . .

It then lists nine determinations that the range country must make but lists no other factors that the FWS *itself* will consider in making an enhancement determination. This language collapses two separate and distinct legal findings into one: the FWS's determination under the ESA that an otherwise unlawful activity may be permitted because it will “enhance the propagation or survival of the species” (known as an “enhancement finding”),¹²⁵ and the CITES requirement that states exporting protected species advise that “such export will not be detrimental to the survival of the species” (known as a “non-detriment finding”).¹²⁶ In other words, the FWS would allow an exporting state's certification that capturing live elephants is *not detrimental* to the species to largely replace its own assessment of whether such capture and import would proactively *enhance the survival* of the species.

Enhancement permits are designed to promote the *recovery* of threatened species.¹²⁷ Permit applicants must provide the FWS with a “full statement of the reasons” why they are “justified in obtaining a permit including the details of the activities sought to be authorized by the permit.”¹²⁸ For enhancement permits, this must include “a statement of the applicant's willingness to participate in a cooperative breeding program and to maintain or contribute data to a studbook.”¹²⁹

¹²⁵ See 16 U.S.C. § 1539(a)(1)(A).

¹²⁶ CITES Arts. III.2(a), IV.2(a).

¹²⁷ See 16 U.S.C. § 1532(3) (defining “conservation” as “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.”).

¹²⁸ 50 C.F.R. § 17.32(a)(1)(vii).

¹²⁹ *Id.* § 17.32(a)(1)(viii).

In evaluating this information to make an enhancement finding, the FWS must consider the following factors:

- (i) Whether the purpose for which the permit is required is adequate to justify removing from the wild or otherwise changing the status of the wildlife sought to be covered by the permit;
- (ii) The probable direct and indirect effect which issuing the permit would have on the wild populations of the wildlife sought to be covered by the permit;
- (iii) Whether the permit, if issued, would in any way, directly or indirectly, conflict with any known program intended to enhance the survival probabilities of the population from which the wildlife sought to be covered by the permit was or would be removed;
- (iv) Whether the purpose for which the permit is required would be likely to reduce the threat of extinction facing the species of wildlife sought to be covered by the permit;
- (v) The opinions or views of scientists or other persons or organizations having expertise concerning the wildlife or other matters germane to the application; and
- (vi) Whether the expertise, facilities, or other resources available to the applicant appear adequate to successfully accomplish the objectives stated in the application.¹³⁰

Hence, the enhancement finding is designed to ensure that the FWS is relying on expert scientific evidence to determine whether a proposed activity is likely to “*reduce* the threat of extinction facing the species,” as well as whether the capture of animals is justified and will not directly *or* indirectly harm the species.¹³¹ After all, “enhance” means to “heighten” or “increase,” and is synonymous with “improve.”¹³² An activity that *enhances* the survival of a species is one that has a net positive impact on the species as a whole, not one that merely avoids harming it.¹³³

¹³⁰ *Id.* § 17.32(a)(2).

¹³¹ *Id.* (emphasis added),

¹³² *Enhance*, Merriam-Webster, <https://perma.cc/P5E4-D6M4>; *Safari Club Int'l v. Zinke*, 878 F.3d 316, 327 (D.C. Cir. 2017).

¹³³ *Safari Club Int'l*, 878 F3d at 327 (“The Service reasonably interpreted the Special Rule to require a holistic inquiry into whether hunting enhances the species’ survival on net, taking into account the sustainability of the existing elephant population in light of the obvious detriments hunting poses to elephant survival.”); *id.* (“Appellants define ‘enhance’ as

On the other hand, the CITES non-detriment finding is a “risk assessment” grounded in the principles of “sustainable use.”¹³⁴ “Detrimental activities, depending on the species, could include, among other things, unsustainable use and any activities that would pose a net harm to the status of the species in the wild. For Appendix-I species, it also includes use or removal from the wild that results in habitat loss or destruction, interference with recovery efforts for a species, or stimulation of further trade.”¹³⁵ In other words, a non-detriment finding only asks whether a proposed activity’s impacts on a species are *neutral*, and not whether the activity will bolster the species’ survival.

It is deeply concerning that the FWS is proposing to outsource to elephant-exporting countries the task of making numerous findings essential to the FWS’s own enhancement finding. Range states’ interests may be adverse to African elephant conservation,¹³⁶ yet the FWS is proposing to accept the countries’ certifications at face-value without a clear avenue to approve, disprove, or modify their findings. Indeed, the FWS’s rejection or questioning of a foreign government’s certification would have serious diplomatic ramifications. The fact that the certification must be “properly documented and verifiable” does not adequately address this concern, because the rule provides no further guidance on what documentation is “proper,” what level of detail is required, or how the FWS will verify the certification.

The United States’ own experience shows that continuing to authorize the import of wild-caught African elephants into the country will only serve to stimulate global trade in this species, rather than to limit it.¹³⁷ The FWS should take all steps necessary to end the removal of elephants

to ‘heighten, increase.’ That definition in no way forecloses the Service from requiring hunting to ‘increase’ elephant survival on the whole, taking into account the full biological and institutional context bearing on the health of the species.” (cleaned up).

¹³⁴ See 50 C.F.R. § 23.61.

¹³⁵ *Id.* § 23.61(b).

¹³⁶ *E.g.*, Ex. 51, Ray Ndlovu, *Zimbabwe Ready to Sell Elephants to ‘Anyone Who Wants Wildlife’*, Bloomberg (June 24, 2019) (quoting Zimbabwe Tourism Minister Prisca Mupfumira as saying the country is “open to everyone who wants our wildlife,” and “We must allow free movement, and we must also decide—it’s our own resource.”).

¹³⁷ 87 Fed. Reg. at 68984 (“There has been an increase of approximately 51 percent in the international trade of live elephants since 2016” and “the available trade data demonstrates that live African elephants, particularly wild-sourced

from their natural habitats, including by banning the import of wild-caught elephants. With subsection (e)(10)(ii), the FWS would allow non-detriment findings made by elephant-exporting countries to subsume its own enhancement findings; this will serve to *expand* the capture and trade in live elephants by countries that view these animals as an exploitable “resource” and are not bound by the ESA’s view that elephants should be conserved for their “esthetic, ecological, educational, historical, recreational, and scientific value.”¹³⁸

Should the FWS nevertheless proceed to allow the import of wild-caught elephants despite these objections, it must revise the proposed rule to clarify that the certifications it will require from the governments of range countries are merely the requisite CITES export non-detriment findings. It should then list the factors that *the agency itself* will use to independently determine whether the specific import of a wild-sourced elephant will enhance the survival of the species. The FWS should make clear that using African elephants for exhibition, conservation education, or breeding (when there is no feasible and concrete plan to reintroduce elephants to their natural range) does not meet the enhancement requirement.¹³⁹ Likewise, the rule should clarify that the *permit applicant* carries the burden of demonstrating that the capture and import of elephants meets the enhancement requirement.

B. Concerns with Specific Enhancement Factors Proposed in Subsection (e)(10)(ii)

If the FWS adopts regulations authorizing the import of wild-sourced elephants over the objections of conservation experts and the animal welfare community, the agency must clarify the

elephants, are being traded in higher numbers in recent years.” Notably, US zoos imported 17 wild-caught elephants from Eswatini in 2016).

¹³⁸ 16 U.S.C. § 1531(a)(3).

