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Public Comments Processing
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Division of Policy and Directives Management
U.S. Fish and Wildlife Service, MS: BPHC
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Re: Docket # FWS-HQ-ES-2016-0010

Dear Service Director Ashe:

The Animal Law Committee of the New York City Bar Association (the “Committee”) writes in response to the request for information issued by the United States Fish and Wildlife Service (the “Service”) in 81 Federal Register 14058 (March 16, 2016) regarding the reclassification of the African elephant, *Loxodonta africana*, from threatened to endangered under the Endangered Species Act of 1973 as amended (“ESA”).¹ We urge the Secretary of the Interior (the “Secretary”) to consider the information presented below, to determine that the African elephant meets the statutory criteria as an endangered species under the ESA, and accordingly, to list the species as endangered under the ESA.

The New York City Bar Association is an independent non-governmental organization of more than 24,000 lawyers, law professors, and government officials, principally from New York City but also from throughout the United States and 50 other countries. The Committee is the first of its kind in the country and has a history of supporting federal, state, and local anti-cruelty legislation. When warranted, the Committee has taken positions on various issues of concern on an international level, such as the protection of African elephants under CITES² and listing the

¹ 16 U.S.C. §§ 1531-1544.

² The Convention on the International Trade in Endangered Species of Wild Fauna and Flora, What is CITES, <http://www.cites.org/eng/disc/what.php>. (All websites referenced in this comment were last visited April 29, 2016).

African lion as an endangered species under the ESA.³ The Committee has a comparable interest in ESA protection of the African elephant population as it numbered only 401,732 definite wild animals in 2013 and is rapidly declining.⁴

RECOMMENDATION

The Committee recommends that the Secretary find the African elephant to be “in danger of extinction throughout all or a significant portion of its range” and, therefore, that listing the African elephant as an endangered species under the ESA is warranted.⁵ The Committee bases its recommendation on its analysis of the work done by established organizations, which demonstrates that the African elephant satisfies the criteria for designation as “endangered” under the ESA.

In particular, we note that the African elephant’s population continues to decline at a significant rate of about 100 elephants per day⁶ which, at a reduction rate of about 7%, outpaces natural population growth rates of 5%.⁷ This steady 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.⁸ More

³ See Animal Law Committee, Letter Of Comment To The U.S. Fish And Wildlife Service On Its Proposed Amendments To The Convention On International Trade In Endangered Species Of Wild Fauna And Flora (CITES) Appendices (June 11, 2012), <http://www2.nycbar.org/pdf/report/uploads/20072306-CommentletterinresponsetoUSFishandWildlifeproposedCITESamendments.pdf>; Letter To The U.S. Fish And Wildlife Service Urging Listing The African Lion As Endangered Under The Endangered Species Act of 1973 As Amended (Jan. 27, 2015), <http://www2.nycbar.org/pdf/report/uploads/AfricanLionEndangeredSpeciesActAnimalReport.pdf>.

⁴ International Union for Conservation of Nature (“IUCN”) Species Survival Commission (“SSC”) African Elephant Database 2013 Continental Total; Preview Report update to 31 December 2013, http://www.elephantdatabase.org/preview_report/2013_africa_final/2013/Africa [Hereinafter “IUCN, *Elephant Database 2013*”].

⁵ 16 U.S.C. § 1532(6), (16).

⁶ World Elephant Day, About Elephants, <http://worldelephantday.org/about/elephants>; see IUCN, *Elephant Database 2013*, *supra* note 4 (According to the African Elephant Database, experts estimate that in 2012, there were between 433,999 and 683,888 elephants in the wild. In 2013, the IUCN estimated a total population of African elephants as between 401,732 and 632,792.).

⁷ CITES SECRETARIAT, STATUS OF AFRICAN ELEPHANT POPULATIONS AND LEVELS OF ILLEGAL KILLING AND THE ILLEGAL TRADE IN IVORY: A REPORT TO THE AFRICAN ELEPHANT SUMMIT (Dec. 2013), https://cmsdata.iucn.org/downloads/african_elephant_summit_background_document_2013_en.pdf.

