



Defenders of Wildlife
and Species Survival Network



Comments on the

*Draft Policy on Enhancement-of-Survival Permits
for Foreign Species Listed Under the Endangered Species Act*

October 17, 2003

Submitted on behalf of

**Animals Asia Foundation * Animal Welfare Institute *
ASMS—Swiss Marine Mammal Protection * Born Free Foundation *
Born Free USA* Caribbean Conservation Corporation *
Center for Biological Diversity *
Center for Marine Mammals Research/Leviathan * Co-Habitat *
Defenders of Wildlife * Earthjustice * Endangered Species Coalition *
Environmental Investigation Agency * Forest Guardians *
Humane Society International (Australia) * Humane Society of Canada
* International Environmental Law Project * Kimya Institute *
Natural Resources Defense Council * Northwest Ecosystem Alliance *
Pro Wildlife * Species Survival Network * Whale and Dolphin
Conservation Society * WildAid * Wildlife Protection Society of India *
World Parrot Trust * XWE - African Wild Life Investigation &
Research Centre**

October 17, 2003

Dr. Peter O. Thomas
Chief, Division of Management Authority
U.S. Fish and Wildlife Service
4401 North Fairfax Drive, Room 700
Arlington, Virginia 22203

Via email to: ManagementAuthority@fws.gov

Re: Draft Policy for Enhancement-of-Survival Permits for Foreign
Species Listed Under the Endangered Species Act

Dear Dr. Thomas:

Defenders of Wildlife is an international, not-for-profit organization dedicated to protecting endangered and threatened species of wildlife and the habitat upon which those species depend. Defenders was a vocal advocate of the Endangered Species Act of 1973 (ESA), 16 U.S.C. §§ 1531-1544, and has worked tirelessly for more than thirty years to ensure the full and effective implementation of the Act.

The Species Survival Network (SSN) is a global coalition of more than 70 environmental and animal welfare organizations dedicated to ensuring that the international trade in wildlife is legal, sustainable and humane.

On August 18, 2003, the Fish and Wildlife Service (Service) published notice of a Draft Policy for Enhancement-of-Survival Permits for Foreign Species Listed under the ESA (Draft Policy). 68 Fed. Reg. 49,512. The Draft Policy would dramatically alter the Service's treatment of import applications for foreign endangered species, allowing the resumption of commercial trade in an indeterminate and potentially limitless number of these species. This represents a radical departure from the permitting policy the Service has followed for nearly thirty years, and a serious threat to the more than 500 species potentially affected by such permits—representing nearly 60% of all endangered animals the ESA protects!

On behalf of the 27 undersigned organizations and their millions of members in the United States and around the world, we wish to express our strong opposition to the Draft Policy. In our collective view, the proposal is fundamentally incompatible with the ESA and with the long-term survival of the species it protects.

I. *The Draft Policy is Inconsistent with the Letter and Spirit of the ESA*

The passage of the ESA is widely recognized as a landmark in endangered species conservation not only in the United States but around the world. In the words of the Supreme Court, it is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” TVA v. Hill, 437 U.S. 153, 180 (1978). Concerned with the imminent disappearance of a growing number of species from habitat loss and over-exploitation, Congress took dramatic action to stem the tides of extinction. As the Court noted in Hill, “[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.” Id. at 184.

This intent extended not only to domestic species but to endangered species wherever they occur. Today, approximately 560 foreign species are listed as threatened or endangered under the ESA, including nearly 60% of all endangered animals protected by the Act. Throughout its text, the ESA reflects Congress’ determination to extend protections for these species to the farthest reaches of its legislative power.

A. *The ESA Allows Endangered Species Imports Only in Exceptional Circumstances*

To address the threat of extinction, Congress established a comprehensive regulatory regime for identifying and protecting threatened and endangered species and their habitat. A central element of that regime was ending U.S. participation in the exploitation of imperiled wildlife. As the House Committee on Merchant Marine and Fisheries observed, “[r]estrictions upon the otherwise unfettered trade in these plants and animals is a significant weapon in the arsenal of those interested in the protection of these species.” Report of the Committee on Merchant Marine and Fisheries to accompany H.R. 37, H. Rep. No. 412, 93d Cong., 1st Sess. 17 (July 27, 1973), reprinted in “A Legislative History of the Endangered Species Act of 1973”, 97th Cong., 2d Sess. (February 1982) (hereinafter “ESA Legislative History”) at 144. Accordingly, Congress ensured in the ESA that “[v]irtually all dealings with endangered species, including taking, possession, transportation and sale were prohibited, *except in extremely narrow circumstances.*” TVA v. Hill, 437 U.S. at 172 (emphasis added; internal citations omitted).

