

Public Comments Processing
Division of Policy, Performance and Management Programs
Attn: Docket No. FWS-HQ-IA-2021-0099
U.S. Fish and Wildlife Service
MS: PRB/3W
5275 Leesburg Pike
Falls Church, VA 22041-3803

***RE: Comments on Revision to the Section 4(d) Rule for the African Elephant
(FWS-HQ-IA-2021-0099)***

Dear Chief Cogliano,

The Humane Society of the United States, Humane Society International, Humane Society Legislative Fund and Center for Biological Diversity hereby submit the following comments in response to the U.S. Fish and Wildlife Service’s (“Service” or “FWS”) Proposed Rule to amend the Endangered Species Act (ESA) Section 4(d) regulation pertaining to African elephants (*Loxodonta africana*). 87 Fed. Reg. 68,975 (November 17, 2022). Our organizations deeply appreciate the Biden Administration’s commitment to elephant conservation and applaud the Service for its dedicated work on this important Proposed Rule. We strongly urge the Service to take decisive and expeditious action to increase protections for this iconic animal, which is faced with extinction.

While we welcome the proposed strengthening of the 4(d) rule for African elephants, these comments present the legal and scientific basis for the Service to completely prohibit imports of African elephant trophies and live animals. Given elephants’ increasingly imperiled status and the burgeoning extinction crisis, the Service’s limited resources are better spent on protecting species rather than permitting activities with demonstrable negative impacts. Should the Service decide to stay its course and simply amend the 4(d) rule, we offer comments on ways to strengthen and solidify the rule’s requirements to better ensure conservation of African elephants. As the agency carries out this rulemaking, we encourage the adoption of a rule with geographic distinction that recognizes the taxonomic split of African elephants into forest elephants (*Loxodonta cyclotis*) and savanna elephants (*Loxodonta africana*) so additional provision can be made for forest elephants’ critically endangered status. Finally, we encourage the addition of provisions to the final 4(d) rule to ensure transparency and informed agency decision-making by providing public notice and comment opportunities.

Full-text pdf copies of all scientific studies cited in this comment have been mailed under separate cover, and are available at the following link: <https://tinyurl.com/7e8nem8f>.

I. LEGAL BACKGROUND

The Service has both a duty and broad authority under Section 4(d) of the ESA to provide far-reaching protections for elephants. Under Section 4(d) of the ESA, for any threatened species, the Service “shall issue such regulations as [it] deems necessary and advisable to provide for the

conservation of the species.” 16 U.S.C. § 1533(d). The Service “may” extend Section 9’s prohibitions to threatened species. *Id.* The ESA defines “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.

16 U.S.C. § 1532(3) (emphasis added); *see also* 16 U.S.C. § 1531(b) (the primary purpose of the ESA is to “provide a program for the conservation of such endangered species”). The term “conservation” includes ensuring a species’ survival as well as promoting its recovery.¹ In *Defenders of Wildlife v. Andrus*, the court construed the relationship between Section 4(d) and the ESA’s conservation definition, stating:

It is clear from the face of the statute that the Fish and Wildlife Service . . . must do far more than merely avoid the elimination of a protected species. It must bring these species back from the brink so they may be removed from the protected class, and it must use all methods necessary to do so. The Service cannot limit its focus to what it considers the most important management tool available to it to accomplish this end. . . . [T]he agency has an affirmative duty to increase the population of protected species.²

That Congress intended FWS to use Section 4(d) of the Act to affirmatively protect threatened species and their habitats is also supported by the ESA’s legislative history. The Senate Report states:

[The section] requires the Secretary, once he has listed a species of fish or wildlife as a threatened species, to issue regulations to *protect* that species. Among other protective measures available, he may make any or all of the acts and conduct defined as “prohibited acts” . . . as to “endangered species” also prohibited acts as to threatened species.

S. Rep. No. 93-307, 93d Cong., 1st Sess. 8 (1973) (emphasis added).

As these legal authorities evidence, the Service can only adopt a 4(d) rule for African elephants if that rule will actually work to recover the species. Conversely, the Service can only decline to extend Section 9’s prohibitions if doing so will actually work to recover the species.

¹ *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004) (quoting *Sierra Club v. United States Fish & Wildlife Serv.*, 245 F.3d 434, 441-42 (5th Cir. 2001) (“‘Conservation’ is a much broader concept than mere survival. The ESA’s definition of ‘conservation’ speaks to the recovery of a threatened or endangered species.”)).

² 428 F. Supp. 167, 170 (D.D.C. 1977).

Moreover, the Service has broad authority under Section 4(d) to issue regulations that provide additional protections for threatened species beyond those in Section 9 of the Act. The legislative history of Section 4(d) makes clear Congress's intent to provide the Service broad authority to adopt regulations that are necessary and advisable for the conservation of threatened species. Indeed, Congress stated that the Service has "almost an infinite number of options available" to conserve threatened species. H.R. Rep. No. 93-412, 93d Cong., 1st Sess. 12 (1973). Furthermore, in interpreting Section 4(d), the D.C. Circuit explained:

the first sentence of § 1533(d) contains the 'necessary and advisable' language and mandates formal individualized findings. This sentence requires the FWS to issue whatever other regulations are 'necessary and advisable,' including regulations that impose protective measures beyond those contained in § 1538(a)(1).

Sweet Home Chapter of Communities for a Great Or. v. Babbitt, 1 F.3d 1, 7-8 (D.C. Cir. 1993). Thus, the Service has very broad authority under Section 4(d) of the ESA to recover threatened species.

Pursuant to the ESA (16 U.S.C. § 1538(a)) and Fish and Wildlife Service regulations (50 C.F.R. §§ 17.21, 17.22), once the Service lists a species as endangered, individuals of listed species, whether captive or wild, are protected from import unless such action will "enhance the propagation or survival of the affected species." 16 U.S.C. § 1539(a)(1)(A); 50 C.F.R. §§ 17.21(g)(1)(ii), 17.22. These protections have been extended by regulation to the threatened species at issue here. 50 C.F.R. §§ 17.31, 17.32, 17.40(e).

Since 1978, the African elephant (*Loxodonta africana*) has been listed as threatened under the ESA and regulated under a 4(d) rule which was amended most recently in June 2016. 50 C.F.R. §§ 17.11, 17.40(e). The current 4(d) rule allows for unrestricted import, export, and interstate trade in live elephants without a permit. 50 C.F.R. § 17.40(e)(2). With respect to hunting trophies, the current 4(d) rule allows imports of two elephant trophies per year and requires compliance with ESA permitting requirements. 50 C.F.R. § 17.40(e)(6). Pursuant to those requirements, before the Service can authorize the import of an African elephant trophy it must be able to make a finding that the take and import of the animal enhances the survival of the species. 16 U.S.C. § 1539(a)(1); 50 C.F.R. § 17.40(e)(6). According to the plain language of the Act, "enhancement" permits may only be issued for activities that themselves positively benefit the species in the wild. 16 U.S.C. § 1539(a)(1); *see also* FWS, *Ensuring the Future of the Black Rhino* (Nov. 25, 2014) (acknowledging that the ESA enhancement standard is more stringent than the CITES nondetriment standard); U.S. Fish and Wildlife Service Handbook for Endangered and Threatened Species Permits (1996) (making clear that an enhancement activity "must go beyond having a neutral effect and actually have a positive effect").

Section 10 permits must be granted on a case-by-case basis, with an application and opportunity for meaningful public participation. 16 U.S.C. § 1539(c); *Friends of Animals v. Salazar*, 626 F. Supp. 2d 102, 119 (D.D.C. 2009). Before the Service can issue authorization to conduct otherwise prohibited acts, it must find that: (1) the permit or registration was "applied for in good faith;" (2) the permit or registration "will not operate to the disadvantage of such endangered species;" and (3) the proposed action "will be consistent with the purposes and policy" of the

ESA (i.e., *conservation*³). 16 U.S.C. § 1539(c)-(d). As explained by Congress, these requirements were intended “to limit substantially the number of exemptions that may be granted under the act.” H. R. Rep. No. 93-412 p. 17 (1973) (emphasis added). Implementing regulations further require that applicants provide detailed information about the animals, persons, facilities, and actions involved in the otherwise prohibited activity. 50 C.F.R §§ 17.21(g), 17.22; *id.* § 13.21(b)(2)(3) (authorization may not be issued if applicants “failed to disclose material information required” or “failed to demonstrate a valid justification”).

In deciding whether to issue a Section 10 permit, the FWS must consider “[t]he probable and indirect effect which issuing the permit would have on the wild populations of the wildlife sought to be covered by the permit;” “[w]hether the permit . . . 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;” “[t]he opinions or views of scientists or other persons or organizations having expertise concerning the wildlife or other matters germane to the application;” and “[w]hether the expertise, facilities, or other resources available to the applicants appear adequate to successfully accomplish the objectives stated in the application.” 50 C.F.R. § 17.22(a)(2). *See also id.* § 17.32; “All of the prohibitions and exceptions in §§ 17.31 and 17.32 apply to the African elephant.” 81 Fed. Reg. 36,388 (June 6, 2016); 50 C.F.R. § 17.40(e).

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) requires that for species listed on Appendix I (including African elephants except populations in Botswana, Namibia, South Africa and Zimbabwe, which are listed on Appendix II), trade can only be authorized if the Scientific and Management Authorities of the receiving country make the requisite findings for issuance of an import permit. CITES Art. III(3). Those conservation and animal welfare findings include: (1) the import will be for purposes which are not detrimental to the survival of the species involved; (2) the proposed recipient of a living specimen is suitably equipped to house and care for it; and (3) the specimen is not to be used for primarily commercial purposes. CITES Art. III(2). An import permit is required for the import of specimens of captive-bred Appendix I species unless the animal is imported from a registered breeding operation. CITES Art. VII(4); CITES Conf. 12.10 (Rev. CoP15); 50 C.F.R. § 23.63. There are no such registered breeding operations for the African elephant.⁴ Therefore, currently, U.S. import of any specimens of African elephants from countries where the species is listed on Appendix I requires the U.S. to issue a CITES import permit.

The elephant populations of Botswana, Namibia, South Africa and Zimbabwe are listed on CITES Appendix II, with the following annotation:

For the exclusive purpose of allowing:

- a) trade in hunting trophies for non-commercial purposes;

³ The primary purpose of the ESA is to “provide a program for the conservation of such endangered species.” 16 U.S.C. § 1531(b). The term “conservation” means “to use...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” – i.e. to recover the species in the wild so that it may be taken off of the list of endangered species. 16 U.S.C. § 1532(3).

⁴ https://cites.org/eng/common/reg/e_cb.html

- b) trade in live animals to appropriate and acceptable destinations, as defined in Resolution Conf. 11.20 (Rev. CoP18), for Botswana and Zimbabwe and for *in situ* conservation programmes for Namibia and South Africa;
- c) trade in hides;
- d) trade in hair;
- e) trade in leather goods for commercial or non-commercial purposes for Botswana, Namibia and South Africa and for non-commercial purposes for Zimbabwe;
- f) trade in individually marked and certified ekipas incorporated in finished jewellery for non-commercial purposes for Namibia and ivory carvings for non-commercial purposes for Zimbabwe;
- g) trade in registered raw ivory (for Botswana, Namibia, South Africa and Zimbabwe, whole tusks and pieces) subject to the following:
 - i) only registered government-owned stocks, originating in the State (excluding seized ivory and ivory of unknown origin);
 - ii) only to trading partners that have been verified by the Secretariat, in consultation with the Standing Committee, to have sufficient national legislation and domestic trade controls to ensure that the imported ivory will not be re-exported and will be managed in accordance with all requirements of Resolution Conf. 10.10 (Rev. CoP18) concerning domestic manufacturing and trade;
 - iii) not before the Secretariat has verified the prospective importing countries and the registered government-owned stocks;
 - iv) raw ivory pursuant to the conditional sale of registered government-owned ivory stocks agreed at CoP12, which are 20,000 kg (Botswana), 10,000 kg (Namibia) and 30,000 kg (South Africa);
 - v) in addition to the quantities agreed at CoP12, government-owned ivory from Botswana, Namibia, South Africa and Zimbabwe registered by 31 January 2007 and verified by the Secretariat may be traded and despatched, with the ivory in paragraph g) iv) above, in a single sale per destination under strict supervision of the Secretariat;
 - vi) the proceeds of the trade are used exclusively for elephant conservation and community conservation and development programmes within or adjacent to the elephant range; and
 - vii) the additional quantities specified in paragraph g) v) above shall be traded only after the Standing Committee has agreed that the above conditions have been met; and
- h) no further proposals to allow trade in elephant ivory from populations already in Appendix II shall be submitted to the Conference of the Parties for the period from CoP14 and ending nine years from the date of the single sale of ivory that is to take place in accordance with provisions in paragraphs g) i), g) ii), g) iii), g) vi) and g) vii). In addition such further proposals shall be dealt with in accordance with Decisions 16.55 and 14.78 (Rev. CoP16).

On a proposal from the Secretariat, the Standing Committee can decide to cause this trade to cease partially or completely in the event of non-compliance by exporting or importing countries, or in the case of proven detrimental impacts of the trade on other elephant populations.

All other specimens shall be deemed to be specimens of species included in Appendix I and the trade in them shall be regulated accordingly.⁵

U.S. import of hunting trophies for non-commercial purposes from Botswana, Namibia, South Africa and Zimbabwe does not require the U.S. to issue a CITES import permit; hunting trophies imported to the United States for other purposes (e.g., personal or commercial purposes) from these countries requires the United States to issue a CITES import permit.

U.S. import of live elephants from Botswana and Zimbabwe, if they are going to appropriate and acceptable destinations as defined in Resolution Conf. 11.20 (Rev. CoP18), does not require the United States to issue a CITES import permit. However, there is an important role for the importing Party as noted in Resolution Conf. 11.20 (Rev. CoP18), paragraph 2:

FURTHER AGREES that, where the term ‘appropriate and acceptable destinations’ appears in an annotation to the listing of a species in Appendix II of the Convention with reference to the trade in all live animals, this term shall be defined to mean destinations where:

- a) the Management and Scientific Authority of the State of import is satisfied that the proposed recipient of a living specimen is suitably equipped to house and care for it sustainably; and
- b) the Management and Scientific Authorities of the State of import and the State of export are satisfied that the trade would promote in situ conservation.

With further regard to imports of live elephants from Botswana and Zimbabwe, Resolution Conf. 11.20 (Rev. CoP18) limits trade in live African elephants *taken from the wild* after CITES CoP18. The Resolution states, in paragraph 1:

AGREES that where the term ‘appropriate and acceptable destinations’ appears in an annotation to the listing of *Loxodonta africana* in Appendix II of the Convention with reference to the trade in live elephants⁶ taken from the wild, this term shall be defined to mean in situ conservation programmes or secure areas in the wild, within the species’ natural and historical range in Africa, except in exceptional circumstances where, in consultation with the Animals Committee, through its Chair with the support of the Secretariat, and in consultation with the IUCN elephant specialist group, it is considered that a transfer to ex-situ locations will provide demonstrable in-situ conservation benefits for African elephants, or in the case of temporary transfers in emergency situations.

U.S. import of live elephants from Namibia and South Africa would be treated as Appendix I and would require the U.S. to issue a CITES import permit, as the United States is not a range State for the African elephant and so could not be a destination for *in situ* conservation of the African elephant.

⁵ /<https://cites.org/sites/default/files/eng/app/2023/E-Appendices-2023-02-23.pdf>

⁶ Excluding elephants that were in ex-situ locations at the time of the adoption of this Resolution at the 18th meeting of the Conference of the Parties.

CITES is implemented domestically through the ESA, and African elephants are listed as threatened under the ESA. 50 C.F.R. § 17.11. By regulation, live African elephants and hunting trophies may be imported only if the permitting requirements of 50 C.F.R. Parts 13, 14 and 23 are complied with. 50 C.F.R. § 17.40(e). The Service cannot issue an import permit if the applicant “failed to disclose material information required, or has made false statements as to any material fact” or “failed to demonstrate a valid justification for the permit.” 50 C.F.R. § 13.21(b)(2),(3).

To summarize the status of U.S. legal requirements for imports of hunting trophies of African elephants:

- the Service must find that the trophy was legally taken in an African elephant range country that declared an ivory export quota to the CITES Secretariat for the year in which the trophy animal was killed;
- the Service must determine that the killing of the trophy animal will enhance the survival of the species and the trophy is accompanied by a threatened species permit issued;
- if from a CITES Appendix I population, the Service must make a CITES non-detriment finding; and
- if from a CITES Appendix II population, no CITES non-detriment finding is required by the Service, but such finding is required by the exporting country.

To summarize the status of U.S. legal requirements for imports of live African elephants under current regulations:

- the United States does not issue a threatened species import permit or make a finding that the import will enhance the survival of the species (ESA enhancement finding);
- if from CITES Appendix I populations, the U.S. must find, *inter alia*, that the import is not detrimental to the survival of the species (CITES non-detriment finding), noting that this is a lesser standard than an ESA enhancement finding;
- if from Botswana or Namibia and captured from the wild prior to CoP18, the U.S. does not need to make a CITES non-detriment finding; and
- if from Botswana or Namibia and captured from the wild after CoP18, or if from South Africa or Zimbabwe, the U.S. may not import the specimen.

Therefore, the current U.S. regulatory regime for import of live African elephants does not provide for the conservation of the species as required by the ESA and this must be rectified by including strong and clear language in the special rule.