⁸ See Letter of Humane Society International, The Humane Society of the United States, IFAW, National Resources Defense Council and The Fund For Animals commenting on African Elephant Special Rule Amendment (FWS-HQ-IA-2013-0091) (Sept. 28, 2015), at 3 [Hereinafter “Comment on African Elephant Special Rule”]; see also Oliver Smith, *African elephants could be extinct ‘within a decade,’* THE TELEGRAPH (Mar. 24, 2015), <http://www.telegraph.co.uk/travel/destinations/africa/articles/African-elephants-could-be-extinct-within-a-decade/>.

specifically, (1) the primary threats faced by African savanna elephants⁹ include poaching for ivory and meat, illegal hunting, loss and fragmentation of habitat due to expansion of the human population and land development, and human-elephant conflict mainly due to habitat encroachment; and (2) the primary threats faced by African forest elephants¹⁰ include poaching for ivory and habitat loss, and they also are more frequently hunted for meat, and threatened by industries extracting natural resources, such as wood, minerals and oil.¹¹ Furthermore, forest elephants have not benefited from development of an ecotourism industry that encourages their protection.¹²

BACKGROUND

The African elephant species has been listed as “threatened” under the ESA since May 1978.¹³ In 1979, the Service estimated that at least 1.3 million African elephants were still in existence.¹⁴ Since 1978, the Service has considered and rejected various petitions to reclassify the African elephant as endangered under the ESA.¹⁵ However, systematic surveys estimate that, by 2013, the African elephant population was depleted to 401,732 identified wild elephants throughout Africa.¹⁶

The ESA defines “endangered species” as any species that is in danger of extinction throughout all or a significant portion of its range, and “threatened species” as any species that is likely to

⁹ African savanna elephants are the larger of the two subspecies of African elephant and they live in the grassy plains and bushlands of Africa. World Wildlife Foundation, Savanna Elephant, www.worldwildlife.org/species/savanna-elephant.

¹⁰ African forest elephants are the smaller of the two subspecies of African elephant and they live in dense forests of Africa. World Wildlife Foundation, Forest Elephant, www.worldwildlife.org/species/forest-elephant.

¹¹ See Elephant Voices, Facts & Figures, <http://www.elephantvoices.org/elephant-sense-a-sociality-4/facts-a-figures.html>.

¹² *Id.*

¹³ See 50 C.F.R. §17.11; Listing of the African Elephant as a Threatened Species, 43 Fed. Reg. 20499 (May 12, 1978).

¹⁴ 43 Fed Reg. at 20500. Other surveys indicate a population of approximately 1 million African elephants in a large number of fragmented populations with the downward trend already in evidence. I Douglas-Hamilton, *African Elephants: Population Trends and Their Causes*, ORYX (Jan. 1987), https://www.researchgate.net/publication/231900757_African_Elephants_Population_Trends_and_Their_Causes.

¹⁵ Endangered and Threatened Wildlife and Plants; Finding on Petition and Initiation of Status Review, 54 Fed. Reg. 26812 (June 26, 1989). See also Endangered and Threatened Wildlife and Plants; Proposed Endangered Status for Certain Populations of the African Elephant and Revision of Special Rule, 56 Fed. Reg. 11392 (Mar. 18, 1991) (proposing to list African elephants as endangered, except in Botswana, Zimbabwe, and South Africa); Endangered and Threatened Wildlife and Plants; Retention of Threatened Status for the Continental Population of the African Elephant, 57 Fed. Reg. 35473, 35474 (Aug. 10, 1992).

¹⁶ IUCN, *Elephant Database* 2013, *supra* note 4.

become an endangered species within the foreseeable future throughout all or a significant portion of its range.¹⁷ A species may be determined to be endangered or threatened for any of these factors: the present or threatened destruction, modification or curtailment of its habitat or range; overutilization for commercial, recreational, scientific or educational purposes; disease or predation; the inadequacy of existing regulatory mechanisms; or other natural or manmade factors affecting its continued existence.¹⁸

The African elephant is currently listed as a “threatened species” under the ESA but, due to the rapid destruction and modification of its habitat paired with high rates of poaching, African elephant populations are dwindling and in danger of extinction and, therefore, warrant being listed as “endangered.”

JUSTIFICATION

A. The African elephant should be listed as “endangered” under the ESA due to present destruction and modification of its habitat and range.

African elephants face ongoing modification and destruction of their habitat and range. Therefore, the species meets the ESA criteria for “endangered” and should be listed as “endangered” under the ESA.