¹³⁹ This aligns with the FWS’s prior claims that it does not grant permits “solely for educational or exhibition purposes.” Endangered and Threatened Wildlife and Plants; Listing All Chimpanzees as Endangered Species, 80 Fed. Reg. 34500, 34518 (June 16, 2015); *see also* Notice of Intent to Propose Rule: Captive-Bred Wildlife Regulation, 57 Fed. Reg. 548-01, 550 (Jan. 7, 1992) (noting that using “captive-bred animals . . . for entertainment” does not “contribute to conservation”); Final Rule: Captive-Bred Wildlife Regulation, 58 Fed. Reg. 68,323, 68,324 (Dec. 27, 1993) (explaining that FWS has “sincere doubts about the relative conservation benefits that are provided to non-native species in the wild from the public exhibition of living wildlife”).

factors that it deems essential to its enhancement determination. We propose that the FWS revise the factors proposed in subsection (e)(10)(ii) as follows:

1. The “Valuable Resource” Certification

Subsection (e)(10)(ii)(C) requires the following certification:

Regulating authorities recognize these populations as a valuable resource and have the legal and practical capacity to manage them for their conservation.

The phrase “valuable resource” is a loaded term that is inconsistent with the spirit of the ESA, which was passed to “halt and reverse the trend toward species extinction, whatever the cost.”¹⁴⁰ “Resources” generally means a supply of materials, money, or assets that humans can extract or use for economic gain. Indeed, the word “resource” appears nowhere in the text of the ESA to refer to protected species. Congress recognized that wild animals “are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.”¹⁴¹ It deemed the extraction and consumption of animals as resources (“overutilization for commercial, recreational, scientific, or educational purposes”) to be a primary driver of extinction.¹⁴² Perhaps this is why it chose not to frame these species as mere “valuable resources” in the text of the ESA. The text of CITES also does not refer to wildlife as “resources.” Instead, it deems wild animals “an irreplaceable part of the natural systems of the earth which must be protected.”¹⁴³

Conversely, some elephant range states view elephants and their body parts as valuable resources that they are eager to exploit. As a spokesperson for the Zimbabwe Parks and Wildlife Management Authority said when the country sold more than 90 elephants to China and Dubai for \$2.7 million, the elephants “must pay for their upkeep.”¹⁴⁴ As the notice of proposed rulemaking

¹⁴⁰ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).

¹⁴¹ 16 U.S.C. § 1531(a)(3).

¹⁴² *Id.* § 1533(a)(1)(B).

¹⁴³ CITES, preamble.

¹⁴⁴ Ex. 52, S. Mavhunga, *Zimbabwe Sells Elephants to China and Dubai for \$2.7 million*, CNN.com (May 14, 2019), <https://perma.cc/C9CC-37J3>.

acknowledges, “African elephant range states are increasingly interested in selling live African elephants as a means to reduce overpopulation of some elephants in some areas *and to generate revenue.*”¹⁴⁵ For this reason, the “valuable resource” certification is not meaningful to the FWS’s enhancement finding. We recommend that the FWS replace this certification with language that actually captures the purpose and spirit of the ESA, such as a certification that the range state recognizes the *ecological importance* of elephants, who shape ecosystems, sequester carbon, and live in complex societies that experience broad harms when individuals are captured and removed.

2. The Family Unit Certification

Subsection (e)(10)(ii)(F) requires the following certification:

Regulating authorities can ensure that the involved live animals have in fact been legally taken from the specified populations and family units were kept intact to the maximum extent practicable.

The fission-fusion dynamic of elephant families and the large number of elephants involved make it highly unlikely that an intact family group could be captured. An African elephant family can range in size from two to 52 individuals. Family groups are composed of a discrete, predictable configuration of individuals who may, over the course of hours or days, temporarily separate and then come back together. Families may also mingle with other social groups to form much larger social aggregations.¹⁴⁶ By the very nature of the fission-fusion social dynamic, relatives may not always stay together. The size of a family, and the fact that not all individuals may be together at the time of capture, makes it highly likely that families will be separated. Acute social disruption (e.g., through poaching, culling, or translocation) has long-term negative consequences for elephants and their survival. Research demonstrates that elephants from disrupted groups had weaker social bonds,

¹⁴⁵ 87 Fed. Reg. at 68985 (emphasis added).

¹⁴⁶ Poole & Moss, *supra* note 31, at 75-76.

higher stress levels, poor mothering, infant rejection, altered key decision-making abilities, and significantly lower reproductive output than females from intact groups.¹⁴⁷

Younger males also would be prone to being left behind, as they tend to spend time a distance away from the family group, playing with unfamiliar peers or on their own.¹⁴⁸ As males prepare to disperse from the family group between 9 and 18 years of age, they gradually spend more time on their own, while still returning to the family. The process of departing from the family averages 16 months but can range from 5 to 35 months.¹⁴⁹ Male elephants acquire information critical to their longevity and reproductive success while still living with the family group. If not yet prepared to be on his own, a young male left behind after capture of his family may not survive. Normally, mortality rates for males in the 10- to 20-year age bracket are significantly higher than in females.¹⁵⁰ Abandonment of a young male would have even more of an impact on his ability to survive, and therefore be detrimental to conservation of the species.

While subsection (e)(10)(ii)(F) calls for keeping family units intact, the “maximum extent practicable” caveat provides a major loophole that will be exploited to exclude elephants who are difficult to handle or to separate young elephants from older family members during capture, especially the younger females whom zoos prefer to import, or for a host of other reasons. The 2003 (San Diego Zoo Safari Park, Lowry Park Zoo) and 2016 (Omaha’s Henry Doorly Zoo, Sedgwick County Zoo, Dallas Zoo) imports of African elephants did not represent anything close to the composition of an elephant family, by gender or age. The imported elephants skewed heavily toward younger females, so that they could produce very lucrative baby elephants for exhibition. In 2003,

¹⁴⁷ Ex. 53, Elizabeth A. Archie & Patrick I. Chiyo, *Elephant Behaviour and Conservation: Social Relationships, the Effects of Poaching, and Genetic Tools for Management*, 21 *Molecular Ecology* 765 (2012), <https://doi.org/10.1111/j.1365-294X.2011.05237.x>; Ex. 54, G.A. Bradshaw, et al., *Social Trauma: Early Disruption of Attachment Can Affect the Physiology, Behavior and Culture of Animals and Humans Over Generations*, 433 *Nature* 807 (2005), <https://doi.org/10.1038/433807a>; Ex. 55, Graeme Shannon, et al., (2013) *Effects of Social Disruption in Elephants Persist Decades After Culling*, *Frontiers in Zoology*, Oct. 23, 2013, <https://doi.org/10.1186/1742-9994-10-62>.

¹⁴⁸ Ex. 55, Shannon, et al., *supra* note 147; Ex. 12, Hartley, et al., *supra* note 31.

¹⁴⁹ Ex. 12, Hartley, et al., *supra* note 31; Poole & Moss, *supra* note 31.

¹⁵⁰ Ex. 12, Hartley, et al., *supra* note 31; Poole & Moss, *supra* note 31.

only three of the 11 elephants captured were males. In 2016, each zoo imported just one male (3 out of 17 elephants). For the most recent import, the average age of the elephants decreased. In 2003, the average age at time of import was 12.75 years, whereas the average age in 2016 was 8.85 (excluding three elephants 20 and older). Zoos choose younger female elephants for import because they are considered easier to handle and transport and they have a longer reproductive life. This provides further incentive to exploit the “maximum extent practicable” loophole.