II. SCIENTIFIC EVIDENCE SUPPORTS THE NEED FOR INCREASED ESA PROTECTION

On February 11, 2015, Humane Society International, the Humane Society of the United States, the Fund for Animals and the International Fund for Animal Welfare, (hereinafter “Petitioners”) petitioned the Service to reclassify the African elephant (*Loxodonta africana*) from threatened to endangered under the ESA (attached and hereby incorporated by reference) [hereinafter 2015 Petition]. On June 11, 2015, the Center for Biological Diversity submitted a petition to list African elephants as two endangered species (forest elephants, *Loxodonta cyclotis*, and savanna elephants, *Loxodonta africana*) (attached and hereby incorporated by reference) [hereinafter 2015

Two Species Petition]. The Service made a positive 90-day finding on these petitions on March 16, 2016, but has yet to complete a 12-month finding. 80 Fed. Reg. 14,058 (Mar. 16, 2016); 16 U.S.C. § 1533(b)(3).

The ESA requires listing determinations to be made “solely on the basis of the best scientific and commercial data available” 16 U.S.C. § 1533(b)(1)(A). *See also TVA v. Hill*, 437 U.S. 153, 184 (1978) (the goal of the ESA is to “reverse the trend toward extinction, whatever the cost”); *New Mexico Cattle Growers v. U.S. Fish & Wildlife Service*, 248 F.3d 1277, 1284-85 (10th Cir. 2001) (quoting H.R. Rep. No. 97-567, pt. 1 at 29 (1982), “The addition of the word ‘solely’ is intended to remove from the process of listing or delisting of species any factor not related to the biological status of the species.”); H.R. Conf. Rep. No. 835, 97th Cong. 2d Sess. 19-20 (1982) (the limitations on the factors the Service may consider in making listing decisions were intended to “ensure that decisions . . . pertaining to listing . . . are based solely upon biological criteria and to prevent nonbiological considerations from affecting such decisions.”).

The U.S. is a significant importer of hunting trophies of African elephants and live wild-sourced African elephants. According to the LEMIS Database, in the most recent five years of data available (2016-2020), 372 wild-sourced African elephant trophies were imported into the U.S., originating in Namibia (172), South Africa (165), Zimbabwe (24), Botswana (8), Zambia (2), and Tanzania (1). Over the same time period, 17 live wild-sourced elephants were imported into the U.S., all originating in Swaziland (18 elephants were captured, but one died in captivity prior to transportation). Therefore, the U.S. must ensure that such imports are enhancing the survival of the species as required by the ESA for this threatened species.

The need for the U.S. to ensure the conservation of the African elephant has grown in recent years as the conservation status of the species has continued to deteriorate. As discussed in the 2015 Petition to reclassify the African elephant, the best available science shows that the African elephant has suffered a population-wide decline of roughly 60% since the Service listed the species as threatened in 1978. This sharp decline is a result of habitat loss, poaching, commercial exploitation, trophy hunting, human-elephant conflict, regional conflict and instability, and climate change, which, combined, put the species in danger of extinction. *See* 16 U.S.C. § 1533(a)(1)(A)-(E).⁷

In 2020, five years after the 2015 petitions were filed, a new IUCN status assessment of the African elephant resulted in splitting the species into two with a listing of the African savanna elephant (*Loxodonta africana*) as endangered under the IUCN Red List of Threatened Species,⁸ and the African forest elephant (*Loxodonta cyclotis*) as critically endangered.⁹ The 2020 IUCN assessments found that the savanna elephant had experienced a decline of more than 50% in the

⁷ *See also* UNEP et al., *A Rapid Response Assessment: Elephants in the Dust, the African Elephant Crisis*. United Nations Environment Program. (2013), http://www.cites.org/common/resources/pub/Elephants_in_the_dust.pdf.

⁸ Gobush, K.S., Edwards, C.T.T, Balfour, D., Wittemyer, G., Maisels, F. & Taylor, R.D. 2022. *Loxodonta africana* (amended version of 2021 assessment). The IUCN Red List of Threatened Species 2022: e.T181008073A223031019. <https://dx.doi.org/10.2305/IUCN.UK.2022-2.RLTS.T181008073A223031019.en>. Accessed on 29 December 2022.

⁹ Gobush, K.S., Edwards, C.T.T, Maisels, F., Wittemyer, G., Balfour, D. & Taylor, R.D. 2021. *Loxodonta cyclotis* (errata version published in 2021). The IUCN Red List of Threatened Species 2021: e.T181007989A204404464. <https://dx.doi.org/10.2305/IUCN.UK.2021-1.RLTS.T181007989A204404464.en>. Accessed on 29 December 2022.

last 75 years (1940-2015), while the forest elephant had declined by more than 80% in the last 93 years (1922-2015). The African Elephant Status Report of 2016 estimated that the number of African elephants has decreased by approximately 104,000-114,000 in surveyed areas since the 2007 report.¹⁰

Since the 2015 petitions were filed, additional scientific evidence has emerged demonstrating the dire plight of the species. Recent studies confirm that elephants are losing habitat to expanding farmland and urban areas;¹¹ severe drought in East Africa has negatively impacted elephant populations;¹² and elephant populations are shrinking even within protected areas.¹³ Forest elephants in Central Africa have declined by 62% from 2002-2011¹⁴ and approximately 80% from 2004-2014.¹⁵ One recent study estimates that it will take 81 years to reverse the 62% population decline from poaching in Central Africa due to slow population growth rates.¹⁶ Elephants outside of protected parks in Namibia had higher stress levels and smaller group sizes than those inside the park, likely due to greater anthropogenic disturbance.¹⁷ A 2017 study found that across Africa, 76% of elephant populations spread across one or more national borders¹⁸ indicating the dire need for management to accurately reflect elephant behavior and movement patterns. Yet, previous research has shown that management based on zones is not biologically relevant to elephants because they ignore appropriate spatial scales as elephants regularly cross into neighboring zones.¹⁹ While many large mammals suffer from the loss of wildlands, African elephants are particularly imperiled due to poaching and habitat loss. The Great Elephant Census from 2016 identified poaching rates that indicate population declines across Africa.²⁰ Further, there was equal poaching pressure in both protected and nonprotected areas, as indicated

¹⁰ Thouless, C.R., Dublin, H.T., Blanc, J.J., Skinner, D.P., Daniel, T.E., Taylor, R.D., F. Maisels, Frederick, H.L. & Bouché, P. (2016). African Elephant Status Report 2016: an update from the African Elephant Database. Occasional Paper Series of the IUCN Species Survival Commission, No. 60 IUCN / SSC Africa Elephant Specialist Group. IUCN, Gland, Switzerland. vi + 309pp.

¹¹ Kioko, J., V. Herbert, D. Mwetta, Y. Kilango, M. Murphy-Williams, and C. Kiffner. (2015). Environmental correlates of African elephant (*Loxodonta africana*) distribution in Manyara Area, Tanzania. *Annual Research & Review in Biology*, 147-154.

¹² Okello, M. M., L. Kenana, D. Muteti, F. Warinwa, J. W. Kiringe, N. W. Sitati, H. Maliti, E. Kanga, H. Kija, S. Bakari, P. Muruthi, S. Ndambuki, N. Gichohi, D. Kimutai, and M. Mwita. (2015). The status of key large mammals in the Kenya – Tanzania borderland: a comparative analysis and conservation implications. *International Journal of Biodiversity Conservation*, 7, 267-276.

¹³ Mose, V. N., and D. Western. (2015). Spatial cluster analysis for large herbivore distributions: Amboseli ecosystem, Kenya. *Ecological Informatics*, 30, 203-206

¹⁴ Maisels, F., Strindberg, S., Blake, S., Wittemyer, G., Hart, J., Williamson, E.A., ... Warren, Y. (2013). Devastating decline of forest elephants in Central Africa. *PLoS ONE*, 8, e59469.

¹⁵ Poulsen, J.R., Koerner, S.E., Moore, S., Medjibe, V.P., Blake, S., Clark, C.J., ... White, L.J.T. (2017). Poaching empties critical Central African wilderness of forest elephants. *Current Biology*, 27, R134–R135

¹⁶ Turkalo, A.K., Wrege, P.H., & Wittemyer, G. (2017). Slow intrinsic growth rate in forest elephants indicates recovery from poaching will require decades. *Journal of Applied Ecology*, 54, 153–159.

¹⁷ Hunnink, L., Ringstad, I.H., Jackson, C.R., May, R., Fossey, F., Uiseb, K., ... Røskaft, E. (2017). Being stressed outside the park—conservation of African elephants (*Loxodonta africana*) in Namibia. *Conservation Physiology*, 5, 1–11.

¹⁸ Lindsay, K., Chase, M., Landen, K., & Nowak, K. (2017). The shared nature of Africa's elephants. *Biological Conservation*, 215, 260–267.

¹⁹ Delsink, A., Vanak, A.T., Ferreira, S., & Slotow, R. (2013). Biologically relevant scales in large mammal management policies. *Biological Conservation*, 167, 116–126.

²⁰ Chase, M.J., Schlossberg, S., Griffin, C.R., Bouché, P.J.C., Djene, S.W., Elkan, P.W., ... Sutcliffe, R. (2016). Continent-wide survey reveals massive decline in African savannah elephants. *PeerJ*, 4, e2354.

by carcass ratios.¹² Data from elephant carcasses indicate that protected areas are failing to protect elephants from poaching and human-elephant conflict.²¹ Elephant population estimates from 73 protected areas across Africa in the CITES Monitoring the Illegal Killing of Elephants (MIKE) program were less than 25% of the predicted size, largely due to poaching.²² Poaching significantly increased across Africa from 2003 to 2010, and poaching has not diminished across most of Africa since 2011.²³ From 2011-2018, poaching remained steady in West, Central, and Southern Africa, and decreased in Eastern Africa.²⁴ In northern Botswana, fresh elephant carcasses increased by 593% from 2014 to 2018.²⁵ In 2018, nearly half (520) of the total elephant carcass records (1,235) received by MIKE from 53 sites all over Africa, were recorded as poached.²⁶ MIKE has identified such high proportions of elephant populations poached that even well-established and protected populations would not be able to compensate by birthrates.²⁷ A recent study evaluated the severe problem of poaching and retaliatory killings of elephants in Zambia;²⁸ another concluded that elephant densities were lower in trophy hunting areas compared to a national park where trophy hunting was not permitted.²⁹ By analyzing seized ivory, experts have identified poaching hotspots,³⁰ such as Garamba National Park, where in just over two months in 2014 poachers killed 68 elephants using helicopters, grenades, and chainsaws.³¹ It is clear that any legal ivory markets and trade in elephant products may be facilitating illegal trade that is directly supplied by industrialized poaching.³² Local populations, particularly those that are isolated, may be extirpated due to high rates of poaching. Recent research has also highlighted that it is not just female matriarchs that play an important role in their societies, but older males are also critical to the survival of their social groups. A study published in 2020 found that older males play an essential role in male social groups and use knowledge of their environment that they have acquired over decades to lead their social

²¹ Chase, M.J., Schlossberg, S., Griffin, C.R., Bouché, P.J.C., Djene, S.W., Elkan, P.W., ... Sutcliffe, R. (2016). Continent-wide survey reveals massive decline in African savannah elephants. *PeerJ*, 4, e2354.

²² Robson, A.S., Trimble, M.J., Purdon, A., Young-Overton, K.D., Pimm, S.L., & van Aarde, R.J. (2017). Savanna elephant numbers are only a quarter of their expected values. *PLOS ONE*, 12, e0175942.

²³ Schlossberg, S., Chase, M.J., Gobush, K.S., Wasser, S.K., & Lindsay, K. (2020). State-space models reveal a continuing elephant poaching problem in most of Africa. *Scientific Reports*, 10, 10166.

²⁴ *Id.*

²⁵ Schlossberg, S., Chase, M.J., & Sutcliffe, R. (2019). Evidence of a growing elephant poaching problem in Botswana. *Current Biology*, 29, 2222-2228.e4.

²⁶ CITES (2019). New report highlights continued threat to African elephants from poaching. Available at: https://www.cites.org/eng/news/new-report-highlights-continued-threat-to-african-elephants-from-poaching_10052019

²⁷ CITES (2019). New report highlights continued threat to African elephants from poaching. Available at: https://www.cites.org/eng/news/new-report-highlights-continued-threat-to-african-elephants-from-poaching_10052019

²⁸ Nyirenda, V. R., P. A. Lindsey, E. Phiri, I. Stevenson, C. Chomba, N. Namukonde, W. J. Myburgh, and B. K. Reilly. (2015). Trends in illegal killing of African elephants (*Loxodonta africana*) in the Luangwa and Zambezi ecosystems of Zambia. *Environment and Natural Resources Research*, 5(2), 24.

²⁹ Crosmar, W. G., S. D. Cote, and H. Fritz. (2015). Does trophy hunting matter to long-term population trends in African herbivores of different dietary guilds? *Animal Conservation*, 18, 117-130.

³⁰ Wasser, S. K., L. Brown, C. Mailand, S. Mondol, W. Clark, C. Laurie, and B. S. Weir. (2015). Genetic assignment of large seizures of elephant ivory reveals Africa's major poaching hotspots. *Science*, 349, 84-87.

³¹ Hance, J. (2015). Poaching onslaught in Garamba National Park: wildlife conservation. *Environmental Management*, 3(1), 24-25.

³² Bennett, E. L. (2015). Legal ivory trade in a corrupt world and its impact on African elephant populations. *Conservation Biology*, 29, 54-60; Smith, R. J., D. Biggs, F. A. V. St. John, M. Sas-Rolfes, and R. Barrington. (2015). Elephant conservation and corruption beyond the ivory trade. *Conservation Biology*, 29, 953-956.

groups.³³ Recent research has also reiterated the importance of older males for reproduction as older males also move farther and faster than young males during musth, which greatly increases their reproductive success by gaining mating access to more females.³⁴ In light of the importance of males in male social groups, scientists have warned that targeted removal of older males can be detrimental to elephant societies.³⁵

Thus, we hold the legal position that the African elephant (now two species) should be protected as endangered, that trophy and live imports of African elephants do not enhance the survival of the species in the wild, and that the Service must act to halt and reverse the current trends towards extinction by completely prohibiting the trophy and live import of African elephants.

III. COMMENTS ON ELEPHANT HUNTING TROPHY PROVISIONS

We applaud the Service for working to strengthen regulations around the import of elephant hunting trophies. While a total prohibition on the import of live African elephants or their trophies is the only way to adhere to conservation requirements set out under the ESA, we nevertheless provide comment on the Service's proposed amendments to strengthen the special rule. The proposed amendments to the special rule are generally an improvement to the current special rule and will help to diminish demand and to provide for better conservation of African elephants.

A. The Service Must Prohibit African Elephant Trophy Imports

We urge the adoption of a regulation that explicitly eliminates elephant hunting trophy trade into the United States. Such a rule is essential given the plain language of the ESA, the current extinction crisis, the lack of scientific support for trophy hunting, the public opposition to this practice of killing imperiled wildlife, such as elephants, for fun and bragging rights, and limited governmental resources, including both budgetary and staffing, that would be better spent on permitting true conservation activities.

Trophy hunting is the killing of an animal to obtain animal parts (such as their heads, hides, claws, teeth, tusks, horns, skin, or the whole stuffed animal) for display but not for subsistence. Cruel and unsportsmanlike practices like baiting, hounding and trapping as well as captive hunts or canned hunting (hunting of captive-bred animals in closed enclosures) are often part of the industry. Every year hundreds of thousands of animals of tens of thousands of species are killed by trophy hunters. Animals that are prolifically targeted by trophy hunters include African elephants, lions, rhinos, leopards, giraffes, baboons, and other imperiled species. To date, too much time has been spent debating the alleged merits of trophy hunting and whether it has any conservation benefits or is detrimental to species' survival. The scientific data,

³³ Allen, C., Brent, L., Motsentwa, T., Weiss, M., & Croft, D. (2020). Importance of old bulls: leaders and followers in collective movements of all-male groups in African savannah elephants (*Loxodonta africana*). *Scientific Reports*, *10*, 13996.

³⁴ Taylor, L.A., Vollrath, F., Lambert, B., Lunn, D., Douglas-Hamilton, I., & Wittemyer, G. (2020). Movement reveals reproductive tactics in male elephants. *Journal of Animal Ecology*, *89*, 57–67.

³⁵ *Id.*; Allen, C., Brent, L., Motsentwa, T., Weiss, M., & Croft, D. (2020). Importance of old bulls: leaders and followers in collective movements of all-male groups in African savannah elephants (*Loxodonta africana*). *Scientific Reports*, *10*, 13996.

research, and information on the whole shows that the detriments of trophy hunting outweigh any potential benefits. As such, if we are to halt the current extinction crisis, our time, resources, and energy must be focused on that effort and not deciding whether importing a trophy from a certain country or region can be found to somehow conserve the species being killed. Killing animals to obtain trophies for bragging rights or for fun whilst we are in the midst of an extinction crisis is not justifiable.

It is undeniable that the extinction crisis requires immediate attention. As the Intergovernmental Science Policy Platform on Biodiversity and Ecosystem Services (IPBES) assessment report points out, we risk losing a million species in the coming decades unless we halt business as usual.³⁶ And one of the main drivers of extinction is direct exploitation.³⁷ The call for radical change by scientists the world over participating in the IPBES global assessments must be heeded. The extinction emergency requires transformative changes. Ending the colonialist practice of trophy hunting is a necessary part of such change.

Moreover, substantial scientific evidence demonstrates the detrimental effects of trophy hunting on wildlife, including elephants. From the loss of the biggest and strongest animals from the gene pool to the loss of tusks in African elephants, the negative effects of selective killing of wildlife on the ability of species to survive especially in the face of a changing climate and increasing human population cannot be overstated. The use of wildlife, and particularly those species threatened with extinction, not for survival but for fun, bragging rights, and decorations out of vanity cannot be allowed to continue given the current extinction crisis. Trophy hunting is exactly the kind of unnecessary direct exploitation that needs to stop.