In the broadest possible language, the ESA makes it unlawful for any person “to import any such species into, or export any such species from the United States,” “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,” or “sell or offer for sale in interstate or foreign commerce any such species.” ESA § 9(a)(1)(A), (E) and (F).

The ESA makes an exception to this otherwise categorical ban in the case of imports carried out “for scientific purposes or *to enhance the propagation or survival of the affected species.*” ESA § 10(a)(1)(A) (emphasis added). Both the ESA itself and the legislative history of the Act manifest Congress’ intent that the exception be interpreted very narrowly, and generally restricted to activities not involving killing or removal of wild specimens.

Significantly, the Service may grant an exception under Section 10 only if it finds, *inter alia*, that the exception “will be consistent with the purposes and policy set forth in Section 2 of this Act.” ESA § 10(d)(3). Section 2, in turn, declares that the purpose of the Act is to “provide a program for the *conservation* of such endangered species.” Id. § 2(b) (emphasis added). It is the “policy of Congress that all Federal departments and agencies *shall seek to conserve* endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.” Id. § 2(c).

Thus, to qualify for a Section 10 exemption, it is not sufficient that a program merely “enhance the propagation” of the species affected, it must also “conserve” that species within the meaning of the ESA. The ESA is quite explicit that the taking of an endangered species can be considered “conservation” only under the most extraordinary circumstances:

The terms “conserve,” “conserving,” and “conservation” mean to use and 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 Act 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 otherwise be relieved, may include regulated taking.*

ESA § 3(3) (emphasis added).

This admonishment is repeated throughout the legislative history of the Act. In reporting the Section 10 exceptions to the full House, the Committee on Merchant Marine and Fisheries explained that:

Any such activities to encourage propagation or survival may take place in captivity, in a controlled habitat or even in an uncontrolled habitat so long as this is found to provide the most practicable and realistic opportunity to encourage the development of the species concerned. They might even, *in extraordinary circumstances*, include the power to cull excess members of a species *where the carrying capacity of its environment is in danger of being overwhelmed.*

ESA Legislative History at 156. The joint Conference Committee used still stronger language in its report on the final version of the Act:

In *extreme* circumstances, as where a given species exceeds the carrying capacity of its particular ecosystem and where this pressure can be

relieved *in no other feasible way*, this “conservation” might include authority for carefully controlled taking of surplus members of the species.

Joint Explanatory Statement of Conference Cmte., H. Rep. No. 740, 93d Cong., 1st Sess. (Dec. 19, 1973), reprinted in ESA Legislative History at 448 (emphasis added).

In sum, both the language and history of the statute manifest a Congressional intent that exceptions to the import and trade prohibitions of Section 9 be granted only rarely. The overriding purpose of the “enhancement of survival” exception was to allow the propagation of endangered species “in captivity or in a controlled habitat,” S. Rep. No. 307, 93d Cong., 1st Sess. (July 1, 1973) reprinted in ESA Legislative History at 309, and to facilitate the reestablishment of populations in areas from which a species has been extirpated. ESA § 10(a)(1)(A). Congress intended that permits involving the lethal take or harvest of endangered species be granted only in the *extraordinary* circumstance where a species is overwhelming its environment and there is no other feasible way of relieving that pressure. As the Conference Committee cautioned, moreover, “[t]o state that this possibility exists . . . in no way is intended to suggest that this extreme situation is likely to occur—it is just to say that the authority exists in the unlikely event that it ever becomes needed.” Id. at 448.

