



NEW YORK
CITY BAR

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**REPORT ON LEGISLATION BY THE
ANIMAL LAW COMMITTEE**

A.8824-A

M. of A. Sweeney

AN ACT to amend the environmental conservation law, in relation to prohibiting the purchase and sale of ivory articles and rhinoceros horns and increasing the penalties for the illegal sale of such articles

S.7040

Sen. Avella

AN ACT to amend the environmental conservation law, in relation to prohibiting the purchase and sale of ivory articles and to increase the penalties for the illegal commercialization of fish, shellfish, crustacea and wildlife, including ivory articles

S.7194

Sen. Lanza

AN ACT to amend the environmental conservation law, in relation to prohibiting the purchase and sale of ivory articles and increasing the penalties for the illegal commercialization of wildlife, including ivory articles

THESE BILLS ARE APPROVED WITH RECOMMENDATIONS

A.8824-A, S.7040, and S.7194 would amend the Environmental Conservation Law (“ECL”) to prohibit the sale, purchase, trade, barter and distribution ivory articles, subject to certain exceptions. These proposed laws would complement existing federal and international efforts to deter and sanction the multi-billion dollar illegal wildlife trade in elephant ivory which is bringing this iconic species to the brink of extinction.¹ A.8824-A would also extend the prohibition to rhinoceros horns.

We support the proposed bills for the following reasons: (i) a comprehensive ivory ban in New York is necessary to save elephants from extinction; (ii) New York is a critical market for illegal ivory traffickers and thereby encourages elephant slaughter and ivory trafficking; (iii) existing New York law regarding ivory cannot be effectively enforced; (iv) existing criminal sanctions are inadequate and require enhancement; and (v) a New York State ivory ban is consistent with federal law. We also support the extension of the prohibition to rhinoceros horns inasmuch as this species is also in danger

¹ This report is limited to a discussion of ivory articles, although we note that the proposed bills also include increased penalties for the illegal commercialization of fish, shellfish, crustaceans and other wildlife and this Committee generally supports laws that protect and conserve endangered and threatened wildlife. Statements in support of the proposed bills apply equally to all of the bills, except where they are distinguished from one another herein.

of extinction and has been decimated through poaching and related trade.²

SUMMARY OF THE PROPOSED LAW

A. Ban on Commercial Trade in Raw and Worked Ivory and Mammoth Articles

In New York, ivory sale is regulated pursuant to ECL §11-0535 which is based in part on the inclusion of elephants on the federal endangered species list.³ A.8824-A and S.7040 would add a new section to ECL §11-0535-A which would prohibit the sale, offer for sale, purchase, trade, barter or distribution (other than to a legal beneficiary) of an ivory article, notwithstanding subdivision (2) of proposed §11-0535, which authorizes the New York State Department of Environmental Conservation (“NYSDEC”) to issue certain licenses or permits.⁴ A.8824-A and S.7194 include several exceptions to the ban for (a) bona fide antiques that contain a certain percentage of ivory by volume (20% and 5%, respectively) and (b) bona fide educational or scientific purposes. All of the bills permit distribution of the article to a legal beneficiary.

B. Penalties

Each version of the proposed legislation would increase monetary penalties and, in addition, S.7040 and S.7194 would also enhance penal sanctions under ECL §71-0924 when the violations of the law carry the potential of a large profit, thus adding to the existing misdemeanor and felony provisions.

JUSTIFICATION

A. A Comprehensive Ivory Ban in NYS is an Urgent Necessity to Save Elephants from Extinction.

As a result of the ivory trade, elephants in the wild are on the brink of extinction. As noted in the sponsors’ justification memos, it is estimated that 96 elephants are killed each day in Africa, translating into one elephant death every fifteen minutes and a 76% population decline since 2002. Experts expect the current levels of illegal trade in ivory to bring elephants to extinction within 20

²All five rhino species are in serious danger due to poaching. Africa’s black rhinos are critically endangered, with a population of fewer than 5,000. There are only 3,000 one-horned rhinos remaining in India and Nepal. Southeast Asia’s Sumatran and Javan rhinos are numbered in the hundreds and tens, respectively. *Rhino Species*, World Wildlife Fund, <http://www.worldwildlife.org/species/rhino> (last visited June 13, 2014); see also Kate Dylewsky, Born Free USA, Letter in support of New Jersey bill A. 3128, May 5, 2014.

³ECL§11-0535 regulates endangered and threatened species so designated by the U.S. Secretary of the Interior and, in addition, those found by the NYDEC as being seriously threatened with extinction, likely to become endangered within the foreseeable future or at risk of becoming threatened in New York .