The notion that wildlife must pay their way is an outdated and dangerous ideology, especially during an extinction emergency. Moreover, there are significant questions about whether such concepts benefit conservation or simply promote continued demand for rare wildlife species such as elephants. The practice is not widely condoned by the public and government resources would be better spent on permitting of activities that actually benefit elephants rather than authorizing trade in dead specimens killed for recreation.

(1) The Law Does Not Support Finding that Trophy Hunting Enhances the Survival of Species

Section 10 of the Endangered Species Act provides that “[t]he Secretary may permit . . . *any act otherwise prohibited* by section 1538 of this title . . . to enhance the propagation or survival of the affected species.” 16 U.S.C. § 1539(a) (emphasis added). Congress intended that the activity being permitted would itself actually enhance the species’ survival. Killing a species threatened with extinction does not on its face benefit the species. The current system impermissibly flips the statutory limitation on its head by allowing income generation alone—i.e., payment of trophy and hunting fees—to justify enhancement permits. A “net benefit” standard allowing permittees

³⁶ IPBES (2019): Global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services. E. S. Brondizio, J. Settele, S. Díaz, and H. T. Ngo (editors). IPBES secretariat, Bonn, Germany. 1148 pages. <https://doi.org/10.5281/zenodo.3831673>

³⁷ *Ibid.*; Jaureguiberry, P., et al. (2022). The direct drivers of recent global anthropogenic biodiversity loss. *Science Advances*, 8(45), eabm9982.

to “pay to play” or pay to import is unlawful under the plain language and intent of Section 10 of the ESA. Moreover, the legislative history of Section 10 confirms Congress' intent to “to *limit substantially the number of exemptions that may be granted* under the act.” H. R. Rep. No. 93-412 p. 17 (1973) (emphasis added). For these reasons, the Service should not be granting trophy import permits for elephants as a matter of law.

(2) The Science Does Not Support Finding that Trophy Hunting Enhances the Survival of Species in General or Elephants in Particular

The notion that trophy hunting benefits species conservation is false. A litany of scientific research shows that trophy hunting threatens the survival of many species and harms conservation. Globally, wildlife populations are rapidly declining due to poaching, climate change, habitat loss and degradation, human-wildlife conflict and other human-induced activities. A landmark report³⁸ by the IPBES warned that one million wild animal and plant species are now threatened with extinction and that direct exploitation is one of the main causes. Species that are highly sought by trophy hunters, such as African elephants, have not been spared from this global trend and have experienced sharp population declines in recent decades.

Wildlife biologists have sounded the alarm that trophy hunting exacerbates the population declines of already imperiled species and harms conservation by deliberately removing the largest and strongest specimens (most frequently males) from populations. Because trophy hunting is selective in their targets, it can add to the population decline of these species by what scientists called “super-additive” threat, meaning that the animals trophy hunters selectively kill will result in additional mortalities beyond those that would normally occur in nature. Trophy hunters kill breeding-aged animals, disrupting the social structure of populations and leading to indirect effects and consequences such as sexually-selected infanticide and the decreased recruitment of young. In contrast, natural mortality in trophy hunted species disproportionately affects the very old and very young.

Hunters generally target the biggest and strongest males, meaning that trophy hunting removes these animals from the breeding pool and unnaturally selects for smaller or weaker animals.³⁹ Researchers have found that the selective nature of hunting causes changes in desirable phenotypic traits in targeted species. In particular, trophy sizes for wild herbivores experienced temporal decline in South Africa and Tanzania. “Declines in trophy size over time due to selective harvesting could be attributed to phenotypic plasticity that may result due to a decline

³⁸ Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES). 2019. Global Assessment Report on Biodiversity and Ecosystem Services. IPBES secretariat, Bonn, Germany, <https://www.ipbes.net/global-assessment-report-biodiversity-ecosystem-services>.

³⁹ Allendorf, F. W., & Hard, J. J. (2009). Human-induced evolution caused by unnatural selection through harvest of wild animals. *Proceedings of the National Academy of Sciences*, 106, 9987-9994; Jachmann, H., Berry, P. S. M., & Imae, H. (1995). Tusklessness in African elephants: a future trend. *African Journal of Ecology*, 33(3), 230-235; Crosmarty, W. G., Côté, S. D., & Fritz, H. (2015). Does trophy hunting matter to long-term population trends in African herbivores of different dietary guilds? *Animal Conservation*, 18(2), 117-130; Pigeon, G., Festa-Bianchet, M., Coltman, D. W., & Pelletier, F. (2016). Intense selective hunting leads to artificial evolution in horn size. *Evolutionary Applications*, 9(4), 521-530.

in abundance of big tuskers and individuals with big horns or tusks as these are mostly selected by hunters.”⁴⁰

Research from Queen Mary University of London revealed that trophy hunting has more profound impacts on wildlife than previously thought.⁴¹ The authors, relying upon sexual selection theory that the fittest males typically breed, found that “the sorts of selectivity associated with human predation can lead to uniquely severe impacts on harvested populations” particularly when environmental change, such as climate change, is considered.⁴² They concluded that “the effect of selective harvesting on extinction risk under environmental change appears to be strong and should at least be considered when strongly sexually selected species are harvested.”⁴³ This study raises important questions about how environmental changes along with trophy hunting have additive effects that increase extinction risk.

Likewise, trophy hunting offtake decreases the likelihood that populations can recover from other impacts such as poaching or climate change. Biologists even warn that when trophy hunting is sanctioned, poaching activity increases, likely due to the perception that species authorized for hunting are of diminished value and the perception that legal killing increases the acceptability of poaching.⁴⁴

Additionally, scientists have sharply questioned the conservation credentials of the trophy hunting industry and published evidence that the proposition that trophy hunting is imperative to the future of conservation has generally been developed and accepted without compelling empirical support. Until recently the literature has been “homogenized, stagnant, and perhaps alienated from the larger popular discourse with its almost singular focus on the effects or effectiveness of trophy hunting, to the neglect of other ethical considerations.”⁴⁵ Indeed in recent years there has been a scientific awakening with a growing number of researchers, economists and conservationists publishing literature or opinion pieces casting off the outdated notion that trophy hunting is an acceptable and useful conservation tool.

Conservation scientists have criticized trophy hunting as “morally inappropriate” and part of “a Western cultural narrative of chauvinism, colonialism, and anthropocentrism.”⁴⁶ They argue that “[t]rophy hunting reenacts a vainglorious history of colonization, wherein the hunt of wildlife symbolically represents the conquering and subjugation of “subhuman” indigenous peoples . . . Kalof and Fitzgerald (2003), for example, analyzed photographic records of animal trophies

⁴⁰ Muposhi, V. K., Gandiwa, E., Bartels, P., Makuza, S. M., & Madiri, T. H. (2016). Trophy hunting and sustainability: Temporal dynamics in trophy quality and harvesting patterns of wild herbivores in a tropical semi-arid savanna ecosystem. *PloS one*, *11*(10), e0164429.

⁴¹ Knell, R. J., & Martínez-Ruiz, C. (2017). Selective harvest focused on sexual signal traits can lead to extinction under directional environmental change. *Proceedings of the Royal Society B: Biological Sciences*, *284*(1868), 20171788.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Chapron, G., & Treves, A. (2016). Blood does not buy goodwill: allowing culling increases poaching of a large carnivore. *Proceedings of the Royal Society B: Biological Sciences*, *283*(1830), 20152939.

⁴⁵ Batavia, C., Nelson, M. P., Darimont, C. T., Paquet, P. C., Ripple, W. J., & Wallach, A. D. (2019). The elephant (head) in the room: A critical look at trophy hunting. *Conservation Letters*, *12*(1), e12565.

⁴⁶ *Id.*

displayed in American hunting magazines, reporting that the images represented sexist, racist norms bespeaking a history of oppression and social exclusion in the United States.”⁴⁷

The IUCN Ethics Specialist Group has stated that conservation laws, policies, and practices should be grounded in ethics.⁴⁸ They found that: the claimed financial benefits of trophy hunting to local communities “appear to be nowhere near as widespread as claimed; claimed conservation benefits are undermined by trophy hunters’ support for abundance of animals they want to kill instead of biologically diverse ecosystems;” and noted the trophy hunting-driven declines of wild populations of hunted species such as African lions. Regarding the ethics of trophy hunting, the Group said:

It can be questioned whether a monetary value can be placed on life. It is unethical to place a monetary value on human life. On what grounds then should this be different with respect to animals? Even if an ‘intrinsic value’ of animals (biocentrism) is denied, an assumed mere ‘instrumental value’ of animals (anthropocentrism) still requires justifiable reasons for killing animals. These may include essential human needs (food, clothing, cultural identity etc.), but certainly not killing for fun (‘experience’, sport, trophies). At the very least, the onus for justifying trophy hunting must lie with those who claim that the ‘benefits’ for wildlife conservation are greater than the ‘costs’ of loss of life. Again, it must be stressed that the assumption of justifiable trophy hunting could only be made on the grounds of ethical anthropocentrism - a position that arguably is not consistent with IUCN’s overarching conservation ethics.

Thus, the support for finding that killing imperiled species is “conservation” is insufficient.

(3) Elephant-specific Science Necessitates a Prohibition

Trophy hunting has been shown to disrupt African elephant family groups and social stability, negatively impacting elephant survival.⁴⁹ The typical targeting of “big tusker” bull elephants or the oldest males by trophy hunters has resulted in a serious decline in the number of such animals and resulting loss of their genetic contributions to the species and vitally important accumulated social knowledge and experience from which younger animals learn.⁵⁰ Research

⁴⁷ Batavia, C., Nelson, M. P., Darimont, C. T., Paquet, P. C., Ripple, W. J., & Wallach, A. D. (2019). The elephant (head) in the room: A critical look at trophy hunting. *Conservation Letters*, 12(1), e12565.

⁴⁸ Bosselmann, K., Burdon, P., Taylor, P., Stewart, N., Kotze, L. and T. Waikavee. 2019. Compatibility of Trophy Hunting as a Form of Sustainable Use with IUCN’s Objectives, <https://www.iucn.org/news/world-commission-environmental-law/201909/compatibility-trophy-hunting-a-form-sustainable-use-iucns-objectives>.

⁴⁹ Milner, J. M., Nilsen, E. B., & Andreassen, H. P. (2007). Demographic side effects of selective hunting in ungulates and carnivores. *Conservation Biology*, 21(1), 36-47, doi: 10.1111/j.1523-1739.2006.00591.x (“Such selective harvesting can destabilize social structures and the dominance hierarchy and may cause loss of social knowledge, sexually selected infanticide, habitat changes among reproductive females, and changes in offspring sex ratio.”)

⁵⁰ Bale, R. (2015). Why killing a bull elephant with big tusks hurts the herd. National Geographic. Available at: <https://news.nationalgeographic.com/2015/10/151017-zimbabwe-elephant-tusker-trophy-hunting-poaching-conservation-africa-ivory-trade>.

shows that elderly male elephants invest more time and energy into mating than do young bull elephants, and therefore removing the older elephants through trophy hunting can have magnified negative impacts on breeding rates.

A 2016 paper by Muposhi et al.⁵¹ presented the results of a study on the impact of trophy hunting on large herbivores, including elephants, in the Matetsi Safari Area near Hwange National Park. They found that trophy tusk sizes of hunted African elephants declined significantly from 2004-2015 possibly indicating, according to the researchers, that elephant trophy hunting in the area is not sustainable. Furthermore, the authors found that, despite the existence since 2014 of data on elephant populations generated from the Great Elephant Census, quotas “may have been based on previous experiences and individual opinions and not based on scientific principles.”⁵² On the general topic of quota-setting in the area, the authors stated, “There seems to be over-reliance on questionable and subjective personal opinions in the quota setting process which in actual sense is supposed to be based on scientific evidence and ecological principles.”⁵³ Finally, the authors note the obvious conflict of interest that exists when the ZPWMA, which relies on trophy hunting as income for its operations, is also in charge of setting quotas, posing the question “who will police the regulator,” noting that it may cause problems when “economic benefits take precedence over regulatory policy framework.”⁵⁴ In other words, the scientific component of quota setting is lacking and the incentive is to allow more hunting to increase revenue.

Selier et al. (2014)⁵⁵ found that elephant hunting in the Greater Mapungubwe Transfrontier Conservation Area, which includes Botswana, South Africa and Zimbabwe, was unsustainable and predicted that trophy bulls will disappear from the population in less than 10 years. The authors explained:

Hunting of bulls had a direct effect in reducing bull numbers but also an indirect effect due to disturbance that resulted in movement of elephants out of the areas in which hunting occurred. The return interval was short for bulls but longer for females. Only a small number of bulls (<10/year) could be hunted sustainably. At current rates of hunting, under average ecological conditions, trophy bulls will disappear from the population in less than 10 years.⁵⁶

Tragically, a recent study of one population of elephants that rapidly evolved tusklessness in response to high levels of poaching found that tuskless mother elephants “displayed a biased offspring sex ratio” toward females supporting that tusklessness may be an “X-linked dominant,

⁵¹ Muposhi, V. K., Gandiwa, E., Bartels, P., Makuza, S. M., & Madiri, T. H. (2016). Trophy hunting and sustainability: Temporal dynamics in trophy quality and harvesting patterns of wild herbivores in a tropical semi-arid savanna ecosystem. *PloS one*, *11*(10), e0164429.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Selier, S. A. J., Page, B. R., Vanak, A. T., & Slotow, R. (2014). Sustainability of elephant hunting across international borders in southern Africa: A case study of the greater Mapungubwe Transfrontier Conservation Area. *The Journal of Wildlife Management*, *78*(1), 122-132.

⁵⁶ *Id.*

male lethal trait governed by a single locus.”⁵⁷ In addition to “downstream impacts such as reduced bioturbation, shifts in plant species composition, reduced spatial heterogeneity, and increased tree cover—any of which could affect myriad other ecosystem properties,” genetic evolution toward tusklessness may impact female to male ratios in elephant populations further contributing to population declines.⁵⁸

(4) The Trophy Hunting Industry Thrives on Rarity, Not Thriving Populations

Rarity is prized by trophy hunters as evidenced by both science and the industry’s practices. A species’ rarity and unique or “impressive” physical traits are key factors in determining a hunter’s target.⁵⁹ In fact, the trophy hunting industry encourages killing of at-risk species by setting up competitions and giving out awards for the most prolific hunters and the killing of rare species. Hunting associations such as Safari Club International (SCI) have elaborate scoring systems that award status based on criteria including rarity.

Trophy hunters are motivated by the industry to: kill animals in order to compete with other trophy hunters; to kill animals that will generate the largest trophies; and to have their kills memorialized in “record books” kept by these industry organizations. For example, Safari Club International has at least four awards that including killing African elephants (African 15, African 29, Dangerous Game of Africa, African Big Five).⁶⁰ Scientists point to “increased status” a hunter might accrue as their motivation to kill because “a greater status is bestowed upon those killing larger and/or rarer animals.”⁶¹ They equate trophy hunting with other status accumulation behaviors such as the purchase and display of luxury objects.⁶²

HSI conducted an analysis⁶³ on winners of SCI’s highest honor – the World Hunting Award, called the “Super Bowl-ring of hunting” (the award itself is, indeed, a ring) to demonstrate the lengths to which zealous trophy hunters will go to both bring home their hunted “trophies” and achieve the multitude of hunting prizes, available for everything from killing a certain number of animals on a given continent, to using “alternative methods,” such as a handgun or bow-and-arrow. Qualifying achievements for the World Hunting Award require that recipients have killed dozens – if not hundreds – of animals on multiple continents, won 11 SCI “Grand Slams”, such as the Africa 29, 17 Inner Circles at the Diamond Level and so on. SCI record book reveals that members have killed at least 2,000 lions, 1,800 leopards, 800 elephants, 570 rhinos including 93 critically endangered black rhinos. In 2016, according to federal tax filings⁶⁴ the SCI annual

⁵⁷ Campbell-Staton, S. C., Arnold, B. J., Gonçalves, D., Granli, P., Poole, J., Long, R. A., & Pringle, R. M. (2021). Ivory poaching and the rapid evolution of tusklessness in African elephants. *Science*, 374(6566), 483-487.

⁵⁸ *Id.*

⁵⁹ Palazy, L., Bonenfant, C., Gaillard, J. M., & Courchamp, F. (2012). Rarity, trophy hunting and ungulates. *Animal Conservation*, 15(1), 4-11.

⁶⁰ <https://safariclub.org/wp-content/uploads/2020/05/world-hunting-award.pdf>

⁶¹ Darimont C.T., Codding B.F., & Hawkes K. 2017. Why men trophy hunt. *Biology Letters*. **13**: 20160909. <https://doi.org/10.1098/rsbl.2016.0909>

⁶² *Id.*

⁶³ Trophy Madness, Humane Society International. <https://www.hsi.org/wp-content/uploads/assets/pdfs/trophy-madness-report.pdf>

⁶⁴ <https://www.safariclub.org/fiscal-statements>.

convention raised more than USD\$7.7 million in net revenue for SCI. Its 2018 financial statement⁶⁵ reported USD\$13 million revenues (before expenses) from the convention.

(5) Workload and Other Benefits Would Accrue from Eliminating Trophy Imports

Prohibiting the import and export of all hunting trophies would streamline the ESA implementation process and significantly alleviate enforcement burdens. The current regulatory system also requires compliance with CITES requirements including making a non-detriment finding (NDF) for Appendix I species, which is a time-consuming and detailed requirement. Explicitly prohibiting elephant trophy imports would alleviate this workload and free staff to work on higher-priority conservation issues.