Consistent with this Congressional intent, the Service has applied a narrow interpretation of the “enhancement of survival” exception for more than a quarter century and routinely denied import applications for foreign endangered species if the import would result in the killing or removal of a wild individual. 68 Fed. Reg. at 49,514. In the rare circumstances where the Service has authorized imports of an endangered species, it has done so only after intense public debate and subject to detailed and stringent criteria to ensure that conservation, not profit, is the motivating purpose behind the import. See, e.g., Notice of Policy on Issuance of Permits for Giant Panda Imports, 63 Fed. Reg. 45,839 (August 27, 1998). In view of the Service’s express mandate to conserve endangered species, and Congress’ manifest skepticism about “conservation” practices involving lethal control or harvest, this narrow interpretation of Section 10 is not only reasonable, but inescapable.

B. The Draft Policy Exceeds the Scope of the Section 10(a)(1)(A) Exception

The Draft Policy proposes to abandon this narrow interpretation in favor of an approach patently inconsistent with the Act. Under this broad and ill-defined approach, the Service could grant an “enhancement of survival” exception for the import, transport and sale of any endangered or threatened foreign species, for any purpose, provided that “the range country and/or the applicants have established a substantive conservation program.” 68 Fed. Reg. at 49,517, col 1. Remarkably, given its potential reach, the Draft Policy does not actually define what its permit approval “policy” would be. Nor does it define, except in the broadest terms, the criteria by which the Service would determine whether a “substantive conservation program” has been established or how a particular import application relates to that program and, ultimately, to the conservation of the species in the wild. Instead, the Draft Policy sets forth a series of five “examples of

potential application”—including ranching crocodiles for leather in Mexico, sport hunting for markhor in Pakistan and wood bison in Canada, aquaculture for the pet and food trade in Asia, and capturing wild Asian elephants for shipment to U.S. circuses. 68 Fed. Reg. at 49,515-517. These examples bear few commonalities beyond the obvious facts that all the species concerned are endangered and, by the Service’s own admission, unlikely to meet the biological criteria for downlisting and that, in the absence of some exception, the import of any of these species for the purposes described would clearly be prohibited by the ESA.¹ Indeed, the Draft Policy proposes the endangered Asian elephant as a promising candidate for “enhancement” without identifying any existing program that would “enhance” the survival of those elephants in the wild.

Beyond compliance with applicable CITES rules, which would be required with or without this new policy, the most concrete criterion for a “substantive conservation program” is an apparent requirement that it “address relevant determinations of the productive capacity of the species and its ecosystem, to ensure that cumulative use does not exceed those capacities or the ability of the population to reproduce, maintain itself, and perform its role or function in its ecosystem.” *Id.* at 49,518, col. 2. Such a requirement can hardly be equated with enhancing the propagation of the species. With respect to the applicant’s personal responsibility, it would appear sufficient that the applicant simply pay for the privilege of shooting, harvesting, tanning, or displaying the animal. More troubling still is the fact that this policy would apply, without limitation, to any of the 550 plus foreign endangered and threatened species not currently covered by a special rule. Because requests for exceptions will be applicant-driven, the Service (and the public) could be confronted with a barrage of requests covering any of these species in any of the 190 countries where they may occur. In the absence of precise and detailed criteria, the ability of both the Service and the interested public to assess and respond to these proposals is completely undermined.

Regardless of its specific elements, however, the Draft Policy reflects a clear intention to rewrite the ESA to allow the import of endangered species killed or captured in the wild for commercial purposes. This intention is directly contrary to the conservation policy of Section 2 and, by extension, to Section 10. It is also contrary to the express intent of Congress in adopting the Section 10 exceptions. The interpretation of Section 10(a)(1)(A) proffered by the Service would turn that intent on its head, and use a narrow exception to swallow the rule itself.

In defense of that interpretation, the Service offers a single, unpublished, and largely inapposite district court decision that has not once been followed—or cited—in the twenty-plus years since it was adopted. See Defenders of Wildlife v. Watt, Civ. No. 81-1048, 1981 U.S. Dist. LEXIS 18458 (D.D.C. 1981) (upholding Service’s decision to lift a pre-existing ban on imports of three threatened kangaroo species based on its

¹ For example, a person importing skins from endangered Morelet’s Crocodiles for use in leather goods would violate clauses (1)(A), (E) and (F) of Section 9(a). As would someone importing an Asian bonytongue for sale in the pet trade. A sport-hunter importing an endangered straight-horned markhor or wood bison trophy would violate clause (1)(A). And a person importing an endangered Asian elephant for use in a circus would violate at least clause (1)(A), and might also violate clause (E).

determination that criteria for lifting the ban, included at the time of the ESA listing, had been satisfied). Most obviously, of course, the court in *Defenders v. Watt*, was addressing imports of three threatened species, rather than 500 endangered species. Further, the case took place in the unique context of an initial listing defining poor regulation as a principal threat factor the species and expressly providing for lifting of import restrictions should that threat be remedied. Finally, and most fundamentally, the court reached its decision without serious analysis of either the statutory text or the legislative history. *Defenders v. Watt* cannot sustain the Service's flawed interpretation of Section 10 against the great weight of authority that compels a different reading.