The African elephant, the world’s largest terrestrial animal, is running out of space and time and is rapidly heading toward extinction.¹⁹ A UNEP/CITES report finds loss of range and habitat to be the most critical long-term threat to the survival of the species.²⁰ This loss impacts not only elephants but also the entire ecosystem; African forest and savannah elephants are known as “keystone” species and are integral to maintaining the biodiversity and landscape of the ecosystem.²¹

¹⁷ 16 U.S.C. § 1532(6), (16), and (20).

¹⁸ 16 U.S.C. § 1533(a)(1)(A)-(E).

¹⁹ See IUCN, *Elephant Database* 2013, *supra* note 4 (In 2013, the IUCN estimated a total population of African elephants as between 401,732 and 632,792. Categories considered are Definite (401,732), Probable (71,736), Possible (96,895) and Speculative (62,429)).

²⁰ UNITED NATIONS ENVIRONMENT PROGRAM (UNEP) ET AL., A RAPID RESPONSE ASSESSMENT: ELEPHANTS IN THE DUST, THE AFRICAN ELEPHANT CRISIS 15 (2013), https://www.cites.org/sites/default/files/common/resources/pub/Elephants_in_the_dust.pdf [Hereinafter “UNEP *et al.*, A RAPID RESPONSE”].

²¹ The elephants traverse long distances dispersing seeds from more than 100 plant species. The extinction of the forest elephant would have an enormously harmful ecological impact on Central Africa’s forests resulting in forests of species-poor, abiotically dispersed trees and lowering the overall diversity of the Congo Basin forest, the second largest rainforest in the world and an important carbon sink. STEPHEN BLAKE, THE ECOLOGY OF FOREST ELEPHANT DISTRIBUTION AND ITS IMPLICATIONS FOR CONSERVATION 247-48 (2002), <http://savetheelephants.org/wp-content/uploads/2014/03/2002ForestElephantDistribution.pdf>.

African elephant habitat is not only decreasing absolutely—the elephant range area in 37 range states in sub-Saharan Africa declined 54.8% between 1979 and 2007 and continues to diminish in size²²—but is also increasingly fragmented. The majority of elephants now exist in small pockets of protected land, which severely restrict the quality of their habitat and block wide-ranging seasonal migration routes that are required for African elephants to access water and food.²³ Human settlements are growing around protected areas and expanding exponentially into previously unsettled wild areas and wildlife conservation areas,²⁴ which increases competition between wildlife and humans for land and resources and also encourages development of roads and fences, natural resource extraction, poaching and bush meat hunting.²⁵ According to 2013 estimates, 29% of known and possible elephant range in Africa is classified as heavily affected by human development and may increase to 63% within 40 years.²⁶ UNEP concludes that, if this trend continues, “combined with poaching, elephant ranges will likely be greatly reduced in parts of Eastern Africa and the elephant may be eradicated locally across parts of Central and West Africa.”²⁷

Additional causes of range loss and habitat destruction and fragmentation for the African elephant include severe droughts and desertification caused by climate change, land degradation (due largely to human activity such as agriculture, livestock industry, intensive irrigation and over-cultivation), and the effects of regional wars and conflict arising from political instability.²⁸ With the geographic range of elephants diminishing, human-elephant conflict is increasing in a variety of ways that threatens the viability of African elephant populations.²⁹

²² The area of range of sub-Saharan Africa decreased from 7.3 million km² in 1979 to a range of 3.3 million km² in 2007. See IUCN, *Elephant Database* 2013, *supra* note 4.

²³ Joyce Poole, *The African Elephant*, STUDYING ELEPHANTS AWF TECHNICAL HANDBOOK SERIES NO. 7 (Kadzo Kangwana, ed., 1996), https://cmsdata.iucn.org/downloads/man_stdele_en.pdf.

²⁴ The human population of sub-Saharan Africa was 854 million in 2010 and 973.4 million in 2014 and is expected to increase to 1.2 billion by 2025 and 2 billion by 2050. See Trading Economics, Population: Total in Sub Saharan Africa, <http://www.tradingeconomics.com/sub-saharan-africa/population-total-wb-data.html>.

²⁵ George Wittemeyer et al., *Accelerated Human Population Growth at Protected Area Edges*, SCIENCE 123, 125 (July 4, 2008), <http://science.sciencemag.org/content/321/5885/123.full-text.pdf+html>.