B. The Proposed Rule Should at Least be Strengthened

We applaud the Service for taking action through the Proposed Rule and import permit decisions to disincentivize the recreational killing of African elephants by American trophy hunters. The United States is, and long has been, one of the leading importers of African elephants for hunting trophy purposes. Although the current 4(d) rule has since 2016 required the Service to make an ESA enhancement finding for the import of African elephant hunting trophies, the rule's lack of detail regarding information required to make this finding creates ambiguity and inconsistency. Elaboration of criteria for making the ESA enhancement finding at least serves as a backstop if the practice of killing threatened elephants for recreation is to continue to be permitted under the ESA.

The lack of specificity in the current 4(d) rule about what must be considered when making an ESA enhancement finding has meant that the Service has made ESA enhancement findings without considering all of the known or probable impacts of trophy hunting on African elephant populations. For example, in general, because trophy hunters target animals with particular physical characteristics, such as large size, trophy hunting removes these animals from the breeding pool and unnaturally selects animals without those characteristics.⁶⁶ When physical characteristics sought by trophy hunters are related to survival, trophy hunting can decrease genetic resilience which is needed to be able to adapt and survive challenges such as climate change and cause unnatural evolutionary impacts. Studies of elephants selectively hunted by poachers for their ivory have shown how rapidly physical changes occur due to this practice. For example, selective illegal of elephants for ivory increased the occurrence of mature female African elephants lacking tusks from 10% to 38% in parts of Zambia over 20 years (1969-1989).⁶⁷ One study found that intensive ivory poaching resulted in rapid evolution of tusklessness in African elephants, indicating that there is a heritable genetic basis for

⁶⁵ https://www.safariclub.org/sites/default/files/2019-01/FinStatement_SCI_FY18.pdf.

⁶⁶ Allendorf, F.W. & Hard, J.J. (2009). Human-induced evolution caused by unnatural selection through harvest of wild animals. *Proceedings of the National Academy of Sciences of the United States of America*, 106, 9987-9994.

⁶⁷ Jachmann, H., Berry, P.S.M., & Imae, H. (1995). Tusklessness in African elephants: a future trend. *African Journal of Ecology*, 33, 230-235.

tusklessness.⁶⁸ This means that selective removal of African elephants for their tusks can have swift and long-lasting physical effects on elephants. Tusks play an important role in elephant feeding and defense, among other functions important to elephant survival.

In addition, the Service has ignored the impact of trophy hunting on African elephant social behavior even when those impacts result in conservation harm. For example, unsustainably high hunting quotas has resulted in the loss of older bulls, skewed sex ratios, and declines in body size.⁶⁹ In the Greater Mapungubwe Transfrontier Conservation Area (managed by South Africa, Zimbabwe, and Botswana) scientists found that, in contrast to current hunting allowances, “only a small number of bulls (<10/year) could be hunted sustainably. At current rates of hunting, under average ecological conditions, trophy bulls will disappear from the population in less than 10 years.”⁷⁰ So-called “trophy bulls” are the oldest males (over the age of 35 years old as cited in the study above) and play an essential role by leading their social groups using multi-generational social and ecological knowledge that is critical to the survival of the entire social group and regulate behavior of younger males.⁷¹ Older males suppress aggression in younger males⁷² which may be important for reducing human-elephant conflict. One study found that as the number of mature bulls present increased, younger male aggression decreased,⁷³ indicating that maintaining a larger number of older males in the population is important for maintaining a less aggressive social group. In the absence of older bulls, young males can cause numerous management problems due to aggressive behavior, which can be remedied by maintaining old males in the population.⁷⁴ Given that human-elephant conflict is a major threat to elephants,

⁶⁸ Campbell-Staton, S.C., Arnold, B.J., Gonçalves, D., Granli, P., Poole, J., Long, R.A., & Pringle, R.M. (2021). Ivory poaching and the rapid evolution of tusklessness in African elephants. *Science*, 374, 483–487.

⁶⁹ Selier, S. A. J., Page, B. R., Vanak, A. T., & Slotow, R. (2014). Sustainability of elephant hunting across international borders in southern Africa: A case study of the greater Mapungubwe Transfrontier Conservation Area. *The Journal of Wildlife Management*, 78(1), 122-132; Muposhi, V.K., Gandiwa, E., Bartels, P., Makuza, S.M., & Madiri, T.H. (2016). Trophy hunting and sustainability: temporal dynamics in trophy quality and harvesting patterns of wild herbivores in a tropical semi-arid savanna ecosystem. *PLoS ONE*, 11, e0164429.

⁷⁰ Selier, S. A. J., Page, B. R., Vanak, A. T., & Slotow, R. (2014). Sustainability of elephant hunting across international borders in southern Africa: A case study of the greater Mapungubwe Transfrontier Conservation Area. *The Journal of Wildlife Management*, 78(1), 122–132.

⁷¹ Evans, K.E. & Harris, S. (2008). Adolescence in male African elephants, *Loxodonta africana*, and the importance of sociality. *Animal Behaviour*, 76, 779–787; Allen, C., Brent, L., Motsentwa, T., Weiss, M., & Croft, D. (2020).

Importance of old bulls: leaders and followers in collective movements of all male groups in African savannah elephants (*Loxodonta africana*). *Scientific Reports*, 10, 13996; Chiyo, P.I., Archie, E.A., Hollister-Smith, J.A., Lee, P.C., Poole, J.H., Moss, C.J., & Alberts, S.C. (2011). Association patterns of African elephants in all male groups: the role of age and genetic relatedness. *Animal Behaviour*, 81, 1093–1099; Allen, C. R., Croft, D. P., & Brent, L. J. (2021). Reduced older male presence linked to increased rates of aggression to non-conspecific targets in male elephants. *Proceedings of the Royal Society B*, 288(1965), 20211374; Slotow, R., Van Dyk, G., Poole, J., Page, B., & Klocke, A. (2000). Older bull elephants control young males. *Nature*, 408(6811), 425-426; Chiyo, P. I., Archie, E. A., Hollister-Smith, J. A., Lee, P. C., Poole, J. H., Moss, C. J., & Alberts, S. C. (2011). Association patterns of African elephants in all-male groups: the role of age and genetic relatedness. *Animal Behaviour*, 81(6), 1093-1099.

⁷² Allen, C. R., Croft, D. P., & Brent, L. J. (2021). Reduced older male presence linked to increased rates of aggression to non-conspecific targets in male elephants. *Proceedings of the Royal Society B*, 288(1965), 20211374; Slotow, R., Van Dyk, G., Poole, J., Page, B., & Klocke, A. (2000). Older bull elephants control young males. *Nature*, 408(6811), 425-426.

⁷³ Allen, C. R., Croft, D. P., & Brent, L. J. (2021). Reduced older male presence linked to increased rates of aggression to non-conspecific targets in male elephants. *Proceedings of the Royal Society B*, 288(1965), 20211374.

⁷⁴ Slotow, R., Van Dyk, G., Poole, J., Page, B., & Klocke, A. (2000). Older bull elephants control young males. *Nature*, 408(6811), 425-426.

disruption of social structure from trophy hunting can have further effects by contributing to reduced human tolerance and increased retaliatory killings.

The decline and extirpation of elephants from the landscape can have wide-ranging impacts on the ecosystem. Elephants are considered keystone species and ecosystem engineers because of the important modifications they make to their environment.⁷⁵ They play an important role in seed dispersal, nutrient recycling, altering plant communities, all of which could be negatively impacted by the decline and extirpation of elephant populations.⁷⁶ They also increase the availability and quality of vegetation at lower heights, which may have a positive effect on smaller herbivores.⁷⁷ Some smaller species, such as steenbok and impala, prefer habitats with elephant-modified vegetation where food is more readily available and visibility is increased (reducing perceived predation risk).⁷⁸ Elephants modify the canopy in a way that increases understory biomass and richness.⁷⁹ These changes create habitat required by smaller animals, such as lizards, which are found at higher densities in elephant-engineered habitats.⁸⁰ Elephants also provide microhabitats for insects other invertebrates, thereby having a positive impact on biodiversity through the process of facilitation of refugia.⁸¹ Therefore, the loss of elephants equates to the loss of vital ecosystem services that they provide.

These examples of how trophy hunting has negative conservation consequences are inherent and cannot be mitigated. Far from enhancing the survival of the species, trophy hunting of African elephants harms the survival of the species. Therefore, the Service should impose strict criteria for these permits. We offer our suggestions on how best to strengthen the Proposed Rule's new enhancement permit requirements below.

(1) The Service Must Require Science-Based Evidence

The proposed rule includes a requirement that “*African elephant populations in the range country are stable or increasing, as well as sufficiently large to sustain sport hunting at the level authorized by the country.*”

We support this requirement, but it does not go far enough.

⁷⁵ Jones, C.G., Lawton, J.H., & Shachak, M. (1994). Organisms as ecosystem engineers. *Oikos*, 69, 373–386.

⁷⁶ Poulsen, J.R., Rosin, C., Meier, A., Mills, E., Nuñez, C.L., Koerner, S.E., ... Sowers, M. (2018). Ecological consequences of forest elephant declines for Afrotropical forests. *Conservation Biology*, 32, 559–567.

⁷⁷ Kohi, E.M., de Boer, W.F., Peel, M.J.S., Slotow, R., van der Waal, C., Heitkönig, I.M.A., ... Prins, H.H.T. (2011). African elephants *Loxodonta africana* amplify browse heterogeneity in African savanna. *Biotropica*, 43, 711–721.

⁷⁸ Valeix, M., Fritz, H., Sabatier, R., Murindagomo, F., Cumming, D., & Duncan, P. (2011). Elephant-induced structural changes in the vegetation and habitat selection by large herbivores in an African savanna. *Biological Conservation*, 144, 902–912.

⁷⁹ Coverdale, T.C., Kartzinel, T.R., Grabowski, K.L., Shriver, R.K., Hassan, A.A., Goheen, J.R., ... Pringle, R.M. (2016). Elephants in the understory: opposing direct and indirect effects of consumption and ecosystem engineering by megaherbivores. *Ecology*, 97, 3219–3230.

⁸⁰ Pringle, R.M. (2008). Elephants as agents of habitat creation for small vertebrates at the patch scale. *Ecology*, 89, 26–33.

⁸¹ Govender, N. (2005). *The effect of habitat alteration by elephants on invertebrate diversity in two small reserves in South Africa*. (Master's thesis). University of KwaZulu-Natal, Pietermaritzburg, South Africa.

We urge the Service to require the submission of scientific evidence and its methodology to support any claims that the import of the elephant trophy will enhance the survival of the species, and such evidence to have been recently obtained by using acceptable methodology. The Service must not rely upon unsubstantiated conclusions regarding benefits. This requirement should include consideration of all sources of mortality when determining if the level of offtake is not detrimental, including offtake due to poaching.

We also urge the Service to require the submission of information identifying the population(s) from which the African elephant was taken, including scientific evidence of the size, trends, and age and sex structure of that local population as well as neighboring populations. It's important that the analysis considers both the impact of trophy hunting on the biological population as well as on the population of the country. Focusing on one will hide impacts to the other.

The majority (76%) of African elephant populations are transboundary, meaning that they are spread across one or more national border⁸². As stated by Lindsey et al. (2017), “relatively few strictly ‘belonging’ to individual countries” and “despite threats and declines continent-wide, the majority of Africa's elephants cannot be clearly ascribed as the ‘national property’ of any one country”. Therefore, requirements for population monitoring and population sizes must apply to *all* countries where the elephant population in question resides.

Based on information obtained from the CITES Trade Database, below are a subset of transboundary elephant populations that include those from which the United States has imported African elephants (adapted from Lindsay et al. 2017).⁸³

Region(s)	Transboundary population name	Countries	Population estimate
East	Amboseli-W Kilimanjaro-Magadi-Natron	Kenya-Tanzania	3,098
East	Mara-Serengeti	Kenya-Tanzania	7,615
East	Tsavo-Mkomazi	Kenya-Tanzania	11,217
East-South	Selous-Niassa	Tanzania-Mozambique	21,640
South	KAZA	Angola-Zambia-Namibia-Botswana-Zimbabwe	201,977
South	Greater Mapungubwe TFCA	Botswana-South Africa-Zimbabwe	1,449
South	Nyika + Zambia border	Malawi-Zambia	47
South	Maputo-Tembe	Mozambique-South Africa	568
South	Limpopo TFCA	Mozambique-Zimbabwe-South Africa	33,785
South	Songimvelo-Malolotja	South Africa-Swaziland	108
South	Lower Zambezi - Mana Pools	Zambia-Zimbabwe	12,782
South	Nyatana - Tete	Zimbabwe-Mozambique	634

⁸² Lindsay, K., Chase, M., Landen, K., & Nowak, K. (2017). The shared nature of Africa's elephants. *Biological Conservation*, 215, 260-267.

⁸³ *Id.*

Consequently, the Service should require the submission of scientific information on the population as a whole, not just the part of the population in the country where the hunt takes place. This would require cooperation between the countries that share the population to obtain population data.

(2) Comments on Proposed Management Capacity of Foreign Regulatory Authorities Requirement

The proposed rule includes a requirement that “*Regulating authorities have the capacity to obtain sound data on these populations using scientifically based methods consistent with peer-reviewed literature.*”

While we agree that this is an important consideration, ultimately it is the responsibility of the Service to ensure that the importation of an elephant trophy will enhance the survival of the species. The Service should make this decision on its own upon receiving scientific information on the population (a function that would be well served by allowing for the submission of comments on particular permit applications, as described further below). In making the enhancement finding, the Service should not rely on the capacity of foreign regulatory authorities, as such capacity alone does not mean that sound data are acquired or used appropriately to make decisions regarding trophy hunting. We urge the Service to revise its proposed language to require that a regulating authority have scientifically based population data and a funded plan to continue monitoring for population trends, instead of merely requiring a nation to have such “capacity.”

In determining the management capacity of foreign regulatory authorities, we urge the Service to consider whether the country has any trade suspensions resulting from the Review of Significant Trade (Resolution Conf. 12.8 (Rev. CoP18)). Such trade suspensions for any species mean that the country has been found to have allowed international trade in CITES Appendix II-listed species without making proper non-detriment findings as required by CITES. A list of current restrictions⁸⁴ reveals that one country that export elephant trophies, Tanzania, has trade suspensions in effect.

Furthermore, the meaning of the term “sound data” must be clarified. Population data must be provided to the Service for the specific local population from which the elephant would be or has been taken, as well as the larger, regional population which may act as a source or sink population. Population data, at all scales, must also include demographic data such as age- and sex- structures and not simply rely on population size.

(3) Comments on the Proposed Legal and Practical Management Capacity Requirements

The proposed rule includes a requirement that “*Regulating authorities recognize these populations as a valuable resource and have the legal and practical capacity to manage them for their conservation.*”

⁸⁴ <https://rst.cites.org/public>.

We support this requirement but urge the Service to revise the requirement to be more explicit, as “capacity” is vague. We urge the Service to ensure that the requirements are verified and effective, and not simply a box for the applicant or exporting country to check. Consequently, we urge the Service to expand the requirement to require countries to provide evidence of their legal authority, funding, staffing, and enforcement capabilities to manage African elephants for their conservation and demonstrated success at the time of the import application. This includes the provision of information on the regulating authorities’ current wildlife law, its current elephant management plan, its budget for implementing the elephant management plan, its capacity in terms of staff and training to implement the elephant management plan, and its enforcement capabilities to ensure applicable laws and the plan are followed.

This additional layer of accountability and transparency is critical in order for the Service to determine that the trophy hunt enhances the survival of the species. It has been documented that the trophy hunting industry in countries such as Zimbabwe and Tanzania have been poorly managed and/or that the countries lack the legal and practical capacity to ensure the conservation of the species.

In 2015, the Service found that Zimbabwe did not at the time have legal and practical capacity for the conservation of African elephants sufficient to make a positive enhancement finding on the import of trophies:

based on the information currently available to the Service on government efforts to manage elephant populations, efforts to address human-elephant conflicts and poaching, and the state of the hunting program within the country, and without current data on population numbers and trends being incorporated into a national management strategy or plan, the Service is unable to make a finding that sport-hunting in Zimbabwe is enhancing the survival of the species⁸⁵

Similarly, the Service also could not make a positive enhancement finding for African elephant trophy hunting in Tanzania because of questionable management practices, a lack of effective law enforcement, and weak governance which have resulted in uncontrolled poaching and catastrophic elephant population declines in Tanzania.⁸⁶ The Service has previously rejected attempts to import trophies from Zambia due to similar concerns of mismanagement including inconsistencies in reported elephant population estimates, failure to comply with monitoring requirements, absence of government funding for elephant protection, and lack of effective anti-poaching measures.⁸⁷

⁸⁵ 80 Fed. Reg. 42524 (July 17, 2015); *see also* 79 Fed. Reg. 44459 (July 31, 2014) (“Without management plans with specific goals and actions that are measurable and reports on the progress of meeting these goals, the Service cannot determine if . . . Zimbabwe is implementing, on a national scale, appropriate management measures for its elephant populations.”); *see also* 79 Fed. Reg. 26986 (May 12, 2014);

<http://www.fws.gov/international/pdf/enhancement-finding-March-2015-elephant-Zimbabwe.pdf>;

<http://www.fws.gov/international/pdf/enhancement-finding-July-2014-elephant-Zimbabwe.pdf>.

⁸⁶ *See* <http://www.fws.gov/international/pdf/enhancement-finding-2015-elephant-Tanzania.PDF>;

<http://www.fws.gov/international/pdf/enhancement-finding-2014-elephant-Tanzania.PDF>.

⁸⁷ *See Marcum v. Salazar*, 810 F.Supp.2d 56, 63 (D.D.C. 2011); *Marcum v. Salazar*, 694 F.3d 123 (D.C.Cir. 2012).