Moreover, it is indisputable that removal methods are grossly inhumane. Previously, captures of young African elephants were mainly the result of culling operations. Today, captures involve the separation of juvenile elephants from their family groups using helicopters, shotguns, or other loud devices. Harassment may continue for hours until the youngest elephants become fatigued and can no longer keep up with the family group.¹⁵¹ Cruise & Russo (2017) described the “usual procedure” for elephant captures in Zimbabwe in 2017: After identifying a viable family group, helicopters “pick off” youngsters with a sedative fired from a rifle.¹⁵² After the elephant collapses, the pilot flies low to drive away family members who attempt to aid the fallen elephant. Eventually, a ground-team retrieves the elephant, tying them up and dragging them onto trucks for transport to holding pens with other frightened and traumatized young elephants. Video documentation of one capture shows officials abusing a young female, striking her, pulling her by the tail, twisting her trunk, and repeatedly kicking her in the head. The capture and holding location for the elephants is kept strictly secret, although such captures are legal in Zimbabwe.

In a document submitted to CITES, “Challenges to CITES Regulation of the International Trade in Live, Wild-Caught African Elephants” (2017), the authors state that once the captured calves are transported to holding facilities, they suffer even more due to aggressive behaviors by

¹⁵¹ Ex. 56, Burkina Faso & Niger, *Challenges to CITES Regulation of the International Trade in Live, Wild-Caught African Elephants*, SC69 Inf. 36 (2017), <https://perma.cc/M6HA-FPMP>.

¹⁵² Ex. 57, Adam Cruise & Christina Russo, *Exclusive: Footage Shows Young Elephants Being Captured in Zimbabwe for Chinese Zoos*, *The Guardian* (Oct. 3, 2017), <https://perma.cc/2Z8K-Q224>.

unrelated captives, dietary changes, and the presence of humans.¹⁵³ The elephants display symptoms of trauma including “depression, lethargy, anxiety, increased stress, intra-specific aggression, and a diminished or non-existent appetite, sometimes resulting in death or contributing to premature mortality.”¹⁵⁴ The document further states that removing wild elephants from their family group through live capture may impact the survivability of the wild population and is therefore relevant to the CITES non-detriment finding that is a requirement for export.¹⁵⁵

Regardless of how “intact” a captured family may be, elephants of all ages will suffer extreme stress and physical, behavioral, and psychological trauma caused by capture. In fact, the capture of adult females and sub-adult males is likely to be more dangerous to the elephants than captures of younger animals, with the potential for significant injuries and the mortality of calves and family members. If captured African elephants are imported, the only facilities that should be considered “suitably equipped” are accredited sanctuaries, as these facilities specialize in rehabilitating abused and traumatized elephants, while providing conditions and care aimed at restoring both physical and psychological health.¹⁵⁶

To better protect wild-living African elephants there should be no imports of live elephants, especially as it is infeasible to capture and import intact family units. In addition, serious questions remain as to how the FWS would be able to determine that regulating authorities in the range

¹⁵³ Ex. 56, *Challenges to CITES Regulation*, *supra* note 151.

¹⁵⁴ *Id.* at 2.

¹⁵⁵ *Id.* at 15.

¹⁵⁶ E.g., PAWS, *About Our Sanctuaries*, <https://perma.cc/AL4W-LFWM> (“At PAWS, ‘rescue’ is just the beginning of a long, dedicated endeavor to provide the best quality of life for victims of captivity who are physically and psychologically damaged - requiring round-the-clock monitoring and specialized care often for the remainder of their lives. . . . Although captive enclosures can never substitute for wild habitat, all sanctuary enclosures are designed to provide grass, trees and an enriched environment for individual animals with consideration for any health or psychological complications, which might preclude their ability to engage in normal activities. Enclosures for healthy animals are designed to replicate, as closely as possible, wild habitats for that species; specially designed areas are constructed for older, arthritic or injured individuals. . . . The elephant habitats at ARK 2000 provide the elephants with acres of varied natural terrain to roam, lakes to bathe in, and state-of-the-art elephant barns equipped with heated stalls and indoor therapeutic pool.”); The Elephant Sanctuary, *Mission*, <https://perma.cc/B5F5-HFV3> (“The Elephant Sanctuary exists to provide captive elephants with individualized care, the companionship of a herd, and the opportunity to live out their lives in a safe haven dedicated to their well-being.”).

country have properly documented and verifiably certified a capture, and that family units were kept intact to the “maximum extent practicable.” This may be especially difficult when captures, such as the recent ones in Zimbabwe and Botswana, have been covertly conducted and deeply shrouded in secrecy.¹⁵⁷

3. The Pregnancy Certification

Subsection (e)(10)(ii)(G) requires the following certification:

Regulating authorities can ensure that no live African elephants to be imported are pregnant.

Even under the best conditions, transport is highly stressful for elephants. The transport of fearful elephants who have experienced the trauma of capture and removal from their natural home undergo even more stress during the long process of transporting them internationally. Transport has several elements to it: Elephants are forced into shipping crates at the holding location, then heavy equipment is used to load the elephant onto a truck for transport to an airport. The trip to the airport can take several hours over rough roads. The crates holding the elephants are unloaded at the airport, where the elephants may wait for hours before being loaded onto a plane for a very long flight. (Flight time for the elephants imported by the Dallas Zoo in 2016 reportedly was 25 hours.¹⁵⁸) After arrival at the destination country the crates are again unloaded, and it may take hours before they can be released after inspections by the USDA, customs officials, and other federal agencies. Once cleared, the crates are loaded onto trucks for travel to the final destination. There, the crates are unloaded, and the elephants are coaxed out to enter a strange and unnatural environment.

The process of transport is even more stressful for a pregnant female, putting her at risk of health complications during and after travel. Yet, in 2016, the Dallas Zoo imported five wild-

¹⁵⁷ Ex. 56, Challenges to CITES Regulation, *supra* note 151; Cruise & Russo, *supra* note 151.

¹⁵⁸ Ex. 58, Chris Van Horne, *New African Elephants Arrive at Dallas Zoo*, NBC (Mar. 11, 2016), <https://perma.cc/6LWZ-Y9NK>,

sourced African elephants, including one female who gave birth at the zoo just two months after arrival.¹⁵⁹ This clearly was a violation of CITES transport guidelines (based on the International Air Transport Association’s *Live Animal Regulations*), which advise against the transport of pregnant mammals “for whom 90% or more of the expected gestation period has already passed.”¹⁶⁰ The FWS should seek to exceed these guidelines. To ensure that pregnant females are not put at risk, the proposed rule should include a permit requirement that pre-transport health checks be conducted, including testing for hormonal indicators of pregnancy, to ensure pregnant females will not be captured or imported.

It is important to note that the proposed Pregnancy Certification conflicts with the Family Unit Certification, which requires that family units have been kept intact. Under the Pregnancy Certification, pregnant females must be left behind. This makes the import of intact family units infeasible, as one or more females may be pregnant at any given time. Female elephants, especially younger females, are dependent on their mothers and family members for support during and after the birth process and in raising their calves. Without their family, a mother and calf may not survive. This clearly is detrimental to the survival of the species and another reason that the import of live elephants should not be allowed.

4. The *In Situ* Conservation Certification

Subsection (e)(10)(ii)(I) requires the following certification:

The government of the range country first considers any live elephants that it approves for export for both in situ conservation programs and for transportation to other locations to augment extant wild populations or reintroduce elephants to extirpated ranges.

¹⁵⁹ Ex. 59, Press Release, Dallas Zoo, *Q&A: Dallas Zoo Welcomes Precious Elephant Calf* (May 24, 2016), <https://perma.cc/W6XE-TNMW>.

¹⁶⁰ Ex. 60, CITES Guidelines for the Non-Air Transport of Live Wild Animals and Plants (2022), <https://perma.cc/SQ3G-SPAN>.