²⁶ UNEP *et al.*, A RAPID RESPONSE, *supra* note 20, at 7.

²⁷ *Id.* at 17.

²⁸ Drought and desertification place pressure on the natural environment, forcing elephants to forage farther for food and water and forcing humans to further encroach on range area—thereby resulting in more destruction and fragmentation of elephant habitat and threatening elephant populations.

²⁹ The Elephant Listening Project, The Cornell Lab, *Threats to African Elephants* (2015), <http://www.birds.cornell.edu/brp/elephant/conservation/general-threats.html>.

B. The African elephant should be listed as “endangered” under the ESA due to overutilization of the species for commercial and recreational purposes.

1. Commercial Purposes

A primary reason to list the African elephant as “endangered” is because the rate of poaching (for ivory and meat) is at such crisis levels that African elephants could become extinct in the wild within the next decade. Elephant populations cannot sustain these losses, especially when compounded with stress, hunger and death related to habitat destruction, extreme droughts due to climate change, culling, and other threats.

a. Elephant Ivory

Since the 1980’s, the commercial aspect of slaughtering elephants for ivory has become militarized and professionalized, and has reached such a staggering level that it is estimated the ivory trade could be worth as much as a billion dollars annually, with such amount likely to increase as the retail price of ivory increases.³⁰ Initially, ivory is harvested from hunting areas in the forest; then ivory is transported from the bush to consolidation points, where it is bundled into larger shipments of 300-1,500 tusks and hidden in standard shipping containers; and finally, it is smuggled through the international shipping system from African ports to Asian markets.

African actors dominate poaching and the transport chain up until ivory is loaded into shipping containers, usually at or near an African port; then Asian organized crime often takes over.³¹ In the ultimate retail market, the illicit tusks are worked, carved and sold.³² Unlike in 1989, when the ivory trade was largely banned and ivory poaching was an “economy of proximity,” the illicit trade in ivory today has become a professionalized transnational network dominated by organized crime and enabled by government functionaries, security forces and businessmen.³³ In 1976, ivory was worth US\$5.77 per kilogram; today its retail value in Asia is over US\$3,000 per kilogram.³⁴

In 2008, CITES permitted a one-time sale of 108 tonnes of stockpiled ivory to China and Japan from stockpiles in Botswana, South Africa, Namibia and Zimbabwe.³⁵ At the time, it was anticipated that releasing ivory from stockpiles would depress the price of ivory and reduce the

³⁰ VARUN VIRA & THOMAS EWING, IVORY’S CURSE: THE MILITARIZATION & PROFESSIONALIZATION OF POACHING IN AFRICA 3, (Apr. 2014), http://www.bornfreeusa.org/a9_ivorys_curse.php.

³¹ *Id.* at 5.

³² *Id.* at 10.

³³ *Id.*

³⁴ *Id.* at 5.

³⁵ Press Release, CITES Secretary-General to Oversee Ivory Sales (Oct. 22, 2008), http://www.cites.org/eng/news/pr/2008/081022_ivory.shtml.

incentive to poach.³⁶ Paradoxically, this relaxation of the prohibitions on ivory sales (allowing for the sale of stockpiled ivory) invited fraud because it is difficult to determine the origin of the ivory when it is for sale, and illegally poached African elephant ivory can be passed off as legal ivory.³⁷ While some may challenge the impact of those one-time sales, the debate has been overtaken by the development, over the last two decades, of illicit forces that have criminalized, networked, professionalized, and militarized the trafficking of ivory and its related profits. Poaching is at an historic high, as evidenced by the increase in large-scale ivory seizures since 2008³⁸ and by the carcasses of poisoned, snared, shot, decapitated and mutilated elephants strewn throughout Africa.

Elephants are currently being killed across the African continent at an estimated rate of approximately 100 a day, or 36,500 a year.³⁹ Scientific evidence from Central Africa has shown that the African forest elephant has been poached at such accelerating rates that its numbers declined 62% just between 2002 and 2011.⁴⁰ While it was once estimated that Central Africa's forests could support over one million elephants, today there may be no more than 50,000 remaining, and those animals largely are concentrated in two countries, Gabon and the Republic of Congo.