II. The Draft Policy Is Inconsistent with the Conservation of Endangered Species

Even if the Draft Policy were permissible under the ESA, it would still be inconsistent with good conservation policy. While properly designed, fully funded, and well-managed harvest programs have proven sustainable for a small number of species in limited circumstances, the history of sustainable management efforts is replete with serious and sometimes catastrophic failures. One need only look at the repeated collapse of major fish stocks—even under intensive management regimes—to appreciate the scope and impact of such failures.

Perhaps more tellingly, the steady stream of species transferred from Appendix II to Appendix I at every Conference of the CITES Parties is a testament to the uncertainty of sustainable management programs. CITES expressly requires that exports of Appendix II species be premised on a science-based assessment that such exports will not be detrimental to the survival of the species. For scores of species, however, regulated trade under CITES Appendix II has proven unsustainable in the long term. There is no overriding cause for such failures: populations may decline because initial abundance estimates were wrong, because demographic models were flawed; because a well-designed program is poorly managed or inadequately funded; or because a well-implemented program is undermined by poaching and illegal trade. In practice, it has frequently proven difficult to identify these failures or their effects on the target species until serious damage has already been done.

For example, Oxford University's Wildlife Conservation Research Unit recently announced results from a multi-year study of the lion population within Hwange National Park, Zimbabwe and the impacts on that population of lion trophy hunts in the area surrounding the park. The study found that the number of lions shot annually far exceeded recommended sustainable levels, and that the preferential targeting of adult male lions by trophy hunters destabilized lion social structures, leading to increased pride takeovers by surviving males. Because new males routinely kill unrelated cubs to bring females into estrus, the increased pride takeovers prevented females from raising cubs to independence. The study further concluded that high lion harvest levels on the periphery of protected areas could be detrimentally affecting lion populations within the parks, creating population sinks for the protected lions. As a result of this and other factors,

Africa's estimated lion population has fallen from 200,000 in the early 1980s to less than 20,000 today—representing a 90% population decline.²

This echoes the results of a 1997 study on bear hunting in Scandinavia. In a study published in the preeminent journal Nature, Swenson et al. reported that sport hunting for bears had significantly reduced growth rates in studied populations. Bear hunters, like lion hunters, preferentially targeted large, mature males. And new male bears, like new male lions, frequently killed the offspring of the bears they replaced, significantly reducing net reproductive output for breeding females. J. Swenson, et. al, "Infanticide caused by hunting of male bears," 386 Nature 450-451 (1997).

Beyond these unpredictable impacts, however, are the far more foreseeable impacts associated with poor design and poor management of harvest programs. Study after study documents programs in which data on population declines are ignored, quotas go unenforced, illegal specimens are laundered through registered programs, and the promised benefits for local communities and conservation efforts never materialize.³ In 2002, Richard Harris and Daniel Pletscher reported the findings of a multi-year study on a trophy hunting program for argali sheep in Western China. Despite concluding that the number of hunters participating in the program could theoretically generate substantial funding for local conservation efforts, they found that only a tiny portion of the resources generated ever reached local conservation officials. The bulk of revenues generated by the hunts were captured by commercial guides and officials and agencies at higher levels of government. Accordingly, they found the program's net contribution to conservation had been minor. R. Harris & D. Pletscher, "Incentives toward conservation of *Argali ovis ammon*: A case study of trophy hunting in western China," 36 Oryx 373 (2002). Indeed, even flagship projects like the much touted CAMPFIRE program have proven unsustainable in the long term without substantial and continuous infusions of outside aid. USAID's recent decision to end such support for CAMPFIRE has called the future of the program into serious question.