We applaud the Service for making such determinations based on the information that was available to them at the time. This is a critically important component for meeting the enhancement finding standards laid out under the ESA, so we urge the Service to include submission requirements under this paragraph that ensures the Service receives verified and comprehensive information sufficient to make a transparent determination around the legal and practical capacities of the exporting countries.

Additionally, due to the transboundary nature of African elephant populations as described in section B above, we urge the Service to require joint management plans between countries with shared elephant populations that are subject to trophy hunting. As with requirements for population monitoring and population sizes, requirements for an adequate, *coordinated* management plan must apply to *all* countries where the elephant population in question resides. This includes the capacity and funding to implement such plans. In addition, these countries must work together on joint management plans that facilitate corridors for safe passage for elephants and meaningful coexistence strategies.

The provision of written non-detriment findings for the trophy trade from exporting countries is a good place for this analysis to begin. If a country is flagged for the Review of Significant Trade or unable to implement Article III or IV with regard to the making of non-detriment findings, then it cannot be found to have the legal and practical capacity to manage.

(4) Comments on the Proposed Rule of Law Requirements

The proposed rule includes a requirement that “*Regulating governments follow the rule of law concerning African elephant conservation and management.*”

We agree that evidence about whether foreign regulatory authorities are following the rule of law concerning African elephant conservation and management should be a determining factor for making the enhancement finding. However, we believe that such evidence need not be specific to African elephants.

A good starting off point is the Corruption Perceptions Index.⁸⁸ The CPI ranks countries based on “perceived levels of public sector corruption.”⁸⁹ But it also accounts for progress in addressing corruption and, thus, is a useful tool. The CPI could be used to measure following the rule of law based on a raw scoring system or improvements in combatting corruption.

Additionally, the 2021 [Global Organized Crime Index](#), a key flagship project of the Global Initiative Against Transnational Organized Crime, funded by the U.S. State Department, provides measures of countries’ overall relationship to organized crime. The Index measures criminality for each country on a scale of 1 to 10, where countries with higher scores have more severe criminality conditions. One of the criminal markets included in the Index is Fauna Crimes which are those related to poaching, illicit trade and possession of species covered by CITES, as well as any other species protected by national law.

⁸⁸ <https://www.transparency.org/en/cpi/2022>.

⁸⁹ *Id.*

African elephant range States have various levels of criminality pertaining to fauna. Three of the top countries of origin of African elephant specimens imported to the United States as trophies during 2016-2020 have very high 2021 criminality scores for fauna: South Africa (7.50), Zimbabwe (7.50), Botswana (7.50) and Tanzania (8.00). The other top exporters, Namibia and Zambia, each scored 4.50 for fauna criminality in the Index, indicating a medium level of fauna criminality. Eswatini (formerly Swaziland), the only country of origin for live African elephants imported to the United States over the same time period, scored 2.00 for fauna criminality in the Index, indicating a low level of fauna criminality.

As these examples illustrate, there are good tools for the Service to use to determine whether a country is abiding by the rule of law, and we encourage the Service to discuss the tools it will use to implement this requirement in adopting the final rule.

(5) Comments on the Proposed Habitat Requirements

The proposed rule includes a requirement that “*The current viable habitat of these populations is secure and is not decreasing or degrading.*”

This is an important requirement for ensuring that trophy hunting is actually benefiting elephants rather than simply perpetuating the species’ rarity (as discussed previously). Unless concerted efforts are being made to ensure that viable elephant habitat is secure, then the primary argument used to justify trophy hunting—that it saves habitat—is unmet.

Planning and reporting done per the Convention on Biological Diversity on National Biodiversity Strategies and Action Plans (NBSAPs) could be a useful tool for ensuring habitat is secure and not decreasing or degrading.⁹⁰

We request clarification of the scope of the term “current viable habitat.” Given the large range size for elephants, this should include the entire range of each population at the local, regional, and larger scale. In addition, this should include suitable corridor habitat along elephant migration routes. Ensuring that a clear definition of current viable habitat is used in the final rule is important to giving this provision meaning for elephants.

(6) Comments on the Proposed Legal Acquisition Requirements

The proposed rule includes a requirement that “*Regulating authorities can ensure that the involved trophies have in fact been legally taken from the specified populations.*”

This provision is carried forward from the current 4(d) rule. 50 C.F.R. 17.40(e)(6)(I)(A). We support continuing to require that regulating authorities ensure that trophies were acquired legally. Between quotas, hunting permits, local laws, and national requirements, it is important that trophies that are destined for the United States were acquired lawfully. Particularly, given the requirements of the Lacey Act, ensuring that elephant trophies were acquired lawfully and from where they are represented to be from are both important factors for the Service’s decision-making. 16 U.S.C. § 3372(a)(2). Thus, we support maintaining this requirement. We emphasize,

⁹⁰ See, e.g. <https://www.cbd.int/reports/>.

however, that it is the *Service's obligation* to determine that regulating authorities have the capacity to reliably ensure that trophies have been lawfully taken; this provision must be applied with scrutiny and not undue deference to the representations of exporting countries.

(7) Comments on the Proposed Application of Funds Requirements

The proposed rule includes a requirement that “*Funds derived from the involved sport hunting are applied primarily to African elephant conservation, including funds used for:*

- (1) *Managing protected habitat, securing additional habitat, or restoring habitat to secure long-term populations of elephants in their natural ecosystems and habitats, including corridors between protected areas;*
- (2) *Improving the quality and carrying capacity of existing habitats;*
- (3) *Helping range state governments to produce or strengthen regional and national elephant conservation strategies and laws;*
- (4) *Developing capacity within the range country to survey, census, and monitor elephant populations;*
- (5) *Conducting elephant population surveys;*
- (6) *Supporting enforcement efforts to combat poaching of African elephants;*
- (7) *Supporting local communities to help conserve the species in the wild through protecting, expanding, or restoring habitat or other methods used to prevent or mitigate human–elephant conflict; and*
- (8) *Supporting local communities by ensuring that 100 percent of the available meat from the African elephant hunt will be donated to local communities.”*

We support the general concept of this requirement but have concerns about the requirement’s current scope and a few of the suggested provisions.

In order to verify if trophy hunting funding is providing adequate benefits to elephant conservation to satisfy the enhancement finding requirements, the Service should include an additional requirement for transparent reporting of the amount of money paid by trophy hunters and a detailed account of where exactly that money is spent. We also suggest that countries are required to provide evidence that the funds from the hunt in question independently and sufficiently make biologically significant advances in elephant conservation that would otherwise not occur in the absence of trophy hunting.

Further, it is important that funds derived from trophy hunting should be used for infrastructure and educational programs that promote human–elephant coexistence. Trophy hunting prices for elephants do not currently reflect the true cost and the amount received by the community from elephant trophy hunting must be sufficient to reimburse community members for damages to crops and infrastructure caused by elephants. A 2021 study⁹¹ on elephant trophy hunting in Namibia found that “sustainable trophy hunting only returns ~30% of the value of crops lost to the community and cannot alone offset the current costs of coexistence with elephants.” This

⁹¹ Drake, M. D., Salerno, J., Langendorf, R. E., Cassidy, L., Gaughan, A. E., Stevens, F. R., ... & Hartter, J. (2021). Costs of elephant crop depredation exceed the benefits of trophy hunting in a community-based conservation area of Namibia. *Conservation Science and Practice*, 3(1), e345.

conservancy is located in the Kavango-Zambezi (KAZA) Trans-frontier Conservation Area which is home to Africa's largest population of elephants (estimated population over 220,000). Yet, elephant trophy hunting in this conservancy was unsustainable with offtake rates more than double sustainable rates, and still did not cover the costs of crop loss in the community. The authors stated that "in 2019, Mashi's hunting concession charged US\$ 40,000 (N\$ 548,000) per elephant hunt. Beyond the US\$ 13,100 conservancy fee, the remainder of that money goes to the privately-operated hunting concession and is not captured by the conservancy." In order for elephant trophy hunting in this community to cover the costs of crop loss, the fees made by the community would need to be more than triple. The authors stated: "[a]t the estimated sustainable offtake rate and current crop depredation level, Mashi would need to earn ~US\$ 50,700 per elephant hunted to achieve parity, or ~3.40 times the current fee." Therefore, communities would need to maintain a much larger portion of the profits to recover their losses *and* gain additional benefits in order for such funds to meaningfully contribute to human-elephant conflict mitigation.

The majority of elephant trophies imported into the United States in the last five years of available data (2016-2020) originated in Namibia. However, there is recent evidence that Namibian conservancies are not benefiting local community members, especially when it comes to coexisting with elephants,⁹² and thus are not meaningfully benefitting the conservation of African elephants.⁹³ People in #Khoadi ||Hôas reported negative feelings towards elephants due to the extreme unequal distribution of benefits from the Community Based Natural Resource Management (CBNRM) (from both trophy hunting and safari tourism), as the paper states "[o]nly a small fraction of the revenues from community-based tourism, however, remains in the communities, and relatively few people profit from these revenues directly."⁹⁴

In light of these examples, it is critical that the Service ensures they have received sufficient, transparent evidence that the funds derived from the trophy hunt in question meet the enhancement criteria.

Additionally, there is a significant need for importers to demonstrate in detail how their funds are used through support for local communities in order help conserve species in the wild. Evidence of long-term benefits that extend beyond distribution of meat resources should be provided.

We strongly oppose the inclusion of language that establishes the provisioning of meat to local communities as African elephant conservation: "*Supporting local communities by ensuring that*

⁹² Schnegg, M., & Kiaka, R. D. (2018). Subsidized elephants: Community-based resource governance and environmental (in) justice in Namibia. *Geoforum*, 93, 105-115; Drake, M. D., Salerno, J., Langendorf, R. E., Cassidy, L., Gaughan, A. E., Stevens, F. R., ... & Hartter, J. (2021). Costs of elephant crop depredation exceed the benefits of trophy hunting in a community-based conservation area of Namibia. *Conservation Science and Practice*, 3(1), e345; Hewitson, L. J., & Sullivan, S. (2021). Producing elephant commodities for 'conservation hunting' in Namibian communal-area conservancies. *Journal of Political Ecology*, 28(1), 1-24.

⁹³ Schnegg, M., & Kiaka, R. D. (2018). Subsidized elephants: Community-based resource governance and environmental (in) justice in Namibia. *Geoforum*, 93, 105-115; Drake, M. D., Salerno, J., Langendorf, R. E., Cassidy, L., Gaughan, A. E., Stevens, F. R., ... & Hartter, J. (2021). Costs of elephant crop depredation exceed the benefits of trophy hunting in a community-based conservation area of Namibia. *Conservation Science and Practice*, 3(1), e345.

⁹⁴ Schnegg, M., & Kiaka, R. D. (2018). Subsidized elephants: Community-based resource governance and environmental (in) justice in Namibia. *Geoforum*, 93, 105-115.

100 percent of the available meat from the African elephant hunt will be donated to local communities.” First and foremost, meat consumption by local communities does not directly enhance the survival of the *species*. The local benefits to human communities that provision of meat may or may not provide are not relevant to making an enhancement determination. Additionally, there is little and inconsistent evidence that meat is distributed equally and makes a meaningful contribution to people’s lives. Elephant meat,⁹⁵ and meat from trophy hunting in general,⁹⁶ is not evenly distributed among community members. A study on three CAMPFIRE districts in Zimbabwe published in 2019 found that although one district council member said that “70% of every animal killed is allocated to the community,” this was not consistent with household perceptions where 1% of households in that community said they benefited from game meat.⁹⁷ Another community council member reported that all the meat was distributed to the community while only 8.3% of households reported benefitting.⁹⁸ In addition, there are reports of elephant meat going to waste because people cannot or do not want to eat that much elephant meat.

Trophy hunting benefits (money, jobs, meat) are unequally distributed among community members, can drive social inequalities, and are largely seasonal and limited to the hunting season. Therefore, it is critical that trophy hunting payment structures be completely overhauled and evidence provided that benefits are economically significant, distributed across the community as a whole, and directly enhance the survival of the species if the Service proceeds with the current language in the Proposed Rule.

IV. COMMENTS ON LIVE ELEPHANT IMPORT PROVISIONS

As with elephant trophy imports, we urge the Service to institute a ban on live elephant imports. Due to widespread failure of captive breeding programs, African elephants, particularly juveniles, are, and will continue to be, in high demand by zoos around the world, including the United States.

U.S. zoos have initiated highly-controversial elephant imports that have resulted in the deaths of imported elephants, their offspring, and other elephants (already located in U.S. zoos) who were moved to accommodate the imported animals. In 2003, the San Diego Wild Animal Park in California and the Lowry Park Zoo in Florida pursued the controversial decision to capture from the wild and import 11 live African elephants from Hlane Royal National Park in Swaziland

⁹⁵ Gargallo, E., & Kalvelage, L. (2021). Integrating social-ecological systems and global production networks: local effects of trophy hunting in Namibian conservancies. *Development Southern Africa*, 38(1), 87-103.

⁹⁶ Tchakatumba, P. K., Gandiwa, E., Mwakiwa, E., Clegg, B., & Nyasha, S. (2019). Does the CAMPFIRE programme ensure economic benefits from wildlife to households in Zimbabwe? *Ecosystems and people*, 15(1), 119-135; Ngorima, A., Brown, A., Masunungure, C., & Biggs, D. (2020). Local community benefits from elephants: Can willingness to support anti-poaching efforts be strengthened? *Conservation Science and Practice*, 2(12), e303.

⁹⁷ Tchakatumba, P. K., Gandiwa, E., Mwakiwa, E., Clegg, B., & Nyasha, S. (2019). Does the CAMPFIRE programme ensure economic benefits from wildlife to households in Zimbabwe? *Ecosystems and people*, 15(1), 119-135.

⁹⁸ Tchakatumba, P. K., Gandiwa, E., Mwakiwa, E., Clegg, B., & Nyasha, S. (2019). Does the CAMPFIRE programme ensure economic benefits from wildlife to households in Zimbabwe? *Ecosystems and people*, 15(1), 119-135.

(now Eswatini).⁹⁹ Seven elephants (including two who were pregnant) went to San Diego and four went to Lowry Park Zoo.¹⁰⁰ In 2011, one of the Swaziland elephants at San Diego Wild Animal Park was attacked and killed by another elephant.¹⁰¹ In 2008, a two-month-old calf born to one of the Swaziland elephants was euthanized after a zookeeper infected the calf with methicillin-resistant *Staphylococcus aureus*, or MRSA.¹⁰² The calf was being hand-raised because his mother could not care for him.¹⁰³ The calf infected as many as 20 other keepers before he was euthanized.¹⁰⁴ An 11-year-old elephant named Punga—an offspring of one of the Swaziland elephants—was shipped to Reid Park Zoo in Arizona in 2012 and died of mesenteric root torsion, or "twisted gut," in 2018.¹⁰⁵

In 2016, Big Game Parks (BGP)—a private organization authorized to manage three protected areas in Swaziland—captured 18 live wild-caught elephants from the Mkhaya Game Reserve for export to the U.S. The capture, removal, and transport of 46% of the population from the wild was reportedly completed in exchange for a \$450,000 donation to the BGP. One of the elephants died while awaiting relocation and 17 elephants were ultimately imported to three U.S. zoos. Approximately two months later, one of the imported females gave birth at the Dallas Zoo, making clear that she was approximately 20 months pregnant at the time she was transported thousands of miles, contrary to CITES guidelines and FWS regulations.¹⁰⁶ In 2017, the Henry Doorly Zoo in Nebraska, which received six of the 2016 Swaziland elephants, announced that one of the imported animals, an 8–9-year-old bull elephant, died under anesthesia while having a prosthetic made to repair a cracked tusk.¹⁰⁷

In 2019, the Pittsburgh Zoo & PPG Aquarium applied to FWS to import 28 wild-caught elephants from Zimbabwe. According to the importation application, the elephants would have

⁹⁹ Gorman, A., *Importing African Elephants Allowed*, Los Angeles Times, July 10, 2003 (available at <https://www.latimes.com/archives/la-xpm-2003-jul-10-me-elephants10-story.html>).

¹⁰⁰ Moss, A., *African elephants arrive at animal park*, The San Diego Union-Tribune, Aug. 23, 2003 (available at <https://www.sandiegouniontribune.com/sdut-african-elephants-arrive-at-animal-park-2003aug23-story.html>).

¹⁰¹ Perry, T., *San Diego elephant fatally attacked by another elephant, necropsy shows*, Los Angeles Times, Dec. 22, 2011 (available at <https://www.latimes.com/local/la-xpm-2011-dec-22-la-me-elephant-20111222-story.html>).

¹⁰² CDC, *Methicillin-Resistant Staphylococcus aureus Skin Infections from an Elephant Calf---San Diego, California, 2008*, MMWR Weekly, March 6, 2009 ("The investigation determined that the elephant calf likely acquired its MRSA infection from a colonized human caretaker"; "The African elephant calf was born in captivity on November 28, 2007") (available at

https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5808a3.htm?s_cid=mm5808a3_e); San Diego Zoo, *Baby Elephant News*, Jan. 17, 2008 (identifying elephant calf born November 28, 2007 as a calf "born to the herd at the Wild Animal Park since they arrived in 2003").

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Smith, D., *Punga the elephant dies at Reid Park Zoo*, Tucson Sentinel, May 9, 2018 (Punga is son to Mabu and Semba who arrived in Tucson from the San Diego Zoo in 2012) (available at https://www.tucsonsentinel.com/local/report/050918_elephant_zoo/punga-elephant-dies-reid-park-zoo/); Bodfield, R., *Reid Park Zoo welcomes first of new breeding herd*, Arizona Daily Star (Mabu was wild-caught in Swaziland and transported to San Diego in 2003) (available at https://tucson.com/news/local/govt-and-politics/reid-park-zoo-welcomes-first-of-new-breeding-herd/article_2342b31c-5162-59f4-b927-72d75f2e2779.html).