As Central African elephant populations have become decimated, poaching has shifted into East Africa, where elephants are more numerous. Tanzania and Mozambique have recently reached critical poaching levels, with as many as 25,000 elephants (66% of the population) killed in Tanzania's Selous ecosystem between 2009-2013, and over 8,000 elephants (roughly 40%) in neighboring Niassa in Mozambique over a similar period. Gabon and the Republic of Congo (the last major elephant populations in Central Africa), as well as Kenya and Zimbabwe, are all noting rapid increases in elephant poaching. Warning signs of escalation are also present in still-secure ranges in Southern Africa.⁴¹ Local extinction of elephant populations already exists in

³⁶ Eliza Strickland, *Elephant-Lovers Worry About Controversial Ivory Auctions in Africa*, DISCOVER MAGAZINE (Oct. 29, 2008), <http://blogs.discovermagazine.com/80beats/2008/10/29/elephant-lovers-worry-about-controversial-ivory-auctions-in-africa>.

³⁷ Bill Padgett, *The African Elephant, Africa, and CITES: The Next Step*, 2 IND. J. GLOBAL LEGAL STUD. 529, 539 (Apr. 1995) (describing how the country of Burundi repeatedly lied about the origin of illegal ivory). <http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1053&context=ijgls>

³⁸ See Testimony of John Scanlon, Secretary-General of CITES, United States of America Senate Foreign Relations Committee Hearing 3 (May 24, 2012), http://www.foreign.senate.gov/imo/media/doc/Scanlon_Testimony.pdf.

³⁹ Alex Shoumatoff, *Agony and Ivory*, VANITY FAIR (Aug. 2011), <http://www.vanityfair.com/news/2011/08/elephants-201108>. This estimated killing rate is consistent with seizures of ivory during the past decade, which have averaged 45,000 pounds a year. Using Interpol's 10 percent estimate, which is based on the amount of drugs they believe they are intercepting—meaning a 90 percent evasion rate—that would be 450,000 pounds, or more than 35,000 elephants each year. *Id.*

⁴⁰ Douglas-Hamilton, *supra* note 14, at 3.

⁴¹ *Id.* at 7.

parts of West and Central Africa.⁴² The spiral toward extinction for African elephants applies not only for small and fragmented elephant populations but also for previously secure large populations—and in excess of what can be sustained in all four African sub-regions, such that elephant populations are now in net decline.⁴³

Notably, the actual numbers may be far worse than these estimates because, despite credible efforts, there is no way to accurately ascertain the number of Africa's remaining wild elephants. For example, there is no way to know the number of carcasses that poachers cover with branches or conceal in other ways to elude rangers; the number of elephants in dense forests and hidden under woodland trees that cannot be detected by aerial surveys; the number of elephants mistakenly double-counted as they cross national borders or wander into the next aerial transect during their migratory movements; the number of confiscated tusks that are diverted and do not reach the strong rooms (where ivory is stockpiled) or that disappear from those strong rooms and are smuggled illegally to their ultimate destinations in Asia; and the number of carcasses that are uncounted or are inaccurately counted.⁴⁴

Poaching and commercialization of ivory are also tied to armed conflict in some source countries—often also associated with illegal mineral resource extraction—where rebel militia groups such as the Lords Resistance Army in Central Africa and the Janjaweed of Chad and Sudan have allegedly been implicated in elephant killing raids. CITES press releases have indicated that ivory collected by them is believed to have been exchanged for money, weapons, and ammunition to support conflicts in neighboring countries.⁴⁵

b. Elephant Meat

Reportedly, elephant meat in Central Africa has an earning potential that could exceed that of ivory according to a new report by the International Union for Conservation of Nature Species Survival Commission (IUCN SSC) African Elephant Specialist Group and the CITES Monitoring the Illegal Killing of Elephants (MIKE) program.⁴⁶ An investigation into the dynamics, scale, and impact of the trade in elephant meat in four Congo Basin countries has revealed that the demand for elephant meat is higher than previously expected. The demand for elephant meat exceeds supply, as the meat is considered a delicacy in Africa and there is a

⁴² *Id.* at 5.

⁴³ Scanlon, *supra* note 38, at 4.

⁴⁴ Shoumatoff, *supra* note 39; Samuel Wasser et al., *Policy Forum, Elephants, Ivory, and Trade*, SCIENCE (Mar.12, 2010), at 1332, <http://www.savetheelephants.org/files/pdf/publications/2010%20Wasser%20et%20al%20elephants,%20Ivory,%20and%20Trade%20Science.pdf>.