⁴“Ivory articles” are defined as including (a) worked or raw ivory from any elephant or mammoth (see subdivision 1(A)(I)) or (b) “any animal part containing ivory included by the Commissioner pursuant” to subdivision of the law (see subdivision (1)(A)(II)); see also subdivisions B and C for definitions of “raw” and “worked” ivory).

years.⁵ A similar crisis is faced by rhinos.

B. New York is a Critical Market for Illegal Ivory Traffickers and Thereby Encourages Elephant Slaughter and Ivory Trafficking.

New York State is recognized as the leading market for ivory – including illegal ivory – in the United States.⁶ In 2012, the NYSDEC, acting with the USFWS, seized more than \$2 million worth of elephant ivory in NYC.⁷ The Humane Society of the United States (“HSUS”) has reported that in 2008, in New York City alone, at least 24 outlets sold 11,376 ivory items. New York is also an active market for ivory sales online. Research by HSUS in 2013 found several hundreds of ivory items for sale online by New York-based stores.⁸

The NYC regional area is not only a major commercial center but offers multiple airports and seaports of entry, *e.g.*, John F. Kennedy International Airport, LaGuardia Airport, Brooklyn-Port Authority Marine Terminal and Howland Hook Marine Terminal. As of 2014, INTERPOL determined that “[t]he majority of large-scale ivory seizures have occurred in maritime ports. The ivory is hidden in shipping containers, and it is usually concealed by other lawful goods. By these methods East African ivory originating primarily from Tanzania has been transported directly to Asian maritime transit hubs, as well as through Uganda and Kenya to Asian hubs and consuming nations...”⁹ USFWS seizures of unlawfully imported elephant ivory at ports of entry over the years have ranged from whole elephant tusks and large carvings to knife handles, jewelry, and tourist trinkets; with the demand for ivory surging in Asia, inspectors have also started intercepting ivory being smuggled out of the United States, making inspections of outbound passengers, freight, and mail parcels increasingly important to ensure that ivory held in the United States does not find its way to illegal markets outside of the country.¹⁰

We note that illegal trade in wildlife parts, including ivory and rhino horns, has been identified as a significant source of financing for illegal weapons and narcotics trafficking and terrorist

⁵ New Jersey Bills, S.2012 (Lesniak)/A.3128 (Mukherji), which would ban the sale, offer for sale, purchase, barter, or possession with intent to sell ivory and rhino horn in the state, with certain exceptions.

⁶ Testimony of Major Scott Florence, NYS Assembly Hearing (January 16, 2014) (noting that “. . . everyone points to New York....That's where all the trade is happening”).

⁷ *Wildlife Groups Outraged After 2 Manhattan Jewelers Plead Guilty To Selling Illegal Elephant Ivory*, CBS New York, July 12, 2012, <http://newyork.cbslocal.com/2012/07/12/wildlife-groups-outraged-after-2-manhattan-jewelers-plead-guilty-to-illegally-selling-ivory/> (last visited May 29, 2014).

⁸ HSUS, Ivory Ban Fact Sheet, April 2014; *see also* Dr. Esmond Martin, “U.S. Exposed as Leading Ivory Market,” Care for the Wild International, May 5, 2008, http://www.careforthewild.com/wp-content/uploads/2012/05/cwi_usaivoryreport_507_v2.pdf (last visited June 13, 2014).

⁹ INTERPOL, Environmental Security Sub-Directorate Project Wisdom, *Elephant Poaching and Ivory Trafficking in East Africa: Assessment for an Effective Law Enforcement Response*, February 2014, <http://www.interpol.int/content/download/23787/225425/version/1/file/Ivory%20Trafficking%20from%20East%20Africa%20finalvb%20Public.pdf> (last visited May 29, 2014).

¹⁰ *Eye on Ivory: Investigations & Inspections*, U.S. Fish and Wildlife Services, November 2013, <http://www.fws.gov/le/pdf/Elephant-Ivory-Investigations.pdf> (last visited May 15, 2014).

organizations.¹¹

We also note the significant public support for a ban on ivory trade. A recent statewide independent survey indicated that more than 80 percent of New York voters are in favor of a permanent state ban on the sale of ivory.¹²

C. Existing NYS Law Regarding Ivory Cannot be Effectively Enforced

The ECL prohibits trade in those species protected by federal law as well as certain additional species listed by the state. *See* ECL 11-0535. The ECL does not prohibit the intrastate trade in wildlife and related articles documented as legally imported prior to specific dates.¹³

These year-specific intrastate commerce exceptions are properly omitted in the Proposed Law and the Alternative Proposed Law. DNA testing and carbon dating are two primary means of identifying the age, origin and species of an ivory or mammoth horn.¹⁴ However, even with advanced technology it is frequently difficult and sometimes impossible to establish an article's age, origin and species in order to sanction commercial dealing in violation of current state and federal statutes and regulations and experts generally agree that an imposition of a specific year-of-import or antique provision would be virtually impossible to impose with accuracy.¹⁵ Accordingly, NYS field investigators are presently unable to enforce existing law to determine whether the ivory is legal or illegal, by species or age, *e.g.*, whether African ivory is legal because it was imported before the federal ban or whether an article is mammoth or elephant.