Nor are these risks restricted to trophy hunting. The risks associated with managed harvest programs for wild parrots prompted the authors of IUCN's Parrot Action Plan to caution strongly against their use. After explicitly acknowledging the theoretical promise of sustainable use programs, the Parrot Action Plan points out that despite this promise, "[n]o demonstrably successful harvesting projects with free-flying parrots have been established to date." Noel Snyder et al., Parrot—Status Survey and Conservation Action Plan 24 (IUCN 2000). As the authors explain:

Realizing the potential benefits of trade requires a degree of control over harvesting that promises to be difficult and expensive to achieve. Solving

² The study is described at <http://www.wildcru.org/hwangelions/mission.html>. Results were delivered to the Zoological Society of London, and reported by BBC on October 7, 2003. See <http://news.bbc.co.uk/1/hi/sci/tech/3171380.stm>.

³ In 2002, Martin Hutter prepared a comprehensive and valuable survey of more than 100 such studies for the German conservation organization Pro Wildlife. Utilization of Wild Living Animals, Conservation and Sustainable Development (Pro Wildlife e.V., Munich 2002). A copy of that report is on file with the author and available upon request from Pro Wildlife at mail@prowildlife.de.

the biological problems associated with sustainable harvest of parrots is challenging enough, and presupposes that sensitive and reliable means of population monitoring may be available for the species in question. Even more challenging are the associated social, political, and economic problems. Examples of the latter include:

1. Illegal laundering of non-sustainably harvested birds through the programmes;
2. Continued poaching of birds by people outside of the programmes; and
3. A tendency for programmes to skimp on the costs of monitoring wild populations and to overharvest to maximize short-term profits.

Id. at 25. The Plan warns that “without truly effective controls over harvesting programmes, attempts at sustainable harvesting run a significant risk of exacerbating conservation problems, rather than solving them. Once species are viewed primarily as items of legal trade, the primary concerns in free capitalistic economies commonly become maximizing short-term profits, rather than ensuring long-term sustainability.” Id. (emphasis added). Not surprisingly, then, when the Service recently proposed to allow imports of wild-caught blue-fronted parrots from a sustainable harvest plan in Argentina, more than 90 eminent parrot biologists spoke out against the proposal.

Whether these risks will become reality for any particular species is beside the point. The relevant fact is that the risks exist, they are significant, and they are potentially catastrophic. The Draft Policy proposes to expose to these risks hundreds of species the Service has recognized as endangered with extinction, thus warranting the most stringent possible protection. As the Parrot Action Plan warns, harvest programs cannot contribute to conservation without extensive, intensive and continuous monitoring and enforcement mechanisms. These mechanisms are difficult to design and costly to maintain. The Service proposes to accept imports from sustainable use programs without defining the criteria by which they would be evaluated, establishing a mechanism by which they could be monitored, or specifying how the Service would meet the human and financial burdens of effectively administering such a mechanism. When the species subject to the policy lie on the verge of extinction, such a cavalier approach is profoundly inappropriate. In our view, the demands of conservation accord with the demands of the law: the Draft Policy must be abandoned.

III. The Draft Policy Misconstrues the Relationship between CITES and the ESA

We disagree with the Service’s suggestion that the requirements of the ESA must be weakened to permit all trade allowable under CITES. The Draft Policy decries the fact that “the ESA imposes different and more stringent standards for the importation of an endangered species than is required under Appendix I of CITES.” 68 Fed. Reg. at 49,514, col. 1. This difference is not an unintended effect of Section 9, but in fact, a fundamental element of the integrated conservation strategy the U.S. developed through ESA and CITES.

The ESA and CITES were developed concurrently, to address separate facets of the same problem—the rising tide of species extinctions caused by human action, including trade.⁴ The United States—and, indeed, Congress itself—played an instrumental role in the initiation and conclusion of the Convention.⁵ Through CITES, the United States established a baseline of protection that might be adopted and implemented by countries around the globe. Yet, CITES explicitly preserves the right of every Party to go beyond this baseline, and adopt more stringent measures at the national level. Article XIV of the Convention declares that:

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 species included in Appendix I, II or 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 Art. XIV (1). For many species, the exercise of this right—by the United States or others—has served as a critical stop-gap between unregulated or under regulated trade and the grant of appropriate CITES protections.