No wild elephant should be captured for the purpose of export to captivity in the United States. This position is supported by the IUCN AfESG,¹⁶¹ and aligns with CITES guidance adopted in 2019 that indicates zoos are not “appropriate and acceptable destinations” for elephants taken from the wild.¹⁶² Generally, only “*in situ* conservation programmes or secure areas in the wild, within the species’ natural and historical range in Africa,” are “appropriate and acceptable.”¹⁶³ *Ex situ* transfers of elephants are only appropriate and acceptable in temporary “emergency situations,” or “in exceptional circumstances” where the CITES Animals Committee, in consultation with the IUCN AfESG, finds the transfer will have “demonstrable *in-situ* conservation benefits for African elephants.”¹⁶⁴

We agree that the United States should not permit any import of wild-sourced African elephants except in exceptional circumstances where no *in situ* alternative exists. But merely requiring a range state to submit a yearly certification that it “first considers” *in situ* placement for elephants will not accomplish this goal. Instead, the certification should be made specific to *each* proposed import, and the FWS should require the *permit applicant* to specifically demonstrate which alternatives were considered and why those alternatives were not feasible. Moreover, requiring the applicant to demonstrate that it has consulted with the IUCN AfESG would provide additional reassurance that any proposal to place wild elephants in *ex situ* captivity will truly enhance species survival.

C. The FWS should add a certification that no elephant will be captured prior to issuance of a permit.

In October 2015, the FWS sought public comment on a draft EA evaluating the environmental impacts of capturing 18 elephants in Eswatini destined for U.S. zoos. Although the zoos’ import permit application claimed that the elephants would be captured “[o]nly following

¹⁶¹ 87 Fed. Reg. at 68983.

¹⁶² Ex. 61, CITES Res. Conf. 11.20 (Rev. CoP18), <https://perma.cc/EC25-RUUS>.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

approval of all necessary import and export permits,” the elephants were actually captured in July 2015—*three months* before the FWS published the draft EA.¹⁶⁵ Indeed, in September 2015, a month before the FWS published the EA, the zoos had already announced that that they expected to receive the animals that fall.¹⁶⁶ The fact that the elephants had already been captured obviously placed a thumb on the scale in favor of issuing a permit. The fact that Eswatini also threatened to kill the elephants if the FWS did not approve the permit further forced the decision. This tactic of brinksmanship has worked twice before,¹⁶⁷ and will serve as a template for future elephant imports if the FWS fails to adopt policies to prevent it. To prevent irreparable harm to the species and preserve the status quo while the FWS considers a permit application, the proposed rule must include a requirement that no elephant may be captured *prior* to issuance of an import permit. Otherwise, the equities are necessarily tipped in favor of authorizing the permit.

IV. The proposed rule enshrines an unlawful pay-to-play scheme.

The FWS’s attempt to ensure that “funds derived” from the import of wild-caught African elephants and from the import of elephant trophies is problematic because it enshrines an unlawful “pay-to-play” scheme, whereby the FWS does not assess whether allowing an otherwise prohibited activity enhances survival of the species (as required by the ESA), but instead encourages a permit applicant to funnel some amount of money to an unrelated conservation effort in exchange for a permit. The FWS is proposing to assess whether “[f]unds derived from the import are applied primarily to African elephant conservation,” and not whether the rupturing of elephant families and removal of individuals from the wild will actually enhance species survival; likewise, the agency is

¹⁶⁵ See Ex. 24, Comments of PAWS, PETA, ALDF, *supra* note 68, at 6; RAW: 6 elephants headed to Omaha’s Henry Doorly Zoo, KMTV Action 3 News (Sept. 25, 2015), <https://youtu.be/GDYkqK1DCLU?t=186>, at 3:06.

¹⁶⁶ RAW: 6 elephants headed to Omaha’s Henry Doorly Zoo, *supra* note 165.

¹⁶⁷ See Ex. 62, Lisa Kane, *A case Study of African Elephants’ Journey from Swaziland to US Zoos in 2003: A Question of Commerce and a Tale of Brinksmanship*, 6 J. Animal L. 51 (2010); see also *Born Free USA v. Norton*, 278 F. Supp. 2d 5 (D.D.C. 2003) (“the Court does not appreciate brinksmanship”).

proposing to assess whether “[f]unds derived from the involved sport hunting are applied primarily to African elephant conservation,” and not whether the killing of the elephant for a trophy will actually enhance species survival. Pay-to-play has always been, and continues to be, contrary to the requirements of the ESA.

The plain language of the ESA states that the FWS may permit “any act otherwise prohibited by section 9 . . . to enhance the propagation or survival of the affected species.”¹⁶⁸ In other words, the otherwise prohibited activity *itself* must be for the purpose of enhancing the propagation or survival of the species—which is why the statute cites as examples “acts necessary for the establishment or maintenance of experimental populations.”¹⁶⁹ Indeed, Congress explained that this language was intentionally drafted “to limit substantially the number of exemptions that may be granted under the act”¹⁷⁰—a purpose that is completely undermined by allowing applicants to effectively purchase a Section 10 permit by agreeing to contribute money to some unrelated purported conservation effort.

In 2003, the FWS tried to enshrine pay-to-play and published a draft policy for “Enhancement of Survival” permits that would officially implement the practice.¹⁷¹ Conservationists—including E.O. Wilson, Jane Goodall, and a coalition of leading 359 scientists—objected, writing that “sustainable use” programs have a “history of negative outcomes” that “counsels strongly against extractive use as a conservation tool for species already in danger of extinction.”¹⁷² The scientists warned that the proposed policy would not benefit endangered species, was too vague, and could lead to an increase in smuggling.¹⁷³ As a result, the FWS never officially

¹⁶⁸ 16 U.S.C. § 1539(a) (emphasis added)(1)(A).

¹⁶⁹ *Id.*

¹⁷⁰ Ex. 63, H.R. Rep. No. 93-412, at 17 (1973) (emphasis added).

¹⁷¹ 68 Fed. Reg. 49512, 49512 (Aug. 18, 2003).

¹⁷² Ex. 64, Letter from Jane Goodall, et al., to Chris Nolan, FWS (Mar. 4, 2004).

¹⁷³ *Id.*; Ex. 65, Shankar Vedantam, *U.S. May Expand Access to Endangered Species*, Wash. Post (Oct. 11, 2003), <https://perma.cc/TJ3N-CMLE>; Ex. 66, Cong. Rsch. Serv., *Enhancement-of-Survival Permits: Background and Status of Proposed Policy* CRS-4 (2006), <https://perma.cc/YTE3-AGMN>.

adopted the policy.¹⁷⁴ In practice, however, the policy is alive and well. Troublingly, the proposed African elephant rule suffers from the same defects that the scientists warned of two decades ago:

[T]he FWS has proposed to allow imports of endangered species killed or collected from the wild in the name of conservation without defining any standards by which proposed conservation programs will be evaluated. Nor has FWS identified the mechanisms through which it would monitor the implementation and outcomes of such programs on an ongoing basis. Without clear and detailed criteria relating to all aspects of data collection, program design and implementation, and oversight, neither FWS nor the scientific community can reliably assess the impacts of proposed conservation programs. It is our shared view that opening the door to commercial imports of endangered species without fully defining these parameters will put the hundreds of species potentially affected by this rule at serious risk. We do not believe such risks are acceptable for species already on the brink of extinction.¹⁷⁵

The donation of profits generated from capturing or killing an elephant, even if such donation is to support species conservation, fails to satisfy the requirement under the ESA that activities will “enhance the propagation or survival of the affected species.”¹⁷⁶ In fact, then-Judge Ketanji Brown-Jackson has objected to the FWS’s determination that “the ESA allows the agency to find Section 10’s ‘enhancement’ requirements satisfied upon nothing more than the permittee’s promise to donate money to an unrelated conservation effort.”¹⁷⁷ Although she found that the plaintiffs lacked standing in that case, she nevertheless explained that the FWS’s pay-to-play approach was contrary to the “plain language” of the statute.¹⁷⁸ Such a “broad interpretation,” she wrote, “appears to thwart the dynamic of environmental protection that Congress plainly intended when it mandated that *no* export of endangered species be allowed, unless the agency permits such export *pursuant to certain specified circumstances*.”¹⁷⁹ By using a pay-to-play policy, the court noted, the FWS was essentially “read[ing] those circumstances out of the statute, such that Section 10(a)’s

¹⁷⁴ Ex. 67, Cong. Rsch. Serv., *The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)* (Sep. 21, 2016), <https://perma.cc/HK8N-S8EP>.