¹⁰⁶ Siebert, C., *New York Times Magazine, Zoos Called It a 'Rescue.' But Are the Elephants Really Better Off?*, Jul. 9, 2019 (available at <https://www.nytimes.com/2019/07/09/magazine/elephants-zoos-swazi-17.html>).

¹⁰⁷ WOWT, *Elephant unexpectedly dies at Omaha's Henry Doorly Zoo*, Sep. 7, 2017.

been destined for the Pittsburgh Zoo, at the time unaccredited by the Association of Zoos and Aquariums (AZA) after forfeiting accreditation in 2015 following a dispute regarding elephant handling practices,¹⁰⁸ the International Conservation Center (an unaccredited facility planned for development), and three AZA-accredited zoos. While the application was subsequently withdrawn, it demonstrates the ongoing demand from both accredited and unaccredited U.S. zoos for wild-caught African elephants.

A circular report by Zimbabwe's Ministry of Environment, Water and Climate defended their 2015 action by stating, "there is over abundance of some populations in the Hwange-Matetsi. . . This is creating serious ecological, financial and socio-economic challenges to the Zimbabwe Park and Wildlife Management Authority. For instance, local overpopulation of elephants has resulted in competition between the elephants and other species in the parks."¹⁰⁹ Eswatini (formerly Swaziland) offered a nearly identical rationale to support its 2016 export to the United States. Any sanction of this theory (which is highly dubious) would encourage a growing trend of impoverished African nations cashing in on wildlife resources, contrary to ecologically sustainable conservation practices.

In 2020-2021 the Ministry of Environment Forestry and Tourism of Namibia auctioned off 57 live wild-caught elephants to the United Arab Emirates and private reserves in Namibia, despite global outrage from concerned stakeholders and elephant scientists. China has a long history of importing live wild-caught African elephants. In 2015, China imported 24 young elephants from Zimbabwe,¹¹⁰ captured from herds living in Hwange National Park. These elephants were sold for approximately \$40,000 each according to estimates from Zimbabwe's wildlife authority. In 2012 the CITES trade database recorded eight wild-caught elephant calves exported from Zimbabwe to China. Seven of the eight died far earlier than the species-typical life expectancy. The same CITES trade database showed that in 2011 China imported four wild-caught elephants from an unknown source.¹¹¹ These examples demonstrate the heightened international demand for wild-caught live elephants which must be taken into account by the Service when determining the impact of U.S. live elephant imports on species survival.

As all these examples illustrate, it is not a sound conservation strategy for the species to import elephants from their native continent into captivity in the U.S. and therefore it is necessary and advisable to completely prohibit the import of live African elephants into the United States. If the Service nevertheless moves forward with amending the permitting scheme for live elephant imports, we provide the following comments on the Service's proposed amendments to strengthen the special rule. If imports are to continue, they must be stringently regulated. The proposed rule improves upon the status quo in this respect, but should be further strengthened as detailed in our comments below.

¹⁰⁸ AZA, *AZA's statement on Pittsburgh Zoo & PPG Aquarium's decision to forfeit AZA accreditation*, Aug. 17, 2015, available at <https://www.aza.org/aza-news-releases/posts/azas-statement-on-pittsburgh-zoo--ppg-aquariums-decision-to-forfeit-aza-accreditation-?locale=en>.

¹⁰⁹ Circular to all Zimbabwean Foreign Missions issued by the Ministry of Environment, Water and Climate, January 20, 2015.

¹¹⁰ <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/zimbabwe/11719546/Zimbabwes-young-elephants-sold-to-China.html>

¹¹¹ The CITES database listed the exporting country as "xx" which means unknown in the country and territory codes under CITES.

A. The Service Must Strictly Prohibit the Import of Live Wild Elephants

We urge the Service to prohibit the import of live wild elephants due to a lack of compliance with enhancement standards under the ESA and due to critical animal welfare violations in the capture, transport and keeping of wild-caught live elephants.

(1) Taking Elephants from the Wild for Placement in Captivity is not Appropriate or Acceptable

Taking elephants from the wild for placement in captivity outside their ranges is not appropriate and should not be authorized under the final 4(d) rule. As noted above, CITES Resolution Conf. 11.20 (Rev. CoP18) states, in paragraph 1:

AGREES that where the term ‘appropriate and acceptable destinations’ appears in an annotation to the listing of *Loxodonta africana* in Appendix II of the Convention with reference to the trade in live elephants¹¹² taken from the wild, this term shall be defined to mean in situ conservation programmes or secure areas in the wild, within the species’ natural and historical range in Africa, except in exceptional circumstances where, in consultation with the Animals Committee, through its Chair with the support of the Secretariat, and in consultation with the IUCN elephant specialist group, it is considered that a transfer to ex-situ locations will provide demonstrable in-situ conservation benefits for African elephants, or in the case of temporary transfers in emergency situations

The U.S. supported the adoption of this language at CITES CoP18 and its continuance at CoP19.

Although this Resolution refers to those African elephant populations listed on Appendix II, the principle that the only appropriate and acceptable destinations for wild-caught elephants are in situ conservation programs or secure areas in the wild, within the species’ natural and historical range in Africa, clearly applies to African elephants in general, and not only those populations listed on Appendix II. Therefore, the Service should not allow imports of wild-caught African elephants to the United States.

(2) Captive Facilities are not “Suitably Equipped to House and Care for” Elephants

Well-established problems with keeping elephants in captivity make clear that captive facilities are categorically unsuitable to house and care for African elephants. We appreciate and support the Service’s proposed extension of the 50 C.F.R. § 17.32 special purpose permit requirement to all interstate commerce in live elephants, including transfer of elephants between facilities. However, for the reasons discussed below, captive facilities in the U.S. are not “suitably equipped to house and care for” African elephants, and thus the care and welfare factors necessary to issue a permit will never be met. 50 C.F.R. § 23.65.

¹¹² Excluding elephants that were in ex-situ locations at the time of the adoption of this Resolution at the 18th meeting of the Conference of the Parties.

Data regarding captive elephant health and mortality demonstrate that zoological facilities are not suitably equipped to house and care for elephants, nor can they maintain the animals in humane and healthful conditions. Even accounting for advances in recent years at some facilities housing elephants in some accredited institutions, captivity remains an impoverished environment for these animals who have complex physical and social needs. “Large-brained animals with complex cognitive capacities such as elephants . . . seem particularly prone to poor welfare in captive environments insofar as they do not have an adequately stimulating, natural environment.”¹¹³ A 2022 review assessing the potential neural impacts of impoverished, captive environments on elephants finds that the evidence reviewed regarding the effects of environmental impoverishment/enrichment on the brain, the neural consequences of stress on the brain, and the neural underpinnings of stereotypies support a substantive hypothesis that “captive elephants . . . sustain impoverishment-related neural deficient and dysregulation similar to what has been documented in other species.”¹¹⁴

In response to the 2019 import permit application submitted by the Pittsburgh Zoo, fifty-five global elephant specialists provided comments to FWS, arguing against the capture of African elephants for the purpose of captivity, finding that elephants:

adapt[] poorly to life in captive facilities. They have shorter lifespans in captivity than in wild populations and they breed poorly, if at all, in captivity. As a highly social, cognitive and intelligent animal, elephants require adequate space to express natural foraging behavior and to form natural, social groups of their own choosing, which zoos cannot provide.¹¹⁵

Free-living elephants have expansive home ranges that, while varying between sexes and across seasons, extend up to 10,000 km².¹¹⁶ In those habitats, elephants engage in a diversity of activities that allow them to meet their ecological, social, and reproductive needs.¹¹⁷ They are adapted, both physically and cognitively, for long-distance movement over diverse substrate while interacting with an ever-changing environment—“a complex network of relationships in

¹¹³ Jacobs, B., Rally, H., Doyle, C., O’Brien, L., Tennison, M., & Marino, L. (2022, p). Putative neural consequences of captivity for elephants and cetaceans. *Reviews in the Neurosciences*, 33(4), 439-465 (at 439).

¹¹⁴ Jacobs, B., Rally, H., Doyle, C., O’Brien, L., Tennison, M., & Marino, L. (2022). Putative neural consequences of captivity for elephants and cetaceans. *Reviews in the Neurosciences*, 33(4), 439-465 (at 441).

¹¹⁵ Open Letter by Elephant Specialists Re: Captive Elephants and Import of Wild Elephants and Captivity (Aug. 19, 2019), <https://blog.humanesociety.org/wp-content/uploads/2019/08/Letter-to-FWS-by-Elephant-Specialists-Re-Zim-calfimports-19-August-2019.pdf>.

¹¹⁶ Ngene, S., Okello, M. M., Mukeka, J., Muya, S., Njumbi, S., & Isiche, J. (2017). Home range sizes and space use of African elephants (*Loxodonta africana*) in the Southern Kenya and Northern Tanzania borderland landscape. *International Journal of Biodiversity and Conservation*, 9(1), 9-26.; Poole, J., & Granli, P. (2009). Mind and movement: Meeting the interests of elephants. *An elephant in the room: the science and well being of elephants in captivity*, (Forthman, DL, Kane, FL, Hancocks, D., and Waldau, PF eds.) Center for Animals and Public Policy, Cummings School of Veterinary Medicine, Tufts University (pp. 3-7).

¹¹⁷ Poole, J., & Granli, P. (2009). Mind and movement: Meeting the interests of elephants. *An elephant in the room: the science and well being of elephants in captivity*, (Forthman, DL, Kane, FL, Hancocks, D., and Waldau, PF eds.) Center for Animals and Public Policy, Cummings School of Veterinary Medicine, Tufts University (p. 4).

time and space.”¹¹⁸ In contrast, in North America, the AZA has previously recommended a minimum of 500m² of outdoor space per elephant.¹¹⁹ According to Michael Schmidt, DVM, who spent 25 years as a zoo veterinarian specializing in the care and breeding of elephants in zoos and later expanded his efforts to include timber elephants in Asia, “zoo elephant exhibit spaces are dangerously inadequate in size to meet the needs of the elephants.”¹²⁰ Small enclosure sizes and static environments prevent elephants from engaging in natural behaviors such as exploring and freely interacting with and learning from a large network of conspecifics, while a limited zoo diet replaces natural foraging.¹²¹

The well-documented consequences caused by captive living conditions include: deadly foot disorders, premature arthritis, tusk injury, traumatic injury from fighting with other elephants, traumatic injury from barriers/doors, bullhook wounds, chain sores, nutritional problems, poor physical fitness, reproductive abnormalities, behavioral problems, infanticide, stereotypic behaviors, tuberculosis, and elephant endotheliotropic herpesviruses in North America.¹²² Fifty percent of captive elephants suffer from foot-related conditions and arthritis—the leading causes of euthanasia in captive elephants in the U.S.¹²³ Major contributors to elephant foot problems are a lack of activity, long hours standing on hard surfaces, and contamination resulting from standing in their own feces and urine.¹²⁴ A survey of 54 institutions revealed that 68 percent of elephants get less than 30 minutes of exercise daily.¹²⁵

Joyce Poole, Ph.D., former Research Director of the Amboseli Elephant Research Project in Kenya and a Director of Elephant Voices, who has studied elephant behavior and communication for more than 30 years, offers a contrast of life in the wild versus captivity:

¹¹⁸ Jacobs, B., Rally, H., Doyle, C., O’Brien, L., Tennison, M., & Marino, L. (2022). Putative neural consequences of captivity for elephants and cetaceans. *Reviews in the Neurosciences*, 33(4), 439-465; Poole, J., & Granli, P. (2009). Mind and movement: Meeting the interests of elephants. *An elephant in the room: the science and well being of elephants in captivity*, (Forthman, DL, Kane, FL, Hancocks, D., and Waldau, PF eds.) Center for Animals and Public Policy, Cummings School of Veterinary Medicine, Tufts University (pp. 2-21).

¹¹⁹ AZA, *AZA Standards for Elephant Management and Care*, Revised Apr. 2012, available at https://assets.speakcdn.com/assets/2332/aza_standards_for_elephant_management_and_care.pdf.

¹²⁰ Michael Schmidt, D.V.M., *Jumbo Ghosts: The Dangerous Life of Elephants in the Zoo* (Philadelphia: Xlibris Corporation, 2001) p 74.

¹²¹ Jacobs, B., Rally, H., Doyle, C., O’Brien, L., Tennison, M., & Marino, L. (2022). Putative neural consequences of captivity for elephants and cetaceans. *Reviews in the Neurosciences*, 33(4), 439-465.

¹²² Jacobs, B., Rally, H., Doyle, C., O’Brien, L., Tennison, M., & Marino, L. (2022). Putative neural consequences of captivity for elephants and cetaceans. *Reviews in the Neurosciences*, 33(4), 439-465; Poole, J., & Granli, P. (2009). Mind and movement: Meeting the interests of elephants. *An elephant in the room: the science and well being of elephants in captivity*, (Forthman, DL, Kane, FL, Hancocks, D., and Waldau, PF eds.) Center for Animals and Public Policy, Cummings School of Veterinary Medicine, Tufts University (p. 3).

¹²³ Blair Csuti et al., *Introduction, The Elephant’s Foot*, Ames, Iowa: Iowa State University Press, 2001, at vii; Susan K. Mikota, D.V.M., et al., “*The Musculoskeletal System*,” *Medical Management of the Elephant*, West Bloomfield, Mich.: Indira Publishing House, 1994, at 137.

¹²⁴ Csuti et al. (2001); Poole, J., & Granli, P. (2009). Mind and movement: Meeting the interests of elephants. *An elephant in the room: the science and well-being of elephants in captivity*, (Forthman, DL, Kane, FL, Hancocks, D., and Waldau, PF eds.) Center for Animals and Public Policy, Cummings School of Veterinary Medicine, Tufts University (pp. 5-6).

¹²⁵ Norie Dimeo-Ediger, *Results of a Survey of Elephant Foot Condition and Care in North America*, *The Elephant’s Foot*, ed. Blair Csuti et al. (Ames, Iowa: Iowa State University Press, 2001), p. 153.

In Amboseli, where elephants grow up in a nurturing social environment, have the freedom to move, and autonomy over their own lives, elephants do not develop foot or weight problems (zero cases out of 2,200 elephants); they are not seen swaying rhythmically back and forth or showing other neurotic behavior (zero incidents in over 34,000 sightings of groups containing 1-550 elephants); they do not have difficulties conceiving (only two cases of infertility out of 558 females over 10 years old); they do not reject or kill their own infants (zero cases out > 1500 births) and they do not attack and kill the individuals with whom they are bonded (zero cases).¹²⁶

These stark contrasts are evident in the high mortality rates of captive elephants in U.S. zoos. Records compiled from news reports and AZA's African Elephant Studbook demonstrate a 41% mortality rate of elephants born at current and former AZA zoos since 2000. The same records confirm there are still nearly two deaths for every birth, a sobering statistic brought to light in a 2012 *Seattle Times* in-depth investigative report, "Elephants are dying out in America's zoos."¹²⁷

Moreover, U.S. climates are inappropriate for African elephants. For example, the climates in Omaha, Nebraska, and Wichita, Kansas—where previous wild-caught African elephants were placed—are not appropriate for elephants as there are five months per year when the average temperature is below 60 degrees. Elephants there are forced to spend approximately half of the year indoors on hard surfaces without adequate exercise in the winter and spring. In Chicago, Illinois, a grossly-inappropriate climate for elephants was likely a contributing factor in the deaths of 55-year-old Peaches, 35-year-old Wankie, and 35-year-old Tatima, the three African elephants sent to Chicago by San Diego Wild Animal Park in order to make room for the Swaziland elephants captured in 2003. Within 2½ years all three elephants were dead. Similarly, climate was a significant reason for the Detroit Zoo's decision to send their elephants to a sanctuary.¹²⁸

Since 1991, nearly half of the 27 U.S. zoos that have closed, or announced plans to close, their elephant exhibits are located in states with colder weather that is especially hard on elephants. Additionally, the Toronto Zoo closed its elephant exhibit in 2013 and sent its elephants to a California sanctuary. The public supports these changes and in some cases the community has demanded that its local zoo relocate its elephants to sanctuaries that provide elephants with more space and companionship.

B. If a Ban is Not Imposed, the Proposed Rule Should be Strengthened

While a ban on the import of all wild-caught live African elephants is the most effective conservation action available, we nevertheless provide comment on the Service's proposed amendments to strengthen the proposed rule with respect to live elephant imports.

¹²⁶ Joyce Poole, Ph.D., Testimony, Chicago City Council Parks and Recreation Committee Briefing, August 25, 2005.

¹²⁷ Berens, Michael, *Elephants are dying out in America's Zoos*, The Seattle Times, Dec. 1, 2012, available at https://special.seattletimes.com/o/html/nationworld/2019809167_elephants02m.html.

¹²⁸ "Detroit Zoo Intends to Send Elephants to Elephant Sanctuary," PRNewswire, May 20, 2004.

First, the Service proposes requirements for enhancement findings for live elephant imports under subparagraphs (10)(ii)(A-E and H) of the proposed rule that are identical to the proposed requirements in subparagraphs (ii)(A-E and H) for sport-hunted trophies. We urge the Service to ensure these requirements are applied to both live and trophy imports of African elephants, and that the Service strengthen these proposals by adopting the additional criteria and suggestions recommended in our comments on trophy imports in section III(B) above.

We offer the following comments on elements of the proposed rule specific to live elephant imports:

(1) Comments on Proposed Legal Acquisition and Family Unit Requirement

The proposed rule includes a requirement that “*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;*”

With respect to the legal acquisition component of this provision, we cross-reference our comment in section III(B)(6) above. In addition, we urge the Service to require disclosure of information regarding any elephants who are harmed during a capture operation, including injuries or deaths to both captured elephants and those who remain *in situ* but who were harmed in the course of the capture operation.