⁴⁵ UNEP et al., *A Rapid Response*, *supra* note 20.

⁴⁶ IUCN News Release, *Sale of Elephant Meat Increases Threat to Elephants in Central Africa* (Mar. 8, 2012), <http://www.iucnredlist.org/news/sale-of-elephant-meat-increases-threat-to-elephants-in-central-africa>.

perception in urban areas that elephant meat is more prestigious than other meats, thereby causing the price of elephant meat to exceed that of most other meats. This demand and high earning potential incentivize hunters to poach elephants for more than just their ivory tusks.⁴⁷

2. Recreational Purposes

African elephants are imperiled by trophy hunting. A 2015 study concluded that elephant densities are lower in trophy hunting areas compared to densities in a national park where trophy hunting is not permitted.⁴⁸ Hunters target the biggest and strongest males, which removes them from the breeding pool and unnaturally selects for small or weaker animals—all of which decreases genetic resilience of the species that is needed for elephants to adapt to and survive other challenges such as climate change.⁴⁹ If the current rates of hunting are sustained, under average ecological conditions, trophy bulls will disappear from the population in less than 10 years.⁵⁰

The Service has already determined that elephant trophy hunting is detrimental to the survival of the species for many reasons, including questionable management practices, a lack of effective law enforcement, and weak governance, as demonstrated in Zimbabwe and Tanzania.⁵¹ Further, the claim that sport hunting or trophy hunting supports local communities which, in turn, benefits wildlife conservation is largely unsupported; studies suggest that Africa's 11 main big-game hunting countries contributed only an average of 0.6% to the national GDP to wildlife conservation as of 2009 and, furthermore, that as little as 3-5% of trophy hunting revenues are actually shared with these communities.⁵²

⁴⁷ *Id.*; see also Chris Tomlinson, *Elephants killed for meat as well as ivory*, LATimes (June 10, 2007), <http://articles.latimes.com/2007/jun/10/news/adfg-elephant10>.

⁴⁸ Comment on African Elephant Special Rule, *supra* note 8.

⁴⁹ *Id.*

⁵⁰ *Id.* citing S. Selier et al. (2014), Sustainability of elephant hunting across international borders in southern Africa: A case study of the greater Mapungubwe Transfrontier Conservation Area, J. WILDLIFE MANAGEMENT (Jan. 2014), 122, 132, available at <http://onlinelibrary.wiley.com/doi/10.1002/jwmg.641/abstract>.

⁵¹ U.S. Fish & Wildlife Service, International Affairs, Import of Elephant Trophies from Tanzania & Zimbabwe, <http://www.fws.gov/international/permits/by-activity/sport-hunted-trophies.html>. See also <http://www.fws.gov/international/pdf/enhancement-finding-March-2015-elephant-Zimbabwe.pdf> (“the Service has determined that it is unable to make a finding that the killing of elephants in Zimbabwe, on or after January 1, 2015, whose trophies are intended for importation into the United States, would enhance the survival of the African elephant in the wild. Therefore, the trophies, parts or products, of elephants taken in Zimbabwe during the 2015 hunting season and future hunting seasons, will not be allowed to be imported into the United States.”); <http://www.fws.gov/international/pdf/enhancement-finding-2014-elephant-Tanzania.pdf> (“unable to find that the sport-hunting of elephants in Tanzania in 2014, for import as personal trophies is likely to enhance the survival of the species”).

⁵² Comment on African Elephant Special Rule, *supra* note 8.

As discussed further below, the Service issued a proposed rule in 2015 to limit the import of African elephant sport-hunted trophies to two per hunter per calendar year.⁵³ Applying common sense, if only approximately 400,000 elephants remain in the wild in Africa, this formula, if enjoyed to the maximum by hunters, would decimate the remaining population of African elephants. Furthermore, sport-hunting does not enhance the survival of the species, and may very well contribute to commercial trade in ivory derived from trophy tusks. Sport-hunting, and its likely contribution to the illegal ivory trade, undermines the goal of President Obama's Executive Order 13648 of July 1, 2013, which provides that it is in the national interest of the United States to combat wildlife trafficking and ensure we are not contributing to the growing global demand for elephant ivory.⁵⁴

C. The African elephant should be listed as “endangered” under the ESA due to inadequacy of existing regulatory mechanisms.