¹⁷⁵ Ex. 64, Goodall et al., *supra* note 172.

¹⁷⁶ 16 U.S.C. § 1539(a)(1)(A).

¹⁷⁷ *New England Anti-Vivisection Soc’y v. FWS*, 208 F. Supp. 3d 142, 176 (D.D.C. 2016).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* (citing 16 U.S.C. §§ 1538, 1539(a)) (emphasis in original).

enhancement-finding requirement actually places no meaningful constraints on FWS's ability to authorize prohibited activities, because, as a practical matter, the agency can *always* condition the granting of a permit on the permittee's undertaking some *other* act that advances scientific knowledge or benefits the species, regardless of the intentions of the permittee with respect to the particular animals it seeks to access and/or the permittee's avowed lack of interest in furthering the species as a whole."¹⁸⁰

Thus, as one member of Congress explained to the Director of the FWS, "[t]his little-known permitting loophole is undermining our collective, global efforts to help preserve animal species protected from abuses under the ESA."¹⁸¹ Capturing elephants for captive display and hunting them for trophies *harms* elephants, and enshrining pay-to-play only furthers the myth that these extractive practices are consistent with the conservation of imperiled species.

V. There is no conservation justification for trophy hunting.

A. Importation of trophies from elephants killed for sport is not justified under the ESA.

The purpose of the ESA is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species."¹⁸² Recreational killing of African elephants is plainly antithetical to this purpose. The ESA's enhancement requirement, derived from Section 10, authorizes the FWS to permit "any act otherwise prohibited" by the ESA

¹⁸⁰ *Id.* at 176-77 (emphasis in original).

¹⁸¹ Ex. 68, Letter from Brendan Boyle, Member of Congress, to Daniel Ashe, Director, FWS, 2 (June 24, 2016); *see also* Ex. 69, Plaintiffs' Memorandum in Support of their Motion for Summary Judgment at 21-28, *New England Anti-Vivisection Soc'y v. FWS*, 208 F. Supp. 3d 142 (D.D.C. 2016); Ex. 70, Comments of New England Anti-Vivisection Soc'y et al., Opposing Yerkes Permit Application, Docket No. FWS-HG-IA-0149 (Nov. 13, 2015); Ex. 71, Comments of New England Anti-Vivisection Soc'y et al., Opposing Yerkes Permit Application, PRT - 69024B (Feb. 22, 2016); Ex. 72, Comments of IFAW on Proposed Revisions to the Regulations Applicable to Permits Issued Under the ESA (Mar. 9, 2004).

¹⁸² *Id.* § 1531.

“to enhance the propagation or survival of the affected species.”¹⁸³ By its very nature, sport hunting does not and cannot “enhance” elephant survival. Rather, the ESA only allows for take or trade of protected animals if those acts result in a *positive* impact on the recovery of the species.

The legislative history of Section 10 explains that the enhancement requirement “might even, *in extraordinary circumstances*, include the power to cull excess members of a species where the carrying capacity of its environment is in danger of being overwhelmed.”¹⁸⁴ Congress codified this idea in its definition of “conservation,” which means “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,” and “*in the extraordinary case* where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.”¹⁸⁵ If Congress had believed that trophy hunting were a permissible basis for a Section 10 permit, it would not have emphasized that culling to protect an ecosystem would be an “extraordinary case” under which a Section 10 enhancement permit could be granted. Trophy hunting is not the rare, last resort “extraordinary case” necessary to protect an ecosystem that Congress envisioned. Rather, it is a cottage industry built around the routine recreational pastime of a small wealthy American elite, which the FWS endorses to “generate funds”¹⁸⁶ for the purported conservation of the very animals killed in the process. Fulfilment of the ESA’s purpose requires *closure* of the trophy hunting market.

B. Trophy hunting is not consistent with conservation of elephant species.

The FWS extensively discusses the importance of conservation of elephants in the proposed rule.¹⁸⁷ Allowing the import of sport-hunted trophies is inconsistent with this goal. While African

¹⁸³ 16 U.S.C. § 1539(a) (emphasis added).

¹⁸⁴ Ex. 63, H.R. Rep. No. 93-412, at 17 (1973).

¹⁸⁵ 16 U.S.C. § 1532 (emphasis added).

¹⁸⁶ 87 Fed. Reg. at 68986.

¹⁸⁷ *See, e.g.*, 87 Fed. Reg. 68975, 68988 (Nov. 17, 2022).

elephants are listed as threatened under the ESA, the IUCN Red List lists both subspecies (the African forest elephant and the African savanna elephant) as endangered, with the African forest elephant listed as critically endangered.¹⁸⁸ This determination was based on the most recent African Elephant Status Report from 2016, which found an estimated population of 415,428 individuals ($\pm 20,111$) for both savanna and forest elephants,¹⁸⁹ and the 2016 Great Elephant Census, which surveyed 93% of the range of savanna elephants and found a continent-wide population decline of 8% per year.¹⁹⁰ This is in stark contrast to the 1976-1979 elephant census conducted by the AfESG, which estimated a minimum of 1.3 million elephants across a range of over 7 million square kilometers.¹⁹¹ Thus, even the higher end of the 2016 estimated population range is less than half the population found in the 1970s. Given the ongoing decline and critical status of African elephants, the FWS should not authorize the import of any elephant trophy into the United States.

Studies on the impacts of trophy hunting demonstrate multiple detrimental consequences of the practice. Trophy hunting results in the loss of genetically important bulls because hunters routinely target the largest, strongest males in a population.¹⁹² Removing males with “high reproductive value” decreases genetic variation, thereby “undermining the foundations of sexual selection,” with implications for evolution, genetic diversity, and general demographics.¹⁹³ Eliminating the oldest, largest bulls also has profound sociological consequences on elephant populations: younger male elephants shadow more experienced males to gain experience and older

¹⁸⁸ *African Forest Elephant*, IUCN Red List, <https://perma.cc/39YP-FB2R>; *African Savanna Elephant*, IUCN Red List, <https://perma.cc/B4BA-UBGV>.

¹⁸⁹ Ex. 73, C.R. Thouless et al., IUCN, *African Elephant Status Report 2016 003* (2016), <https://perma.cc/MX2K-F6UB>.

¹⁹⁰ Ex. 74, Michael J. Chase et al., *Continent-Wide Survey Reveals Massive Decline in African Savannah Elephants*, PeerJ, Aug. 31, 2016, <https://doi.org/10.7717/peerj.2354>.

¹⁹¹ Ex. 75, Iain Douglas-Hamilton, IUCN/WWF/NYZS *Elephant Survey and Conservation Programme: The African Elephant Action Plan (Excerpts)*, 1 *Elephant* 47, 48 (1980), <https://doi.org/10.22237/elephant/1521731732>.

¹⁹² See Ex. 76, Connie R.B. Allen et al., *Importance of Old Bulls: Leaders and Followers in Collective Movements of All-Male Groups in African Savannah Elephants (*Loxodonta Africana*)*, 10 *Sci. Rep.* (2020), <https://doi.org/10.1038/s41598-020-70682-y>.