We note that the inclusion of the woolly mammoth (*Mammuthus primigenius*) in the Proposed Law is necessary for this reason as law enforcement personnel are not able to distinguish between

¹¹ A September 2013 report, issued by the U.N. Commission on Drugs and Crime, estimated that more than 60 per cent of the elephants killed in Africa were illegally killed for their tusks, generating 154 metric tons of illegally-harvested ivory, much of the proceeds from which are financially used to support terrorist and criminal groups. *See* Alex Shoumatoff, *Ivory and Agony*, VANITY FAIR (Aug. 2011), <http://www.vanityfair.com/culture/features/2011/08/elephants-201108>; Samuel Wasser et al., Policy Forum, *Elephants, Ivory, and Trade*, SCIENCE (Mar.12, 2010), 1332-1332 at 1332, <http://www.savetheelephants.org/files/pdf/publications/2010%20Wasser%20et%20al%20Elephants,%20Ivory,%20and%20Trade%20Science.pdf> (last visited June 13, 2014).

See also *Ivory's Curse: The Militarization and Professionalization of Poaching in Africa*, Born Free USA, April 2014, <http://a362a94f6d3f5f370057-c70bddd8faa4afe1b2ec557b907836d0.r4.cf1.rackcdn.com/Ivorys-Curse-2014.pdf> (last visited May 29, 2014) (noting the links to violent militias, organized crime, government corruption).

¹² POLL: NEW YORK VOTERS OVERWHELMINGLY SUPPORT STATEWIDE IVORY BAN, Wildlife Conservation Society, April 7, 2014, <http://www.wcs.org/press/press-releases/new-york-state-ivory-poll.aspx> (last visited May 15, 2014).

¹³ 1990 for African elephants, 1975 for Asian elephants. USFWS, *supra*, note 2.

¹⁴ *Radiocarbon Clues Help Track Down Poached Elephant Ivory*, National Public Radio, July 2, 2013, <http://www.npr.org/2013/07/02/197899542/scientists-devise-new-methods-to-catch-ivory-poachers> (last visited May 30, 2014); Testimony of William C. Woody, NYS Assembly Hearing (January 16, 2014).

¹⁵ Testimony of Kevin T. Uno, Ph.D., of Lamont-Doherty Earth Observatory of Columbia University, NYS Assembly Hearing (January 16, 2014) (testifying that while new technology can reveal the year of an animal's death, the equipment necessary is prohibitively expensive and burdensome such that USFWS investigators are unable to use it to enforce a year-specific law); *See also* *Nuke Test Radiation Can Fight Poachers*, University of Utah, July 1, 2013, http://unews.utah.edu/news_releases/nuke-test-radiation-can-fight-poachers/ (last visited May 13, 2014).

protection legislation is recognized as a valid exercise of state police power²¹ where it is not preempted by federal law.²² Thus, in the absence of federal preemption the New York State legislature may enact legislation consistent with, and more stringent than, existing federal law governing the sale of ivory articles.²³

A number of federal statutes and regulations combat the illegal ivory trade and wildlife trafficking including, but not limited to, the Endangered Species Act of 1973 (ESA)²⁴, the Lacey Act²⁵, the African Elephant Conservation Act²⁶ and the federal regulations promulgated thereunder.²⁷ Like S.7040 and S.7194, federal law contains criminal penalties: in addition to facing sanctions under the ESA, those who engage in illegal wildlife trade under the ESA may also be subject to prosecution under the Lacey Act's anti-trafficking provisions (which provides a maximum penalty of 5 years in prison and fines of \$250,000 for an individual or \$500,000 for an organization).²⁸

The proposed bills would provide additional and more stringent regulation of ivory trade in a manner we believe is consistent with federal law (*e.g.*, the proposed state laws would carry their own penalties independent of the federal laws and would not recognize some of the exceptions presently set forth in the federal law).

²¹ See, *e.g.*, *People v. Bunt*, 118 Misc. 2d 904, 910 (N.Y. J. Ct. 1983) (New York anti-cruelty law constitutional as “reasonable extension of the state’s police powers”).

²² *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476 (1991) (upholding state law regulating pesticide usage where not in conflict with federal law concerning pesticide usage, noting that “the States’ historic powers are not superseded by federal law unless that is the clear and manifest purpose of Congress”); *Cuomo v. The Clearing House Ass’n, L.L.C.*, 557 U. S. 519 (2009)(a federal banking regulation did not preempt the ability of states to enforce their own fair-lending laws).