With respect to the family unit component of this provision, we urge the Service to adopt stronger language to ensure compliance. While the Service has previously determined that maintaining captive elephants in “family groups” would likely improve the reproductive success of captive elephants, the Proposed Rule does not adequately provide for oversight and guidance on the proposed requirement that “family units were kept intact to the maximum extent practicable.” We, therefore, urge the Service to provide specificity regarding the information required to demonstrate relatedness of elephants taken by range states. Such information might include genetic documentation or recorded observational population data. We also urge the service to provide clarity by better defining the term “to the maximum extent practicable.” This is critically important given the importance of family groups for reproduction, social learning, and survival.

The import of live African elephants to the United States goes against all modern elephant management principles (as per the National Norms and Standards for the Management of Elephants in South Africa, 2008 (hereinafter, Norms and Standards)). South Africa’s Norms and Standards prohibit capture of live elephants, except in narrow circumstance not including export to zoos, because of the negative trauma associated with it.

South Africa’s Norms and Standards states that elephants must be managed in a way that “(vi) is ethical and humane and (vii) recognizes their sentient nature, highly organized social structure and ability to communicate” (paragraph 2). The Norms and Standards’ “Guiding Principles” (paragraph 3) state, “Any person executing a function or exercising a power or carrying out an activity that relates, directly or indirectly, to an elephant must do so with regard to the following further principles: elephants are intelligent, have strong family bonds and operate within highly

socialized groups and unnecessary disruption of these groups by human intervention should be minimized,” “management interventions must, wherever practicable, be based on scientific knowledge or management experience regarding elephant populations and must (i) take into account the social structure of elephants; (ii) be based on measures to avoid stress and disturbance to elephants,” and “where lethal measures are necessary to manage an elephant or group of elephants or to manage the size of elephant populations, these should be undertaken with caution and after all other alternatives have been considered.”

Regarding these family bonds, the Norms and Standards define a “cow-calf group” as “a cohesive group of females and their calves led by the matriarch or another older female, which associate regularly and closely with one another over time” (paragraph 1) and that “[a]n elephant may only be translocated if it is—(a) part of a cow-calf group, and (i) the entire cow-calf group is translocated; and (ii) the calves are more than 2 months old” (paragraph 12). Paragraph 14 states, “[a]n elephant population in the wild must be managed with proper regard for (a) the highly social nature of elephants; (b) the organised matriarchal system in which they normally operate; (c) the division of the population into different herds; (d) the division of a herd into cow-calf groups each under a matriarch; (e) the existence of adult bulls in a herd outside of the cow-calf groups; and (f) the role of adult bulls in dominating and controlling juvenile males.”

As evidenced by previous exports, cow-calf groups have been severely disrupted through captures for export, causing significant harm to both the captured animals and those who remain. In the wild, females remain in their natal herds for life and removal disrupts the complex family and social network that is critical to reproduction and survival. For captured and translocated elephants, it is well-known that capture from the wild for a life in captivity compromises their welfare.¹²⁹ From what is known of previous cases of cull orphans placed into new “family groups,” no made-up group can replace the bond of related females. The act of removing these individuals from their families and placing them in artificially-produced herds conflicts with the best available science regarding elephant management. A zoo setting will not be in any way analogous to their own families, from which they have been removed. As Bradshaw and Lindner state, “[i]mportantly, elephants in most captive situations lack the cohesive communities in which they live and interact naturally which help them cope with, and recover from, trauma” and “[s]uch trauma and deprivation, made particularly vulnerable because of captive animals’ dependence on humans for survival, leaves indelible psychophysiological scars. Trauma actually changes how the brain develops and functions.”¹³⁰

(2) Comments on Proposed Requirement Regarding Import of Pregnant African Elephants

The proposed rule includes a requirement that “*Regulating authorities can ensure that no live African elephants to be imported are pregnant.*”

¹²⁹ <http://www.elephantvoices.org/phocadownload/FAQs-Swaziland-elephant-export-publ28Oct2015.pdf>; <http://allanschore.com/pdf/SchoreBradshawNature-elephantbreakdown.pdf>; Shannon, G., Slotow, R., Durant, S. M., Sayialel, K. N., Poole, J., Moss, C., & McComb, K. (2013). Effects of social disruption in elephants persist decades after culling. *Frontiers in Zoology*, 10(1), 1-11.

¹³⁰ Bradshaw, G.A. & Lindner, Lorin, *Post-Traumatic Stress and Elephants in Captivity*, https://nanopdf.com/download/post-traumatic-stress-and-elephants-in-captivity_pdf.

We support this requirement and urge the Service to ensure strict compliance with the rule. CITES guidelines particularly disavow the transportation of animals in advanced stage of pregnancy. CITES guidelines specifically for transporting elephants state that “[a]nimals obviously in advanced stages of pregnancy . . . should not be shipped.” The International Air Transport Association’s (IATA) guidelines for the transport of animals by air state generally that “animals in late pregnancy should not be transported by air.” Additionally, CITES guidelines state that “[a]n animal that is injured or that has physiological weaknesses or pathological problems should not be considered fit for transport especially if . . . it is a pregnant female for whom 90% or more of the expected gestation period has already passed . . .” FWS’ regulations implementing CITES state, “[a] mammal in the last third trimester of its pregnancy, if this is detectable using professionally accepted standards, shall not be accepted for transport into the United States . . .” 50 C.F.R. § 14.105; *see also id.* § 23.3 (“if you are importing . . . wildlife . . . you must comply with the regulations in part 14 of this subchapter”).

Past imports of live wild-caught African elephants into the United States have demonstrated the insufficiency with which this standard is enforced. As detailed above, one of the African elephants imported from Swaziland to the Dallas Zoo in 2016 was transported while approximately 20 months pregnant—an advanced stage of a 22-month gestation period. According to FWS’ Environmental Assessment, the elephants were “thoroughly screened and tested by veterinarians in Swaziland” prior to the import. However, the exporting party, Big Game Parks, a private organization authorized to manage three protected areas in Swaziland, failed to or was unable to identify the advanced pregnancy. As HSUS and HSI noted in our comments regarding the 2015 draft Environmental Assessment, “the fact that the elephants had not been trained using operant conditioning calls into question the capacity of veterinarians to have actually performed the necessary examination” of the animals.¹³¹

In addition, it is unimaginable that veterinarians at the Dallas Zoo had no involvement with such screening, whether physically or by consulting with veterinarians in Swaziland, prior to shipping the elephant 9,000 miles. Indeed, Dallas Zoo even acknowledged that it had “some indications of a possible pregnancy in Swaziland” but stated that hormone tests were allegedly inconclusive.¹³² Dallas Zoo veterinarians should have been directly involved in the examination of the elephants prior to (and during) transport. And any credible wildlife veterinarian must be able to visually identify as pregnant an elephant who is two months away from giving birth (given the enormity of these animals and the size of the elephant fetus in utero). It is also unclear why an ultrasound was not performed while the elephant was sedated for transport. If the hormone tests were inconclusive and an ultrasound not performed, Dallas Zoo should have exercised the precautionary principle and not transported this female until it could be confirmed that she was not pregnant.

¹³¹ HSUS & HSI, Comments re: Draft Environmental Assessment of and Import Permit for 18 African Elephants from Swaziland (Nov, 23, 2015) (“Comments”), *available at* <https://www.regulations.gov/#!documentDetail;D=FWS-HQ-IA-2015-0157-3312>.

¹³² The Dallas Zoo, Q&A: Dallas Zoo welcomes precious elephant calf (May 24, 2016), <http://zoohoo.dallaszoo.com/2016/05/24/qa-dallas-zoo-welcomes-precious-elephant-calf/>.

Cases such as this, where regulating authorities or importing parties know or should have known that an elephant was in an advanced stage of pregnancy, raise significant concerns regarding the compliance with and enforcement of this standard. Therefore, it is critical that regulating authorities and importing parties are required to secure veterinarians with species-specific expertise to allow them to perform the necessary examination and make the required determination. Regulating authorities and importing parties must provide explicit evidence that no live elephants to be imported are pregnant.

(3) Comments on Live Elephant Imports Based on *in situ* Conservation Considerations and Transportation for Reintroduction or to Augment Existing Wild Populations

The proposed rule includes a requirement that “*The elephants have been considered for in situ conservation programs, and consideration has been given to moving elephants to augment extant wild populations or reintroduce to extirpated ranges.*”

We agree with and reiterate the comments submitted to the Service in relation to the proposed rule by 18 elephant conservation experts.¹³³ Under no circumstances can the Service justify the capture and captivity of wild African elephants on *in situ* conservation grounds, a position supported by the IUCN-SSC African Elephant Specialist Group originally in 2003 and again at the recent meeting of the Specialist Group in 2019:

Believing there to be no direct benefit for *in situ* conservation of African elephants, the African Elephant Specialist Group of the IUCN Species Survival Commission does not endorse the removal of African elephants from the wild for any captive use.¹³⁴

The authors of the comment write:

We unreservedly oppose the import of live elephants from anywhere in the continent of Africa for any purposes to US zoos or other captive destinations; simple rule changes governing the conditions of captivity will not suffice....

A trend towards a vision of the *in situ* conservation of threatened species has been grafted onto the original guiding principles of zoos only relatively recently. A small proportion of the zoo industry members has taken this mission to heart, while retaining the public entertainment function, but the latter remains the primary activity of zoos and animal attractions. At the same time, a number of the zoological societies that were strongly linked to animal collections in the early days have become independent conservation NGOs in their own right, with separate, distinct fund-raising systems and *in situ* research and conservation programmes that have no need for direct connection to the animal exhibits, apart from a nostalgic, historical association. The zoos and collections themselves remain focussed on

¹³³ Comment of *in situ* African elephant experts Patricia Awori *et al.* Re: Revisions to the Endangered Species Act's Section 4(d) Rule for the African Elephant.

¹³⁴ *Id.*

keeping animals in the captive environment, despite the partial broadening of vision by some members of the industry....

There is most definitely not a continuum across *ex situ* to *in situ* conditions; the necessarily hygienic yet barren zoo conditions are fundamentally different from wild nature, even when the latter is substantially altered by human pressures. Whereas elephants in their natural forest and savanna habitats are allies in the fight against climate change, enhancing their ecosystems' ability to sequester and store carbon, once in a zoo they are essentially unemployed. Moreover, zoos are a source of greenhouse gas emissions through their manufactured concrete and steel buildings, energy use for heating and lighting structures, transporting food in and waste out, water purification, etc.). ... it reduces our chance of halting the twin crises of climate change and biodiversity loss.¹³⁵

We urge the Service to prohibit the import of live elephants as there are no grounds for import based on *in situ* conservation nor “acceptable standards that would ensure that zoo and elephant collection facilities are ‘suitably equipped’ to hold these cognitively and socially complex animals.”¹³⁶ (*See also* Elephant Specialists Alliance International’s “Statement on Exhibition of Elephants in Captivity.”¹³⁷)

Should the Service continue to allow live African elephant capture and importation, we urge the Service to strengthen this criterion by clearly identifying the evidence range countries must provide to demonstrate substantive and meaningful activities undertaken to achieve the alternative remedies of *in situ* conservation, augmentation of other wild populations, or reintroduction. The Service must make clear that mere assertions that range states considered these alternatives or the provision of unsubstantiated statements regarding unviability of the alternatives are insufficient.

Further, where applicable, evidence of *in situ* conservation efforts must include utilization of humane population control programs, such as immunocontraception. Unfortunately, many range states do not use modern scientific techniques such as immunocontraception to manage population growth despite the existence of this humane, practical, science-based alternative.

The 2003 and 2016 live elephant imports from Swaziland are illustrative. BGP’s 2014 Conservation and Management Plan (CMP) (included in the CITES materials as part of the 2015 application) stated that in 2003 11 elephants were “translocated” to San Diego and Lowry Park zoos but then stated—as though this result were unexpected—that “the elephants [in Swaziland] continued to breed every year.” The CMP also stated that all adult males in the Park and Reserve were vasectomized in 2009, claiming success because the dominant bulls continued to mate without producing calves. However, this was obviously not the case since the population

¹³⁵ Comment of *in situ* African elephant experts Patricia Awori *et al.* Re: Revisions to the Endangered Species Act's Section 4(d) Rule for the African Elephant.

¹³⁶ Comment of *in situ* African elephant experts Patricia Awori *et al.* Re: Revisions to the Endangered Species Act's Section 4(d) Rule for the African Elephant.

¹³⁷ Elephant Specialists Alliance International, *Statement on Exhibition of Elephants in Captivity*, https://elephant-specialists.org/wp-content/uploads/2022/07/ESAI_Statement-on-Exhibition-of-Elephants-in-Captivity.pdf.

continued to grow. The fact that vasectomizing was not continued with males born into the population is an indicator of the true goal of BGP's elephant management: to continue to produce young elephants so they can be captured and exported to zoos. Indeed, although the CMP's stated objective was zero growth, the plan also acknowledged that younger bulls, when mature, will breed creating a "breeding gap of 5-6 years." Permitting young bulls to breed was not a way to achieve the CMP's stated zero-growth goal; it was a way to keep producing elephants that could be captured and exported in exchange for "voluntary" financial support. In fact, the reasons given for capture and export in 2015 were identical to the reasoning provided in 2003. If the Service continues to permit the import of wild-caught live elephants despite the failure of some range countries to utilize available, science-based, humane population control measures, elephant managers in range countries will be under no pressure to implement these measures (and will have a financial incentive to continue the status quo).

V. COMMENTS ON OTHER AFRICAN ELEPHANT IMPORTS

The current special rule for African elephants states, "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 have been met." 50 C.F.R. § 17.40(e)(2). This means that the Service is not requiring permits for this trade or making enhancement findings for import, export, and other activities with such parts and products. While the proposed rule commendably corrects a similar regulatory gap by requiring permits for the import of *live* elephants, it leaves in place the existing lack of regulation with respect to elephant parts and products. We urge the Service to regulate -- i.e., require permits for this trade in order to ensure that the obligation to conserve threatened species in Section 4(d) of the ESA is met.

The United States continues to be a major importer of such elephant parts and products. Between 2010 and 2019, this included small leather products (38,926 specimens / 37,233 for commercial purposes), skins and skin pieces (30,882 specimens / 29,039 for commercial purposes), and ivory carvings (13,119 specimens / 5,329 for commercial purposes).¹³⁸ United States' imports of these parts and products over the period studied far exceed those of other countries (approximate 43% of global total / 44% of global commercial total).¹³⁹

The Service asserts that regulating such activity is not necessary because "there is no information to indicate that...commercial use of elephant parts and products other than ivory has had any effect on the rates or patterns of illegal killing of elephants and the illegal trade in ivory."¹⁴⁰ Even if ivory is the primary motivation for elephant poaching, regulating the international and

¹³⁸ CITES Trade Database download on March 13, 2023: comparative tabulations filtered for *Loxodonta africana*, US importer, number of specimens, all sources, all purposes/commercial purposes. Totals based on importer reported quantities.

¹³⁹ Same parameters as above. All purposes: global import total was 266,336 specimens; US import total was 114,984 specimens. Commercial purposes: global import total was 185,886 specimens; US import total was 81,084 specimens.

¹⁴⁰ 80 Fed. Reg. at 45161.

domestic trade in other elephant parts will ensure that the new restrictions on the ivory market do not have the impact of incentivizing killing elephants for other valuable parts. Further, the Service ignores the broader negative impact that commercialization of wildlife parts has on public perception of the need to conserve imperiled species. Therefore, we strongly urge the Service to regulate interstate and foreign commerce in all African elephant parts and products to provide for the conservation of the species, as required by law.

VI. THE SERVICE SHOULD RECOGNIZE THE TWO SPECIES OF ELEPHANTS IN AFRICA AND INCLUDE PERMITTING REQUIREMENTS FOR FOREST ELEPHANTS AND FOREST ELEPHANT SPECIMENS

A. The Service Should Issue a Direct Rule Recognizing Savanna and Forest Elephants as Two Separate Species

The 2015 Two Species Petition seeks to have the Service recognize the two species of elephants in Africa. We ask that the Service to do so now, through a direct final rule, and ensure the final 4(d) rule addresses both species and offers forest elephants increased protections given their critically endangered status.