¹⁹³ Ex. 77, Rolando Rodríguez-Muñoz et al., *Revealing the Consequences of Male-Biased Trophy Hunting on the Maintenance of Genetic Variation*, 16 *Conservation Genetics* 1375, 1375–76 (2015), <https://doi.org/10.1007/s10592-015-0747-8>.

bulls are more likely to cooperate and bond with other older bulls.¹⁹⁴ Young male elephants have also been observed exhibiting hyper-aggression towards other animals when they lack older male role models to demonstrate appropriate elephant behavior.¹⁹⁵ Trophy hunting also negatively impacts family groups and social structures, which, in turn, decreases species survival.¹⁹⁶ Specifically, hunting can destabilize dominance hierarchies, increase infanticide, and disrupt population dynamics in a manner that depresses population growth.¹⁹⁷

Sanctioning trophy hunting of imperiled species is further linked to poaching activity increases—an enormous threat to wildlife populations.¹⁹⁸ Poachers have been found exploiting trophy hunting loopholes to launder illegal wildlife products and sell them on the black market.¹⁹⁹ Thus, legal trade in trophy hunting products can provide cover for markets for illegal trade. It is neither easy, nor straightforward, for law enforcement to ensure that legal trophy hunting schemes do not serve to launder illegally hunted animal parts.²⁰⁰ Furthermore, because trophy hunting can increase demand for trophies beyond sustainable hunts, local buyers of elephant parts secondary to trophy hunting may be unwarily supporting illegal trade.²⁰¹

The FWS must acknowledge that U.S. trophy hunters play an outsized role in the global African elephant-killing industry and, therefore, curtailing U.S. trophy imports would undeniably benefit the species.²⁰² American trophy hunters have an enormous impact on wildlife in other

¹⁹⁴ Ex. 78, Shifra Z. Goldenberg, et al., *Controlling For Behavioural State Reveals Social Dynamics Among Male African Elephants, *Loxodonta Africana**, 95 *Animal Behaviour* 111, 117 (2014), <https://doi.org/10.1016/j.anbehav.2014.07.002>.

¹⁹⁵ Ex. 79, *The Delinquents: A Spate of Rhino Killings*, CBSnews.com (60 Minutes) (Aug. 22, 2000), <https://perma.cc/9XUG-VBVV>.

¹⁹⁶ See Ex. 80, Jos M. Milner et al., *Demographic Side Effects of Selective Hunting in Ungulates and Carnivores*, 21 *Conservation Biology* 36, 35 (2006), <https://doi.org/10.1111/j.1523-1739.2006.00591.x>.

¹⁹⁷ *Id.*

¹⁹⁸ See Ex. 81, IFAW, *Killing for Trophies: An Analysis of Global Trophy Hunting Trade* 7 (2016), <https://perma.cc/QS4N-Q6ZY>.

¹⁹⁹ *Id.*

²⁰⁰ Ex. 82, Vanda Felbab-Brown, *On the Vices and Virtues of Trophy Hunting*, Brookings (Nov. 27, 2017), <https://perma.cc/4EUT-5YDX>.

²⁰¹ *Id.*

²⁰² See generally Ex. 83, Humane Society International, *Trophy Hunting by the Numbers: The United States' Role in Global Trophy Hunting* (2016), <https://perma.cc/T42U-ZRBV>.

countries, having killed and imported over 1.26 million wild animals between the years 2005 and 2014.²⁰³ During this time, 4,624 of these trophies were from African elephants, with an average of 462 trophies per year.²⁰⁴ While proponents of trophy hunting argue that it brings in important tourism revenue, as demonstrated in Section IV above, this pay-to-play rationale *is not allowed* under the ESA. Moreover, trophy hunting revenue provides only a tiny percentage of tourism revenue in Africa.²⁰⁵ A study of nine African countries that allow trophy hunting²⁰⁶ found that, in total, trophy hunting revenue was only 1.8% of total tourism revenue.²⁰⁷ In Ethiopia, trophy hunting revenue accounts for a mere 0.3% of tourism revenue, and trophy hunting revenue does not exceed more than 0.27% of *any* range country's GDP.²⁰⁸ Thus, the economic benefits of trophy hunting are vastly overstated.²⁰⁹ The marginal contribution from trophy hunting to employment is likely in the range of 7,500-15,500 jobs (in stark contrast to the more than 50,000 jobs claimed by hunting supporters) and foreign trophy hunters make up, on average, fewer than 0.1% of tourists.²¹⁰ Putting an end to the import of elephant trophies would deter many American trophy hunters, impact African countries only minimally, and signal to other countries that the U.S. does not, and cannot, support the hubristic recreational killing of intelligent, imperiled animals. More importantly for the purposes of this rulemaking, it is inappropriate for the FWS to weigh range state profit—such as tourism, GDP, jobs, and economic impact—against preservation of a threatened species. As the Supreme Court has made clear, “The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, *whatever the cost.*”²¹¹

²⁰³ *Id.* at 21.

²⁰⁴ *Id.* at 15.

²⁰⁵ See Ex. 84, Economists at Large, *The \$200 Million Question: How Much Does Trophy Hunting Really Contribute to African Communities?* 12 (2013), <https://perma.cc/QU8L-7MEX>.

²⁰⁶ South Africa, Ethiopia, Cameroon, Tanzania, Zambia, Botswana, Namibia, Burkina Faso, and Zimbabwe.

²⁰⁷ Ex. 84, Economists at Large, *supra* note 205, at 12.

²⁰⁸ *Id.*

²⁰⁹ Ex. 85, Economists at Large, *The Lion's Share: On the Economic Benefits of Trophy Hunting* 3 (2017), <https://perma.cc/5357-BB6V>.

²¹⁰ *Id.*

²¹¹ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) (emphasis added).

The FWS asserts it is “unconvinced that a conservation case has been made” for a ban on elephant sport-hunted trophies.²¹² Yet prohibitions on the take and import of protected species are the ESA’s *axiomatic* means of conservation.²¹³ Moreover, the agency has previously banned the import of such trophies from Zimbabwe. In April 2014, it announced an interim suspension on the importation of sport-hunted African elephant trophies taken in Zimbabwe during the 2014 season, citing insufficient information to determine that the killing of such elephants would enhance survival of the species.²¹⁴ The FWS again confirmed this ban in July 2014 and March 2015 via final negative enhancement findings.²¹⁵ These determinations were based upon information provided at various CITES meetings, as well as information from the Zimbabwe Parks & Wildlife Management Authority.²¹⁶ Thus, there is precedent for at least a partial moratorium on the import of elephant trophies.

Furthermore, given the evidence presented above, as well as the legislative history of the ESA, there is more than enough justification for a complete moratorium on the import of sport-hunted elephant trophies. The U.S. has complete discretion to restrict what products cross its borders and broad authority under Section 4(d) to adopt rules that are “necessary and appropriate” to protect threatened species.²¹⁷ By prohibiting the import of these trophies, the FWS would close a significant gap in the current protections for African elephants. Disallowing the import of these trophies would reduce the number of elephants hunted abroad and set a global example that other states might choose to follow, thereby fulfilling the ESA’s mandate to the FWS to conserve threatened and endangered species.²¹⁸

²¹² 87 Fed. Reg. 68975, 68981 (Nov. 17, 2022).

²¹³ See 16 U.S.C. 1538(a)(1)(A)-(G).

²¹⁴ 79 Fed. Reg. 26986, 26986 (May 12, 2014).

²¹⁵ 79 Fed. Reg. 44459, 44459 (July 31, 2014); 80 Fed. Reg. 42524, 42524 (July 17, 2015).