While elephant habitat destruction and poaching occurs in Africa and much demand for ivory comes from Asia, the United States plays a large role in the rapid decline of African elephant populations. According to a study in 2008, “[w]ith the exception of China (including Hong Kong), there is more worked ivory for sale in the U.S. than anywhere else in the world.”⁵⁵ The report noted that, in New York City alone, at least 124 outlets sold 11,376 ivory items—and that over 13,000 additional ivory items were found throughout the U.S.⁵⁶ And in 2012, the New York State Department of Environmental Conservation, acting with the Service, seized more than \$2 million worth of elephant ivory in New York City.⁵⁷

Existing regulatory mechanisms in the U.S. are inadequate to handle the current and increasing ivory trade and therefore fail to protect the African elephant from extinction. Because of the deficiencies in U.S. regulation and numerous threats from habitat loss and poaching, the African elephant should be listed as “endangered” under the ESA.

⁵³ Endangered and Threatened Wildlife and Plants; Revision of the Section 4(d) Rule for the African Elephant (*Loxodonta africana*), 80 Fed. Reg. 45154, 45165 (July 29, 2015).

⁵⁴ Executive Order, Combating Wildlife Trafficking, June 1, 2013, <https://www.whitehouse.gov/the-press-office/2013/07/01/executive-order-combating-wildlife-trafficking>.

⁵⁵ Esmond Martin & Daniel Stiles, U.S. Exposed as Leading Ivory Market, Care for the Wild International (May 5, 2008).

⁵⁶ *See id.*

⁵⁷ *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-elephant-ivory>.

1. Current regulation of African elephants under the ESA

African elephants were listed as a threatened species under the ESA in 1978.⁵⁸ The ESA generally provides limited protections for threatened species, as compared to endangered species. The robust Section 9 “take” prohibitions that constitute the primary substance of the ESA generally apply only to endangered species:

[W]ith respect to any endangered species of fish or wildlife . . . it is unlawful for any person subject to the jurisdiction of the United States to--

- (A) import any such species into, or export any such species from the United States;
- (B) take any such species within the United States or the territorial sea of the United States;
- (C) take any such species upon the high seas;
- (D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);
- (E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;
- (F) sell or offer for sale in interstate or foreign commerce any such species; or
- (G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.⁵⁹

The only provision within this section that applies to threatened species is Section 1538(A)(1)(G), which makes it unlawful to violate any regulation pertaining to a threatened species.

The ESA allows the Secretary to issue regulations regarding threatened species when “necessary and advisable to provide for the conservation of such species.”⁶⁰ Under this authority, the Service has developed the Special Rule for African Elephants (“Special Rule”), which makes it illegal for any person to: import or export any African elephant (meaning elephants or elephant parts);

⁵⁸ Listing of the African Elephant as a Threatened Species, 43 Fed. Reg. 20,499-02 (May 12, 1978).

⁵⁹ 16 U.S.C. § 1538(A)(1) (emphasis added).

⁶⁰ 16 U.S.C. § 1533(d) (known as ESA Section 4(d)) (“Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) of this title.”).

possess, sell or offer for sale, receive, deliver, transport, ship, or export any African elephant that was illegally imported into the United States; or sell or offer for sale any sport-hunted trophy imported into the United States in violation of permit conditions.⁶¹ While the Special Rule appears to give the African elephant great protections, the exceptions to the Special Rule leave many gaps that reveal the weaknesses of classifying the African elephant as only “threatened” rather than “endangered.” The exceptions contained in the Special Rule allow:

- African elephants, other than sport-hunted trophies and raw and worked ivory, to be imported, exported, and moved in interstate trade, provided all permit requirements of 50 CFR parts 13 and 23 have been complied with;
- Raw or worked ivory (other than sport-hunted trophies) to be imported if it is a bona fide antique of greater than 100 years of age on the day of import, or was exported from the United States after being registered with the Service; and
- Sport-hunted trophies to be imported into the United States under a variety of circumstances.⁶²

While the Service has issued a proposed rule to revise the Special Rule for the African elephant, the proposed rule itself contains gaps that leave African elephants vulnerable—and there is no indication that the rule will even be finalized.⁶³

- The proposed rule establishes an arbitrary quota for trophy imports at two per year per hunter.⁶⁴ There is no evidence that this quota has a scientific basis or is “necessary and advisable to provide for the conservation” of African elephants, as required under the ESA.⁶⁵
- The proposed rule does not regulate interstate or intrastate trade of African elephants, a gap that places the primary enforcement burden on the officials monitoring imports.⁶⁶
- The proposed rule contains a *de minimis* exemption that allows for limitless interstate trade of items containing small amounts of ivory, such as musical instruments and

⁶¹ 50 C.F.R. § 17.40(e)(2).