²³ There is no express preemption provision in the President’s Ivory Initiative.

²⁴ 16 U.S.C. §1531 *et seq.* The African elephant and Asian elephant are listed as endangered under the ESA. Both elephant species are also protected under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”), the agreement among 175 nations, including the United States, to ensure that international trade in specimens of wild animals and plants does not threaten their survival.

²⁵ 16 U.S.C. §3371 *et seq.*

²⁶ 16 U.S.C. §4201 *et seq.*

²⁷ Relevant federal law also includes the President’s July 2013 Executive Order No. 13648 on Combating Wildlife Trafficking (defined herein as the “President’s Ivory Initiative”), which was followed by the February 2014 issuance of the National Strategy for Combating Wildlife Trafficking, and the United States Fish and Wildlife Service’s Director’s Order No. 210, entitled “*Administrative Actions to Strengthen U.S. Trade Controls for Elephant Ivory, Rhinoceros Horn, and Parts and Products of Other Species Listed Under the Endangered Species Act (ESA)*” (dated February 25, 2015, as amended May 15, 2014) (“USFWS Director’s Order”).

²⁸ The maximum penalty for violating the ESA is one year in prison and a \$100,000 fine for an individual, \$200,000 for an organization. See ESA, Section 11. We note that the USFWS Director’s Order recently strengthened the applicable penalties. See also *U.S. v. Kepler*, 531 F.2d 796, 797 (6th Cir. 1976) (penalties are not an illegal taking when imposed upon a person convicted of attempting to sell a leopard and a cougar in interstate commerce to an undercover agent. While the Court noted that the defendant could have sold his wild animals intrastate with the proper permits, which he did not have, a due process issue is not necessarily raised by a State prohibition. The Tenth Amendment authorizes a state departure from federal law where there are changed circumstances. See *Shelby County v. Holder*, 570 U.S. (2013), 133 S. Ct. 2612 (2013).

SUPPORT FOR THE PROPOSED BILLS AND RECOMMENDATIONS

We support the proposed bills but recommend that they be amended to take into account the following considerations:

First, we note that the A.8824-A was originally drafted to contain enhanced felony penalties for violations. We note that, following introduction, A.8824-A was amended to remove the enhanced felony penalties, while they remain in S.7040 and S.7194. We approve of these originally proposed enhanced penalties as a necessary deterrent²⁹ and recommend that they be reinstated in A.8824-A.

Second, we note that the exception set forth in A.8824-A and S.7194 regarding ivory trade for “educational or scientific purposes” is not fully recognized by existing federal law nor defined with necessary specificity.³⁰ Accordingly, we recommend that these exceptions under A.8824-A and S.7194 be amended to comport with existing federal law as there should be no exception where the ESA does not include one, and where there is no definition or guideline to apply.

Third, we note that the term “antique” as used in A.8824-A and S.7194 is not defined. Accordingly we recommend that A.8824-A and S.7194 be amended to incorporate the definition of antique set forth under the ESA, subject to the additional *de minimus* ivory content requirement contained in A.8824-A and S.7194.³¹ Additionally, we note that A.8824-A designates 20% by volume as *de minimus* ivory content for purposes of this exception. We recommend that this percentage be lowered to a significantly smaller amount (such as the 5% content by volume limit contained in the S.7194).

Lastly, we recommend, for the same reasons that mammoth ivory is included in the proposed bills, that the bills be amended to define the term “ivory article” to include ivory from any species of wildlife including, without limitation, hippopotamuses, walruses, whales and narwhals.

CONCLUSION

For all of the above-stated reasons, the proposed bills are approved with the aforementioned recommendations.

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²⁹ As the bill was originally drafted, if the value of the ivory article exceeded \$25,000, the offense would constitute a Class D felony and if the value of such an article exceeded \$250,000, it would constitute a Class C felony.

³⁰ The terms “educational” and “scientific” are not defined in the proposed legislation. The reference to “educational” has no counterpart in the ESA, and the reference to “scientific” does not mirror the ESA exception for “genuine scientific purposes that will contribute to conservation of the species.”

³¹ 16 U.S.C. 1539(h)(antique exception) and 16 U.S.C. 1539(g)(places burden of proof on person claiming the benefit of a statutory exemption). Under federal law, to qualify as antique, the importer, exporter or seller must show that the item meets all of these criteria: (1) it is 100 years or older; (2) it is composed in whole or in part of an ESA-listed species; (3) it has not been repaired or modified with any such species after December 27, 1973; and (4) it is being or was imported through an endangered species “antique port.” See *USFWS Moves to Ban Commercial Elephant Ivory Trade, supra*.