Not surprisingly, therefore, the United States has steadfastly defended its Article XIV right throughout the thirty-year history of the Convention. The exercise of that right provides the basis for many of the country’s most important wildlife laws, including the ESA itself, the Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1421h, the Wild Bird Conservation Act, 16 U.S.C. §§ 4901-4916, and the Pelly Amendment. 22 U.S.C. §§ 1971-1979. The Service’s suggestion that the exercise of this right is somehow inappropriate represents a radical departure from well-established and widely supported U.S. policy. We respectfully disagree with that suggestion.

⁴ See ESA Legislative History at 144 (“Restrictions upon the otherwise unfettered trade in these plants and animals are a significant weapon in the arsenal of those who are interested in the protection of these species. [CITES] was directed primarily at this problem; most of the provisions of H.R. 37 are also designed to deal with the problem one way or another.”)

⁵ In 1963, the International Union for the Conservation of Nature and Natural Resources (IUCN), of which the U.S. is a member, passed a resolution calling for an international convention to regulate the trade in rare or threatened species. The first draft of the convention was completed in 1964, and an initial list of controlled species released in 1969. Willem Wijnstekers, The Evolution of CITES (6th ed. 2001). Anticipating a rapid conclusion to the negotiations, the Endangered Species Conservation Act of 1969, the immediate precursor to the present ESA, prohibited trade in wildlife in violation of foreign law and directed the Secretary of State to convene “an international ministerial meeting on fish and wildlife prior to June 30, 1971” for the purpose of signing “a binding international convention on the conservation of endangered species.” Pub. L. 91-135, 83 Stat. 278 §§ 5(b) and 7(a). Although the negotiations could not be completed by that date, a second draft of the Convention was circulated in 1971. H.R. 37, § 10(a)(2) (Jan. 3, 1973) (93rd Congress, 1st Sess.) The endangered species bill introduced by Rep. John Dingell in January 1973 repeated the call for a ministerial meeting to conclude the treaty within the year. ESA Legislative History at 144. As a “direct outgrowth” of the U.S. legislation, a plenipotentiary conference for CITES was convened in Washington, D.C. in late February, 1973. Negotiations were completed and the Convention signed at Washington on March 3rd of that year. Id.

IV. The Environmental Impact of the Draft Policy Should be Assessed

We also disagree with the Service's conclusion that the issuance of this policy does not require preparation of an environmental assessment under the National Environmental Policy Act (NEPA). See 68 Fed. Reg. at 49,518. In view of its far-reaching impacts on federally protected species, adoption of the Draft Policy would clearly constitute a major federal action significantly affecting the human environment, thus necessitating an environmental impact assessment under NEPA. 42 U.S.C. § 4332.

The Service's NEPA obligations are defined by the NEPA implementing regulations of the Council on Environmental Quality, and the Departmental Manual (DM) of the Department of Interior. Both the DM and the CEQ regulations specify several "intensity" factors relevant to identifying actions that are "significant" within the meaning of NEPA. As a preliminary matter, the regulations make clear that a significant environmental impact may exist even where the agency believes the net effect of an action will be beneficial. 40 C.F.R. § 1508.27(b)(1). In assessing that potential significance, the Service must consider, among other things:

- (A) the degree to which the effects on the quality of the human environment are likely to be highly controversial, 40 C.F.R. § 1508.27(b)(4); 516 DM 2, App. 2 § 2.4;
- (B) the degree to which the possible environmental effects are highly uncertain or unknown; 40 C.F.R. § 1508.27(b)(5);
- (C) the degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration, *Id.* § 1508.27(b)(6); 516 DM 2, App. 2 § 2.5;
- (D) the degree to which the action may adversely affect an endangered or threatened species listed under the ESA; 40 C.F.R. § 1508.27(b)(7); and
- (E) whether the proposed action "threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment." 40 C.F.R. § 1508.27(b)(10); 516 DM 2, App. 2 § 2.10.

All of these factors are substantially implicated by the Draft Policy.

A. Public Controversy

The Draft Policy is already the subject of substantial public controversy. The proposal is actively and vocally opposed by scientists, conservation groups, animal welfare and animal rights organizations, members of Congress and growing numbers of concerned citizens from across the political spectrum. The proposal has received attention in nearly every major national newspaper, and many wire services and online

media outlets. And it is almost certain to result in significant litigation. Clearly, this proposal is highly controversial.