²¹⁶ 79 Fed. Reg. 44459, 44460 (July 31, 2014); 80 Fed. Reg. 42524, 42526 (July 17, 2015).

²¹⁷ 16 U.S.C. § 1533(d); 87 Fed. Reg. at 68978.

²¹⁸ 16 U.S.C. § 1531.

C. Feedback on proposed enhancement factors

As detailed above, we strongly urge FWS to ban the import of sport-hunted elephant trophies altogether and to eliminate pay-to-play from consideration (see Section IV, *supra*). Under CITES, trade must not be “detrimental to the survival of the species.”²¹⁹ Under the ESA, however, there is an *enhancement* requirement. By using the proposed factors to allow pay-to-play, FWS is conflating the CITES non-detriment standard with the more stringent enhancement requirement under the ESA. Nevertheless, should FWS choose to move forward with the proposed regulations, we offer the following considerations and additions to the factors articulated under section (e)(6)(ii) of the proposed regulations.²²⁰ Here, we incorporate the concerns discussed in Section III above about the FWS’s undue reliance on exporting states’ certifications, as well as our criticism of the requirement that such states deem elephants to be “valuable resources.”

5. The “Funds Derived” Certification

Section (e)(6)(i)(G) of the proposed regulation requires that “[f]unds derived from the involved sport hunting are applied primarily to African elephant conservation.”²²¹ First, we suggest clarifying which funds are included in this bucket by defining “funds derived.” This term should be broadly defined to include all funds associated with trophy hunting, including permit fees, hunting guide costs, and any other amounts paid by trophy hunters and any other individuals or organizations involved with the hunt. “Funds derived” should be the gross amounts, and not just net profits derived from the hunt. In other words, trophy hunting outfits should not be permitted to deduct costs and then only donate a portion of the remaining funds. Second, we suggest that the FWS eliminate the word “primarily” altogether and require that 100% of “funds derived” be applied to African elephant conservation.

²¹⁹ CITES Article III(3)(a).

²²⁰ 87 Fed. Reg. 68975, 68994 (Nov. 17, 2022).

²²¹ *Id.*

We note that the FWS has asked for “documented and verifiable certification by the government” of the proposed determinations.²²² As discussed previously, we ask the FWS to clarify what it means by “documented” and how it will verify this information. Will the agency send staff to make annual trips to each range country to verify that accurate information is being provided? Below, we have included a proposal on how the FWS can better verify this information via the use of conservation officers sent to each range country.

6. Further Recommendations Related to Trophy Imports

As discussed previously in Section III of these comments, the FWS must revise the proposed rule to clarify that the certifications it will require from the governments of range countries are merely the requisite CITES export non-detriment findings, and do not speak to the FWS’s enhancement determination. It should then list the factors that *the agency itself* will use to independently determine whether the specific import of an elephant trophy will enhance the survival of the species. Likewise, the rule should clarify that the *permit applicant* carries the burden of demonstrating that killing the elephant from whom the imported trophy is derived enhanced the propagation or survival of the species. The agency’s enhancement determination should clearly cite the sources of information on which it is based and be made publicly available for comment along with any data and studies underlying the finding.

While the FWS has proposed a new permit application form for the import of live elephants,²²³ the same does not appear to be true for elephant trophy permit applications. If the agency is going to continue to authorize such permits—which, as explained above, it has no authority to do—it must require a new form for this category as well, with the goal of gathering more information about the structure and practices of the trophy hunting industries in the relevant

²²² *Id.*

²²³ *Id.* at 68992.

countries. The agency should require that permit applications report the details of the hunt, including the hunting methods used, the amounts paid for hunting services, permits, and any other fees, information on the payees, and information on anyone else involved in the hunt (guides, observers, etc.) and their affiliations and licensures. The FWS should deny any permit application if a hunt was completed without the presence of a guide who is properly licensed by the host country. This information on hunting practices should be compiled annually, made publicly available, and used to help the FWS evaluate the certifications provided by the relevant country.

Likewise, a trophy import should not be allowed if any individual involved has previously violated any wildlife law. The FWS should specify via regulation that a permit will be denied if anyone involved in the hunt (financially or otherwise) has been convicted of a violation of state, federal, or international wildlife law or regulation. Thus, the permit application also should require reporting of such violations, under penalty of perjury.

The FWS should significantly increase processing fees for trophy imports and use those fees to fund scientific and conservation efforts. Fees should be at least \$1,000 per permit (a pittance compared to the tens of thousands of dollars paid by trophy hunters)²²⁴—and ideally should be set at a level to fully fund FWS travel to range states to verify the information provided in the annual certifications and ensure that funds are being applied to African elephant conservation efforts that actually achieve the goals of preventing the decline and enhancing the recovery of the species. Officers should also act as observers of randomly selected trophy hunts and help host countries with their maintenance of anti-poaching and anti-trafficking programs. The FWS should offer increased transparency into how permitting fees are used with annual, publicly available reporting on how fees are distributed.

²²⁴ See, e.g., Ex. 84, *Economists at Large* (2013), *supra* note 205, at 5 (citing lion hunting fees between \$20,000 and \$70,000).

“‘Fair chase’ hunting is generally defined as the ethical, sportsmanlike, and lawful pursuit of freeranging wild game in a manner that does not give the hunter an improper advantage.”²²⁵ While most hunters and hunting organizations in North America support fair chase hunting, this is not commonplace on African hunts.²²⁶ “Baiting, drugging, and fencing of target animals, or hunting from vehicles or in or around protected areas, each occur (either legally or illegally)” during African trophy hunts.²²⁷ The FWS should develop a fair chase standard and require trophy import permit applicants to demonstrate that a given hunt meets this standard. Failure to meet this standard should result in denial of the permit application.

Finally, as the FWS notes, the agency must ensure that hunting revenues do not simply substitute for other existing conservation funding.²²⁸ The agency should require countries to report at least ten years of historic elephant conservation funding, the origins of such funding, how such funding was used, and the successes and failures of conservation projects. The FWS must then require that, moving forward, hunting revenues do not exceed more than five percent of the historic, ten-year average of hunting revenues, when compared to the overall conservation budget.

VI. The FWS should use its broad discretion under Section 4(d) to require notice and comment prior to issuing permits authorizing activities involving African elephants.

The FWS does not follow notice and comment procedures for permit applications involving threatened species, evidently because it believes threatened species permits are not subject to Section 10(c) (16 U.S.C. § 1539(c)).²²⁹ Yet the FWS acknowledges it has a “wide latitude of discretion to

²²⁵ Ex. 86, Natural Resources Committee Democrats, *Missing the Mark: African Trophy Hunting Fails to Show Consistent Conservation Benefits* 25 (2016), <https://perma.cc/YB54-89HK>.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ 87 Fed. Reg. 68975, 68989 (Nov. 17, 2022).