⁶² See 50 C.F.R. § 17.40(e).

⁶³ See Endangered and Threatened Wildlife and Plants; Revision of the Section 4(d) Rule for the African Elephant (*Loxodonta africana*), 80 Fed. Reg. 45154 (July 29, 2015).

⁶⁴ See *id.* at 45165.

⁶⁵ 16 U.S.C. § 1533(d).

⁶⁶ See 80 Fed. Reg. at 45161.

knives.⁶⁷ This provision introduces a gap into the regulations that makes the laws more confusing for the public and for law enforcement. Further, it allows some ivory trade to continue legally, which only contributes to the general global ivory trade, despite calling the exemption *de minimis*.

- The proposed rule contemplates an exception from the ban on the sale of ivory in interstate commerce for museums or similar cultural or historical organizations; however, the proposed rule does not define museums, leaving a potential gap for a wide variety of organizations to call themselves museums in order to fit into this loophole.⁶⁸

2. Benefits of uplisting the African elephant to “endangered”

The current regulation of African elephants under the ESA is confusing and in flux, and it leaves many gaps, even if the proposed rule were to be finalized. Uplisting the African elephant from threatened to endangered would increase protections and clarify the regulatory landscape, making it easier for the public to comply and for law enforcement to identify and prosecute violators—and sending a message to actors along the poaching chain that the United States takes protection of the African elephant seriously.

Designating the African elephant as endangered under the ESA would eliminate most of the regulatory gaps described above and would make the Special Rule inapplicable, since such special regulations are allowed only with respect to threatened species. The import and export as well as transport, delivery, receipt, shipment, sale, or offering for sale in interstate or foreign commerce of African elephants and products derived from them would all be illegal.⁶⁹ Notably, there would still be an exception for certain antiques that are over 100 years old, composed in whole or in part of any endangered or threatened species, have not been repaired or modified with any part of such species on or after December 28, 1973, and enter at a port designated under the ESA.⁷⁰ There would also still be an exception for scientific activity, activity that “enhance[s] the propagation or survival of the affected species,” or activity that is “incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.”⁷¹ However, such activity is allowed only through a permit, where the permit applicant submits a conservation plan,⁷² where the public is given an opportunity for comment, and the government makes a finding that the taking

⁶⁷ *See id.* at 45163.

⁶⁸ *See id.*

⁶⁹ 16 U.S.C. § 1538(a)(1).

⁷⁰ *See* 16 U.S.C. § 1539(h)(1).

⁷¹ 16 U.S.C. § 1539(a)(1).

⁷² “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.” 16 U.S.C. § 1532(3).

will be incidental and the impacts minimal.⁷³

Despite these exemptions, the protections for species listed as “endangered” under the ESA are strong and, indeed, much stronger than for those listed merely as “threatened.” In light of the diminishing African elephant population along with the thriving ivory trade, significant measures must be taken to save the species from extinction. Listing the African elephant as endangered would ban the import of live African elephants and sport-hunted trophies as well as the interstate transport, delivery, receipt, shipment, sale, or offering for sale of African elephant parts and illegally imported live African elephants. Such restrictions would “provide an obstacle to the flow of ivory globally,” halt ongoing circumvention of rules and regulations and crack down on illegal trade and trophy hunting in the U.S., and significantly enhance the U.S.’s ability to effect the purpose of the Endangered Species Act—to protect and conserve endangered species.

CONCLUSION

For the foregoing reasons, we urge the Secretary to recognize that the African elephant subspecies meets statutory criteria as an “endangered species” and to list the African elephant as “endangered” under the ESA.

Respectfully,



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⁷³ See 16 U.S.C. § 1539(a)(2).

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