B. Uncertainty

As discussed in Section II above, the history of “sustainable use” programs for wildlife is replete with unforeseen and, often, unforeseeable consequences. In addition to affecting the target population in unpredictable and deleterious ways, such programs often have collateral impacts on non-target populations, non-target species and human communities, both within and beyond the borders of the implementing country. For example, there is now substantial anecdotal evidence that the resumption of legal ivory trade from southern Africa led to increased elephant poaching not only in the exporting States, but elsewhere in Africa and Asia. In Kenya, this resurgence was accompanied by the slaying of Maasai villagers in encounters with heavily armed poachers. Particularly in the absence of detailed criteria, the application of the Draft Policy across scores of countries and hundreds of species increases the risk of such unexpected consequences by many orders of magnitude.

C. Precedential Impact

By definition, this Draft Policy signals a fundamental directional shift in the Service’s treatment of permit applications for foreign endangered and threatened species. If adopted, it would preclude the need for the detailed, species-by-species rulemaking process the Service has applied for decades. And, by the Service’s own admission, it would signal to both range States and importers a new laxity in the handling of permits and in the standards by which “enhancement” is measured.

D. Effect on Endangered and Threatened Species

The Draft Policy could affect any of the roughly 550 endangered and threatened species not currently subject to a special rule. As previously noted, this represents more than 60% of all endangered animals protected under the ESA. The Draft Policy would undermine the most fundamental protection provided for these species in the Act. Short of delisting these species entirely, a more sweeping effect can hardly be imagined.

E. Violation of Law

As detailed in Section I above, the Draft Policy would violate both the letter and the spirit of the ESA. Accordingly, we believe the Draft Policy warrants the preparation of an environmental assessment and, should the Service proceed, a full environmental impact statement.

V. Conclusion

On its surface, the idea of employing sustainable use programs to generate critically needed resources for species conservation has an intuitive appeal. Experience has shown, however, that such programs—whether by design or by operation—too often favor use over sustainability. With species already on the brink of extinction, the risks attendant to such an imbalance are particularly inappropriate. The ESA does not permit the Service to take such risks under the guise of enhancing the survival of an endangered species. In those exceedingly rare cases where extraction of wild individuals can demonstrably and reliably contribute to survival and recovery of an endangered species, the ESA contains clear legal mechanisms through which the Service can act—either by proving that the “extraordinary circumstances” envisioned by Congress truly exist or by downlisting the species and adopting a special rule. While the Service may consider these processes inconvenient at times, they are mandated both by law and by the dictates of sound public policy. They should not be abandoned or bypassed for the sake of administrative expediency. Accordingly, we urge the Service to abandon this Draft Policy and reiterate its commitment to the narrow interpretation of Section 10(a)(1)(A) that it has long and properly applied.

In our collective view, the Draft Policy is only one manifestation of a growing and increasingly disturbing trend in the Service’s implementation of our nation’s most important wildlife laws. Our organizations have a long and fruitful history of collaboration and cooperation with your agency. Regrettably, however, we are confronted by an ever expanding array of regressive decisions and policy proposals—extending throughout and beyond the ESA—that elevate form over substance, private interests over public good, and politics over law. We urge the Service to reverse this trend, and reclaim its proper role as the leading advocate and protector of wildlife, both in the United States and around the world.

Respectfully submitted,

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On behalf of Defenders, SSN, and the undersigned organizations:

Animals Asia Foundation
Animal Welfare Institute
ASMS—Swiss Marine Mammal Protection
Born Free Foundation

Born Free USA
Caribbean Conservation Corporation
Center for Biological Diversity
Center for Marine Mammal Research/Leviathan
Co-Habitat
Earthjustice
Endangered Species Coalition
Environmental Investigation Agency
Forest Guardians
Humane Society International (Australia)
Humane Society of Canada
International Environmental Law Project
Kimya Institute
Natural Resources Defense Council
Northwest Ecosystem Alliance
Pro Wildlife
Whale and Dolphin Conservation Society
Wild Aid
Wildlife Protection Society of India
World Parrot Trust
XWE - African Wild Life Investigation & Research Centre