The Center's 2015 Two Species Petition included the then available science on the need to recognize that forest elephants (*L. cyclotis*) and savannah elephants (*L. africana*) are two separate species. The Petition and the Center's 90-day finding comments cite studies showing that rare hybridization events between forest and savannah elephants are likely anthropogenic and consistent with treating these genetically distinct populations as separate species.¹⁴¹

International scientific authorities have since converged around this consensus. In 2021, the IUCN African Elephant Specialist Group (AfESG) recognized savanna elephants as an endangered species and forest elephants as a separate critically endangered species, reflecting "the consensus that has emerged among experts following new research into the genetics of

¹⁴¹ These studies include: Roca, A. L., Georgiadis, N., Pecon-Slattey, J., & O'Brien, S. J. (2001). Genetic evidence for two species of elephant in Africa. *Science*, 293(5534), 1473-1477; Grubb, P., Groves, C. P., Dudley, J. P., & Shoshani, J. (2000). Living African elephants belong to two species: *Loxodonta africana* (Blumenbach, 1797) and *Loxodonta cyclotis* (Matschie, 1900). *Elephant*, 2(4), 1-4; Comstock, K. E., Georgiadis, N., Pecon-Slattey, J., Roca, A. L., Ostrander, E. A., O'Brien, S. J., & Wasser, S. K. (2002). Patterns of molecular genetic variation among African elephant populations. *Molecular Ecology*, 11(12), 2489-2498; Roca, A. L., Georgiadis, N., & O'Brien, S. J. (2007). Cyto-nuclear genomic dissociation and the African elephant species question. *Quaternary International*, 169, 4-16; Roca, A. L., Georgiadis, N., & O'Brien, S. J. (2005). Cytonuclear genomic dissociation in African elephant species. *Nature genetics*, 37(1), 96-100; Rohland, N., Reich, D., Mallick, S., Meyer, M., Green, R. E., Georgiadis, N. J., ... & Hofreiter, M. (2010). Genomic DNA sequences from mastodon and woolly mammoth reveal deep speciation of forest and savanna elephants. *PLoS biology*, 8(12), e1000564; Ishida, Y., Oleksyk, T. K., Georgiadis, N. J., David, V. A., Zhao, K., Stephens, R. M., ... & Roca, A. L. (2011). Reconciling apparent conflicts between mitochondrial and nuclear phylogenies in African elephants. *PLoS one*, 6(6), e20642; Maisels, F., Strindberg, S., Blake, S., Wittemyer, G., Hart, J., Williamson, E. A., ... & Warren, Y. (2013). Devastating decline of forest elephants in Central Africa. *PLoS one*, 8(3), e59469; Mondol, S., Moltke, I., Hart, J., Keigwin, M., Brown, L., Stephens, M., & Wasser, S. K. (2015). New evidence for hybrid zones of forest and savanna elephants in Central and West Africa. *Molecular Ecology*, 24(24), 6134-6147.

elephant populations.”¹⁴² Their assessments note that the African forest and savanna elephant species began diverging six million years ago, were first formally recognized in 2005, are supported by new genetic research, and undergo limited hybridization—“evident at only 14 of the more than 100 localities recently examined across the vast forest-savanna ecotone.”¹⁴³ The Service has previously relied upon on IUCN species specialist groups’ taxonomic assessments.¹⁴⁴

More recent science continues to verify that African forest and savanna elephants are best treated as separate species.¹⁴⁵ A 2018 analysis of elephant genome data found that forest elephants “comprise a lineage that is distinct from savanna elephants, confirming” that they “should be classified as distinct taxa.”¹⁴⁶ A 2022 machine learning analysis “confirm[ed] that six morphological criteria can be used to distinguish the species with more than 90% confidence.”¹⁴⁷ The Integrated Taxonomic Information System also recognizes forest and savannah elephants as distinct species.¹⁴⁸

We urge the Service to update African elephants’ taxonomic classification under the ESA using a direct final rule, requiring no public notice or comment period. As scientific understanding of phylogenetics improves, the Service occasionally updates the list of endangered and threatened wildlife through direct final rulemaking.¹⁴⁹ The Service can update species’ scientific names without notice or comment because modernizing its taxonomic nomenclature in as timely a manner as possible is noncontroversial, technical, and in the public interest.¹⁵⁰ Courts have

¹⁴² Press Release, IUCN, *African Elephant Species Now Endangered and Critically Endangered - IUCN Red List* (Mar. 25, 2021).

¹⁴³ Gobush, K.S., Edwards, C.T.T, Maisels, F., Wittemyer, G., Balfour, D. & Taylor, R.D. 2021. *Loxodonta cyclotis* (errata version published in 2021). *The IUCN Red List of Threatened Species* 2021: e.T181007989A204404464. <https://dx.doi.org/10.2305/IUCN.UK.2021-1.RLTS.T181007989A204404464.en>; Gobush, K.S., Edwards, C.T.T, Balfour, D., Wittemyer, G., Maisels, F. & Taylor, R.D. 2022. *Loxodonta africana* (amended version of 2021 assessment). *The IUCN Red List of Threatened Species* 2022: e.T181008073A223031019. <https://dx.doi.org/10.2305/IUCN.UK.2022-2.RLTS.T181008073A223031019.en>

¹⁴⁴ Taxonomical Update for Orangutan, 83 Fed. Reg. 2085, 2086 (Jan. 16, 2018) (to be codified at 50 C.F.R. pt. 17).

¹⁴⁵ Kim, H.J. and Wasser, S.K. 2019. Report for the IUCN African Elephant Specialist Group and U.S. Fish and Wildlife Service. University of Washington, Seattle, Washington. On file with IUCN and U.S. Fish and Wildlife Service.

¹⁴⁶ Palkopoulou, E., et al. 2018. A comprehensive genomic history of extinct and living elephants. *Proceedings of the National Academy of Sciences* 115(11): E2566–2574. DOI: 10.1073/pnas.1720554115.

¹⁴⁷ Bonnard, Cornette, R., Pichard, M., Asalu, E., & Krief, S. 2022. Phenotypical characterization of African savannah and forest elephants, with special emphasis on hybrids: the case of Kibale National Park, Uganda. *Oryx*, 1–8. <https://doi.org/10.1017/S0030605321001605>

¹⁴⁸ ITIS, *Loxodonta cyclotis* (Matschie, 1900), TSN 609784 (n.d.); ITIS, *Loxodonta africana* (Blumenbach, 1797), TSN 584939 (n.d.).

¹⁴⁹ See Orangutan Update, 83 Fed. Reg. 2085; Technical Amendments for Southeastern Mussels, Snails, and a Reptile, 87 Fed. Reg. 8960 (Feb. 17, 2022) (to be codified at 50 C.F.R. pt. 17) (changing several species’ taxonomic classifications).

¹⁵⁰ See 5 U.S.C.A. § 553 (notice and comment is not required “when the agency for good cause finds” it “impracticable, unnecessary, or contrary to the public interest”); Orangutan Update, 83 Fed. Reg. at 2086; Southeastern Species Amendments, 87 Fed. Reg. at 8961.

upheld direct final rules like these where agencies offered to withdraw them upon receipt of significant adverse comments or scientific information.¹⁵¹

The Service’s regulations support addressing this taxonomic issue. They instruct the agency to rely on standard taxonomic distinctions, its own biological expertise, and that of the relevant scientific community in determining whether a population is a species under the ESA.¹⁵² The Service “use[s] the most recently accepted scientific name” for a species and relies, “to the extent practicable, on the Integrated Taxonomic Information System (ITIS) to determine a species’ scientific name.”¹⁵³ Thus, both standard taxonomy and ITIS support recognizing the two species.

B. Forest Elephants Should Receive Additional Protections under the Final 4(d) Rule Given Their Critically Endangered Status

Recognizing forest elephants as a separate species will enable the Service to tailor the 4(d) rule to address the dire threats this species faces. The IUCN estimates that forest elephant populations have declined 60% more than savannah elephants in the last three generations and continue to be poached for body parts other than ivory such as skin, tails, bone, and hair.¹⁵⁴ By recognizing the species split, the Service can either ban trade in forest elephants and their specimens entirely or ensure any trade in forest elephants necessitates an ESA permit in the final 4(d) rule.

As forest elephants are Critically Endangered it is imperative that they receive greater protections under the 4(d) rule. In the absence of an import ban on forest elephants and related specimens, we urge the Service to at least ensure that any trade in forest elephants or related species requires an ESA permit.

VII. COMMENTS ON CITES NATIONAL LEGISLATION PROJECT PROVISION

The proposed 4(d) rule includes the provision that:

(11) CITES National Legislation Project and African elephants.
African elephants and their parts and products may not be imported into the United States under the exceptions for import provided in Sec. 17.32 or paragraphs (e)(2), (e)(6), or (e)(10) of this section except when all trade in the specimen has been and is accompanied by a valid CITES document issued by the

¹⁵¹ See *Milice v. Consumer Prod. Safety Comm'n*, 2 F.4th 994, 1000 (D.C. Cir. 2021); *Sierra Club v. U.S. E.P.A.*, 99 F.3d 1551, 1554 (10th Cir. 1996) (“[a] direct final rule becomes effective without further administrative action, unless adverse comments are received within the time limit specified”).

¹⁵² 50 C.F.R. § 424.11(a).

¹⁵³ 50 C.F.R. § 17.11(c).

¹⁵⁴ Gobush, K.S., Edwards, C.T.T., Maisels, F., Wittemyer, G., Balfour, D. & Taylor, R.D. 2021. *Loxodonta cyclotis* (errata version published in 2021). *The IUCN Red List of Threatened Species* 2021: e.T181007989A204404464. <https://dx.doi.org/10.2305/IUCN.UK.2021-1.RLTS.T181007989A204404464.en>; Gobush, K.S., Edwards, C.T.T., Balfour, D., Wittemyer, G., Maisels, F. & Taylor, R.D. 2022. *Loxodonta africana* (amended version of 2021 assessment). *The IUCN Red List of Threatened Species* 2022: e.T181008073A223031019. <https://dx.doi.org/10.2305/IUCN.UK.2022-2.RLTS.T181008073A223031019.en>

Management Authority of a Party with a CITES Category One designation under the CITES National Legislation Project (see Sec. 23.7 of this chapter, <http://www.cites.org>).

87 Fed. Reg. At 68,994-995. The CITES National Legislation Project is a unique and valuable project to ensure that Parties to CITES have legislation that comports with the convention's requirements.¹⁵⁵ While the system is designed to both incentivize compliance (as well as punish noncompliance) additional leverage such as proposed here -- i.e., access to the valuable U.S. market especially for the trophy trade -- is a sound way to prompt CITES compliance for the benefit of elephants and many other species.

Given that the ESA is the United States' implementing law for CITES, it is appropriate to incorporate this requirement into a 4(d) rule for a threatened species. One purpose of the ESA is to carry out the United States' pledge "to conserve to the extent practicable the various species of . . . wildlife . . . facing extinction, pursuant to . . . the Convention on International Trade in Endangered Species." 16 U.S.C. § 1531(a)(4), (4)(f). Additionally, the Service "shall encourage":

(1) Foreign countries to provide for the conservation of fish or wildlife and plants including endangered species and threatened species listed pursuant to section 1533 of this title;

(3) Foreign persons who directly or indirectly take fish and wildlife or plants in foreign countries or on the high seas for importation into the United States for commercial or other purposes to develop and carry out wish such assistance as [the Service] may provide, conservation practices designed to enhance such fish or wildlife or plants and their habitat.

16 U.S.C. § 1537(b). Coupled with the agency's broad mandate from Section 4(d) of the Act to conserve threatened species, ensuring that importing countries have adequate CITES' compliant legislation is a solid step toward to meeting the Service's ESA obligations as well as helping ensure that national legislation in exporting countries meets CITES requirements.

Of course, paper laws are one thing but their enforcement and implementation are another. Thus, it is crucial to maintain the CITES national legislation requirement alongside meaningful enforcement of the proposed requirements that exporting countries: "have the legal and practical capacity to manage" elephant conservation and "follow the rule of law."

VIII. THE SERVICE HAS THE STATUTORY AUTHORITY TO REQUIRE ESA PERMITS FOR ELEPHANTS FROM SOUTH AFRICA, NAMIBIA, BOTSWANA, AND ZIMBABWE

Section 9(c)(2) of the ESA does not foreclose application of the proposed 4(d) rule to the elephants listed as threatened and on Appendix II of CITES in Botswana, Namibia, South Africa,

¹⁵⁵<https://www.chathamhouse.org/sites/default/files/public/Research/Energy,%20Environment%20and%20Development/bp0904.pdf>

and Zimbabwe. One goal of the ESA is species' recovery and the Service's proposed action comports with that goal. Moreover, the ESA serves in part as implementing legislation for CITES. 16 U.S.C. § 1538; Resolution Conf. 8.4 (Rev. CoP15) (urging parties to "adopt[] appropriate measures for effective implementation of the Convention"). The Convention itself is clear that:

1. The provisions of the present Convention shall in no way affect the right of Parties to adopt:
 - (a) stricter domestic measures regarding the conditions for trade, taking, possession or transport of specimens of species included in Appendices I, II and III, or the complete prohibition thereof; or
 - (b) domestic measures restricting or prohibiting trade, taking, possession or transport of species not included in Appendix I, II or III.

CITES, Article XIV. Additionally, the Service's regulations recognize CITES Parties' ability to craft more protective domestic measures. *See, e.g.*, 50 C.F.R. § 23.20(b). This language in the Convention and interpretations thereof helps clarify the meaning of the ESA, including Section 9(c)(2). *Hopson v. Kreps*, 622 F.2d 1375, 1380 (9th Cir. 1980) ("The issue in any legal action concerning a statute implementing a treaty is the intended meaning of the terms of the statute. The treaty has no independent significance in resolving such issues, but is relevant insofar as it may aid in the proper construction of the statute." (citing *United States v. Navarre*, 173 U.S. 77 (1899); *Botiller v. Dominguez*, 130 U.S. 238 (1889))).

Under the ESA, the Service may extend Section 9's prohibitions to a threatened species. Here, the Service is proposing to do just that – meaning that the importation of African elephants even where they are listed on Appendix II would be illegal and clarifying that the exemption in 50 C.F.R. § 17.8. is not applicable because an import permit is a necessary and advisable measure required for the conservation of the species. The Service has the statutory authority to do this under the ESA. Furthermore, the Service has issued similar 4(d) rules in the past for African elephants. Likewise, African lion, vicuña, and argali sheep are all examples of threatened species with more protective 4(d) rules. We encourage the Service to follow its past work and ensure the 4(d) rule applies to all elephants from Africa.

IX. THE SERVICE SHOULD PROVIDE PUBLIC NOTICE AND COMMENT ON ELEPHANT TROPHY AND LIVE IMPORTS

We urge the Service to provide for public notice and comment on permit applications for elephant trophy and live imports as well as the related enhancement findings for this trade. Section 10 of the ESA requires notice and the opportunity to comment on endangered species permits.¹⁵⁶ The same requirement should be extended to threatened species. Public participation in the permitting process gives the Service information it needs to fulfil its ESA duties of

¹⁵⁶ 16 U.S.C. § 1539(c).

ensuring that permits enhance the propagation or survival of affected species¹⁵⁷ and complying with CITES (e.g., by making non-detriment findings, not primarily commercial purpose findings, and for live elephants ensuring importing facilities are suitably equipped to house and care for elephants).¹⁵⁸

The notice and comment period helps the Service make innovative and informed regulatory decisions that advance species conservation while promoting the principles of transparency and open government that infuse CITES and the ESA. Given the need for the agency's permitting decisions to be based upon the best available science, notice and comment opportunities are crucial to ensuring FWS has the best information and permitted activities will aid in carrying out the ESA's conservation mandate. The current permitting regime for ESA-threatened species is heavily skewed toward the permittees with the public left in the dark about applications, enhancement findings, and permit issuance. We urge you to change this practice and involve the public in threatened species permitting to ensure a full and fair record is developed before permitting decisions are made.

In addition to providing notice and the opportunity to comment on permit applications pertaining to the trophy and live trade of elephants, we also urge the agency to revert to its country-wide finding practice and make enhancement (and non-detriment) findings through a public notice and comment process as suggested by the Court of Appeals for the D.C. Circuit.¹⁵⁹ Given this precedent and that Section 10(c) of the ESA mandates public notice, comment, and provision of records to the public for endangered species permits, we urge FWS to adopt notice and comment provisions for all elephant trophy and live permits and enhancement findings.

Specifically, we propose the following revisions (with new text underlined and in bold) to provide for notice and comment:

Revised Rule Language

50 C.F.R. § 17.40(e)(6)

- (i) African elephant sport-hunted trophies may be imported into the United States provided:
 - (A) The trophy was legally taken in an African elephant range country that declared an ivory export quota to the CITES Secretariat for the year in which the trophy animal was killed;
 - (B) A determination is made **through public notice and comment** that the killing of the trophy animal will enhance the survival of the species and the trophy is accompanied by a threatened species permit issued under § 17.32;
 - (C) **The Director provides public notice of the permit application in the Federal Register, offers the public an opportunity for comment, and provides public notice of whether the permit is granted or denied;**
 - (D) The trophy is legibly marked in accordance with 50 CFR part 23;
 - (E) The requirements in 50 CFR parts 13, 14, and 23 have been met; and

¹⁵⁷ 16 U.S.C. 1539(a)(1)(A).

¹⁵⁸ See 50 C.F.R. §§ 23.61-62, 23.65.

¹⁵⁹ *Safari Club Int'l v. Zinke*, 878 F.3d 316, 331-34 (D.C. Cir. 2017).

(F) No more than two African elephant sport-hunted trophies are imported by any hunter in a calendar year.

50 C.F.R. § 17.40(e)(10) Live African elephants.

(i) Live African elephants may be imported into the United States, provided the Service determines **through public notice and comment process** that the activity will enhance the survival of the species, 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), the animal is accompanied by a threatened species permit issued under § 17.32, and the requirements in 50 CFR parts 13, 14, and 23 and paragraph (e)(11) of this section have been met.

(A) The Director must provide public notice of the permit application in the Federal Register, offer the public an opportunity for comment, and provide public notice of whether the permit is granted or denied

At the very least, the Service should commit to on-line posting of the annual certifications received from range countries. This would enable importers to know whether the relevant certification has been provided for a given country and allow the public to offer additional information regarding the status of the species in each country.

As detailed above, we are concerned that outsourcing elements of these determinations to or even relying predominately upon information from permit applicants or range countries creates an inherent conflict of interest. Receiving and considering scientific evidence and data from a variety of scientists, individuals, and entities that not only provide deep issue expertise, but that are also not a party to the permit application, is critical to the Service in making sufficient determinations.

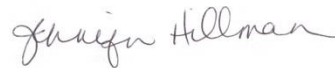
Conclusion

We applaud the Service for taking action to amend the existing special rule, which has failed to provide for the conservation of African elephants, as required by law. While we believe that this species meets the statutory definition of an Endangered species and therefore must be protected under the ESA's strict prohibitions on import, export, interstate commerce, and take, if the Service moves forward with finalizing the amended special rule, we strongly urge the Service to strengthen its proposal as provided herein.

Respectfully,



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