February 7, 2024

Addendum to Safari Club International's Comments on Proposed Rule, Revision to the Section 4(d) Rule for the African Elephant, 87 Fed. Reg. 68975 (Nov. 17, 2022)

In its March 2023 comment letter, Safari Club International ("SCI") explained why the CITES National Legislation Project ("NLP") restriction included in the proposed rule should not be adopted. In addition to the reasons within SCI's March 2023 letter, the proposed NLP restriction is arbitrary for several additional reasons.

First, the restriction would operate as a de facto ban for some range states based on a metric that was neither intended for this purpose nor has any relevance to an enhancement determination. The NLP designation is simply not a measure of how well each range state manages their elephants. For example, Botswana holds the world's most elephants. Despite currently being in Category Two of the NLP, the Service in 2023 granted import permits for sport-hunted elephants from Botswana. In so doing, the Service determined that hunting enhances the survival of the species in those areas. The same is true for elephants from Zambia. Despite being in Category Two, the Service found enhancement in 2023 and issued import permits.

In those 2023 findings, the Service determined the import and underlying hunting have conservation value for elephants, and the range county's management is sufficient to conserve the species. Application of the NLP restriction would arbitrarily contradict those findings—not based on conservation value or any change in the on-the-ground realities of elephant conservation in either country, but due to the NLP designations. That is neither rational nor efficient administration of the Endangered Species Act, and it is likely an arbitrary change of policy under the Administrative Procedure Act. If the Service thought that the NLP designation was relevant to whether hunting enhances the survival of the species, it could have factored that issue into existing enhancement determinations. But it did not (and should not) because it implicitly acknowledges that the NLP designation is not part of the criteria (in the C.F.R., the IUCN Guiding Principles, or any other metrics) relevant to the question of enhancement.

Second, the NLP restriction would effectively result in a threatened-listed species being more protected, or have more trade restrictions apply, than an endangered-listed species. For an endangered species, a sport-hunted trophy can be imported if the hunting enhances the survival of the species. In that instance, the Service would grant an enhancement of survival import permit. This currently occurs regularly for the import of well-managed species, such as endangered-listed bontebok from South Africa. Hypothetically, if South Africa were in NLP Category Two, the NLP designation would have no impact on the Service's review of import permit applications for bontebok trophies. However, under the same hypothetical, import of

threatened-listed elephants from South Africa would be prohibited, regardless of any positive enhancement determination.

It makes no sense for import of a threatened species to be more restricted than an endangered species. This was not Congress' intent, as shown in the clear language of Section 4(d) of the Endangered Species Act. Inclusion of the NLP restriction would effectively mean that if elephants were listed as endangered, fewer restrictions would apply: import would require only an enhancement of survival permit, regardless of NLP designation, and the Service would be unable to create such a de facto import ban. Congress surely did not intend for the Service to impose more stringent restrictions on threatened species than the prohibitions that Congress found necessary for endangered species.[1]

Finally, the de facto bans resulting from the NLP designation restriction are the kind of country-wide bans that the D.C. Circuit Court found problematic in *Safari Club International v. Zinke*, 878 F.3d 316 (D.C. Cir. 2017). The bans would provide no opportunity for hunters, outfitters, or range states to overcome the NLP designation with a demonstration of enhancement, no matter how robust. The Service must provide meaningful opportunity for hunters and range states to fulfill any requirements for import. It is arbitrary to ban imports from what otherwise might be the most beneficial hunting in southern Africa.

SCI recognizes the range states can achieve NLP Category One designation, at which point the NLP restriction in the proposed rule would not prohibit imports, but an ESA Section 4(d) rule is an inappropriate means to encouraging this outcome. It seems that the Service is using the rule as a stick to force sovereign nations to adopt legislation untethered to proper elephant management. This runs counter to the Service's obligations under the Convention on International Trade in Endangered Species, as well as the Endangered Species Act's direction to "encourage foreign conservation programs." The Service should work with range states, recognize the successes that the southern African countries have had in elephant conservation and reward them by alleviating trade restrictions, not by imposing additional arbitrary and onerous requirements and restrictions.

For these reasons, and those included in SCI's March 2023 comment letter, the NLP restriction must be removed from the final rule amending the Section 4(d) rule for the African Elephant.

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[1] Similarly, the annual certification requirement included in the proposed rule amounts to a more stringent requirement than what is required for importation of endangered listed species, like bontebok. Again, this runs counter to Congress' intent and should not be adopted in the final rule.