²²⁹ *See, e.g.*, Endangered and Threatened Wildlife and Plants; Listing the Straight-Horned Markhor as Threatened With a Rule Under Section 4(d) of the ESA, 79 Fed. Reg. 60365, 60368 (Oct. 7, 2014) (“The Service does not publish notices for receipt of applications for threatened species permits in the Federal Register; therefore, there is no requirement for public notice and comment.”).

select and promulgate appropriate regulations tailored to the specific conservation needs of the threatened species.”²³⁰ For African elephant permits, adopting the notice and comment requirements of Section 10(c) will ensure that all permit applications and decisions are carefully considered and reasoned. Notice and comment are “necessary and advisable to provide for the conservation of such species.”²³¹

Capturing elephants for captivity and killing them for sport are highly controversial activities. The businesses and individuals hoping to engage in these activities would no doubt prefer that they remain shrouded in secrecy. Yet the enhancement determination factors that the FWS is proposing are designed, in part, to “increase transparency with stakeholders in the decision-making process” and allow “more efficient evaluations of applications.”²³² The agency claims, “In making ESA enhancement findings, we review all relevant information available to us, including information submitted with the individual permit applications, information received in response to inquiries we make of the range country, and *all other reliable information we receive from interested parties, such as species experts, hunting organizations, community groups, and nongovernmental organizations.*”²³³ Yet the FWS cannot consider “all other reliable information” if species experts, NGOs, and other interested parties are not actually given notice and an opportunity to comment on a permit application. To have any knowledge of ESA permit applications related to threatened species, the public must proactively submit Freedom of Information Act (FOIA) requests, which can take months or years to fill, and are not a reasonable way to obtain *timely* information about pending permit applications.²³⁴

²³⁰ 87 Fed. Reg. at 68978.

²³¹ 16 U.S.C. § 1533(d).

²³² 87 Fed. Reg. at 68977, 68987.

²³³ *Id.* at 68987 (emphasis added).

²³⁴ For example, on December 22, 2022, Harvard Law School’s Animal Law & Policy Clinic submitted a FOIA request to the FWS for applications to import live African elephants, in hopes that responsive records could be used to inform these comments. Nearly three months later, we have not received any responsive records.

FOIA's affirmative disclosure requirements require the FWS to "make available for public inspection in an electronic format" records that have been released to any person and "because of the nature of their subject matter . . . are likely to become the subject of subsequent requests for substantially the same records."²³⁵ Because capture and hunting of African elephants are highly controversial, the agency receives many requests for information on these topics. The FWS need look no further than its own public comment dockets to confirm this. When the agency sought comments on whether to allow zoos to import elephants from Eswatini in 2015 (which it publicized under the National Environmental Policy Act, rather than the ESA), it received over 8,100 public comments.²³⁶ Likewise, at the time of submission of these comments, the FWS has already received over 45,000 public comments.²³⁷

Adopting a notice and comment requirement for African elephant permits is "necessary and advisable" because it will promote the goals of the ESA and ensure that permit decisions are fully informed and well-reasoned. Doing so is well within the FWS's broad discretion under Section 4(d) and will have the added benefit of fulfilling the agency's affirmative disclosure obligations under FOIA.

VII. The FWS should require permits for trade in other elephant parts.

We urge the FWS to eliminate the proposal in subsection (e)(2)²³⁸ to allow continued trade in African elephant parts and products other than ivory and sport-hunted trophies (such as elephant skins, hair, and bones) without a threatened species permit and enhancement finding.

²³⁵ 5 U.S.C. § 552(a)(2)(D).

²³⁶ Draft Environmental Assessment: Dallas Zoo Management, Dallas, Texas, Docket ID FWS-HQ-IA-2015-0157, <https://www.regulations.gov/docket/FWS-HQ-IA-2015-0157> (last visited Mar. 20, 2023).

²³⁷ Endangered and Threatened Wildlife and Plants; Revision to the African elephant 4d rule, Docket ID FWS-HQ-IA-2021-0099, <https://www.regulations.gov/docket/FWS-HQ-IA-2021-0099> (last visited Mar. 20, 2023).

²³⁸ "*Parts and products other than ivory and sport-hunted trophies.* African elephant parts and products other than ivory and sport-hunted trophies may be imported into or exported from the United States; sold or offered for sale in interstate or foreign commerce; and delivered, received, carried, transported, or shipped in interstate or foreign commerce in the course of a commercial activity without a threatened species permit issued under § 17.32, provided the requirements in 50 CFR parts 13, 14, and 23 and paragraph (e)(11) of this section have been met."

The proposed rule would improve the existing rule by prohibiting trade with countries that fail to achieve a Category One designation under the CITES National Legislation Project. However, the revision does not go far enough. As discussed throughout these comments, *commercialization* of African elephants, regardless of form, is a major driver of species decline. Products made of elephant parts are readily available on the U.S. luxury market. Elephant skin boots are available online for \$800,²³⁹ elephant leather chairs sell for \$3,500,²⁴⁰ and panels of elephant skin imported from Zimbabwe sell for \$100 per square foot.²⁴¹ Section 4(d) protective regulations must be “necessary and advisable *to provide for the conservation of such species.*”²⁴² Allowing virtually unchecked trade in elephant parts does not “provide for” the conservation of the species. It does exactly the opposite, and is inconsistent with the logic undergirding the proposed rule.

According to a 2017 analysis of CITES trade data, elephant hide exports “have held steady or grown during the past decade, far surpassing those in preceding years.”²⁴³ Between 2007 and 2016,

Zimbabwe and South Africa together exported the whole hides of 38,858 elephants plus another 609,000 square feet and 21,504 pounds of skins and leatherwork. At an average 20 square feet per processed hide, these would represent more than 30,000 elephants. . . . Unless there is considerable overlap in the CITES data, at least 70,000 African elephants appear to have given their hides to the legal global skin trade during the past decade—about twice the number poached for ivory each year.²⁴⁴

Likewise, a 2015 analysis by the International Fund for Animal Welfare, et al., as part of an as-yet unresolved petition to list African elephants as endangered, found “a more than two-fold increase in

²³⁹ Ex. 87, Dina Fine Maron, *Is a U.S. Retailer Selling Boots Made From Endangered Elephants?*, Nat. Geo. (Jan. 9, 2023), <https://perma.cc/DJ8A-92LV>. The boots featured in this article are advertised as “Brass Indian Elephant Boots,” suggesting that the leather was from Asian elephants. The author was unable to verify the species of skin used, but interviewed former FWS director Dan Ashe, who suggested the skin might be from African elephants.

²⁴⁰ Ex. 88, *Carved Biedermire Elephant Chair*, <https://perma.cc/5NFP-X4BM>.

²⁴¹ Ex. 89, Roje Exotic Leather, *Elephant*, <https://perma.cc/S84F-B9Q6>.

²⁴² 16 U.S.C. § 1533(d) (emphasis added).

²⁴³ Ex. 90, Eric Scigliano, *Elephant Skin Auctions in Zimbabwe are Booming—and Legal*, Nat. Geo. (Dec. 20, 2017), <https://perma.cc/8KQB-ZFEL>.

²⁴⁴ *Id.*

African elephant skin imports to the U.S. between 2008 and 2012 as compared to the previous five-year period.”²⁴⁵ Notably, Zimbabwe and South Africa are the countries of origin for most skins and skin products imported to the U.S. for commercial purposes;²⁴⁶ both hold Category One designations under the CITES National Legislation Project,²⁴⁷ suggesting that the proposed rule would not meaningfully impact trade in elephant products.

The FWS points to the “increase of approximately 51 percent in the international trade of live elephants since 2016” as a justification for requiring import permits for live African elephants that include an enhancement finding.²⁴⁸ This same logic should be used to prohibit trade in all elephant parts unless the FWS issues a permit after finding that the trade would enhance the propagation or survival of the species.

²⁴⁵ Ex. 91, IFAW et al, *Petition to the Secretary of the Interior to List the African Elephant (Loxodonta Africana) as Endangered Pursuant to the Endangered Species Act* 62-66 (Feb. 11, 2015), <https://perma.cc/XZ54-DK8X>.

²⁴⁶ *Id.* at 64.

²⁴⁷ CITES Nat'l Legis. Proj., *Status of Legislative Progress for Implementing CITES* (Nov. 2022), <https://perma.cc/6VJ9-WW5P>.

²⁴⁸ 87 Fed. Reg. at 68984.