

February 5, 2018

Timothy Van Norman, Chief
Branch of Permits, Division of Management Authority
U.S. Fish and Wildlife Service

Via electronic submission

Re: PRT-57017C, Submitted by Zoological Society of San Diego
Docket No. FWS-HQ-IA-2017-0095

Dear Mr. Van Norman,

On behalf of People for the Ethical Treatment of Animals (PETA), I submit the following comments in opposition to the Zoological Society of San Diego's ("San Diego") request under the Endangered Species Act (ESA) for a permit to import a male elephant calf named Ongard from Zoos Victoria and the Melbourne Zoo to Zoo Miami.

At just seven years old, Ongard is still a calf, likely freshly weaned from his mother. He has spent his entire life in her company and surrounded by relatives, including several other calves close to his age. Taking him from these familiar surroundings, permanently severing his social bonds, subjecting him to long hours of trans-oceanic travel, and placing him in a new environment would be traumatic, severely disruptive, and could lead to persistent abnormal behaviors such as fear and aggression. This move is not in his best interest.

The sole purpose of the proposed import is to display Ongard in a zoo with the hope of using him to breed more elephants, also for the purpose of zoo display. ESA permits are only available for activities that will "enhance the propagation or survival of the affected species" (the "Enhancement Requirement"). 16 U.S.C. § 1539(a)(1)(A). They cannot be used to stockpile animals, and the U.S. Fish and Wildlife Service (FWS) has long held that zoological exhibition alone does not enhance endangered species conservation. It follows that breeding endangered animals for the sole purpose of stocking future zoo exhibits also fails to satisfy the Enhancement Requirement.

For all of the reasons discussed in these comments, FWS must deny this request. PETA requests notification of FWS's final action on the Application. Pursuant to 50 C.F.R. § 17.22(e)(2), should FWS decide to issue the permit despite these objections, I hereby request notice of that decision at least ten days prior to the issuance of the permits via e-mail to RMathews@petaf.org or telephone to 202-680-8276.

Very truly yours,



Rachel Mathews, Esq.
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**Comments of People for the Ethical Treatment of Animals
in Opposition to PRT-57017C, Submitted by Zoological Society of San Diego**

I. Zoo Miami, Not San Diego, Is the Proper Applicant.

Although San Diego will hold "title" to Ongard and his hypothetical offspring, it will not possess him and expresses no intention of doing so.¹ He will be imported directly to Zoo Miami, which will be responsible for his care and ultimately carrying out the breeding activities used to justify the permit. Indeed, the bulk of the Application—from facilities information, to staff résumés, to educational materials—pertains to Zoo Miami alone.² San Diego does not control or employ Zoo Miami, and it failed to include a copy of any agreement or contract detailing the relationship between the two facilities.

The Application requires a signed certification that "legally binds the applicant to the statement of certification," including certifications that the applicant has read and understands the regulations that apply to the permit; has submitted "complete and accurate" information; and understands that it is subject to felony criminal liability for any false statement made in the application. FWS Form 3-200-37 at 1, 7. San Diego signed this certification, even though it has no way of verifying that the information provided to it by a third party was truly complete and accurate. In fact, it wasn't. The Application excludes highly relevant required information, such as an explanation of the death of the elephant Lisa in August 2017, just over a year after she was moved to the facility. It also excludes information about the size of Zoo Miami's current Asian elephant exhibit (information that is notably absent from the zoo's website and has not been reported by the media; a zoo industry chat forum claims that it is only one acre. *See* AZA Elephant Exhibit Sizes, Zoochat.com (June 30, 2013), <https://www.zoochat.com/community/threads/aza-elephant-exhibit-sizes.326779/>). Even though Zoo Miami will be receiving Ongard and engaging in the purported species enhancement activities justifying the permit, it is not bound by San Diego's certification.

This is precisely why ESA permits are specific and not transferable or assignable. 50 C.F.R. §§ 13.42, 13.25(a). Only a person who is "under the direct control of the permittee, or who is employed by or under contract to the permittee for purposes authorized by the permit, may carry out the activity authorized by the permit." *Id.* § 13.25(d). Hence, while a permittee may reasonably contract with animal transport company to carry out an import, it is not reasonable for San Diego to apply for a permit on behalf a third party zoo that it does not own, manage, direct, or control.

Zoo Miami—or Zoo Miami together with San Diego—is the proper applicant. Should FWS issue the permit to San Diego, it will be setting a precedent that erodes the protections of the ESA and makes similar transactions on behalf of unrelated third-parties more likely to occur in the future. The Application suggests that San Diego intends to continue to broker similar deals to import elephants to US zoos other than its own. *See* Application at 15-17. In this instance and in future instances, the zoo that will actually be responsible for the care of the animal and the purported species enhancement activities must be required to demonstrate that it is eligible for an ESA exemption.

¹ Nor will it have control over his breeding or the placement of his offspring, which will be determined by Association of Zoos and Aquariums and Zoos Victoria. Application at 14, 16.

² Indeed, in issuing a permit, FWS must consider "[w]hether the expertise, facilities, or other resources available to the applicant appear adequate to successfully accomplish the objectives stated in the application." 50 C.F.R. § 17.22(a)(2)(vi) (emphasis added).

II. The Import Does Not Enhance the Propagation or Survival of the Species.

Section 10 of the ESA affords FWS limited authority to issue permits to allow activities that are otherwise prohibited by Section 9, such as importing an endangered elephant, "for scientific purposes or to enhance the propagation or survival of the affected species." 16 U.S.C. § 1539(a)(1)(A). This section was intended "to limit substantially the number of exemptions that may be granted under the Act, . . . given that these exemptions apply to species which are in danger of extinction." H.R. Rep. No. 93-412, at 156 (1973). Such was Congress's desire to limit exemptions that it prohibited "[v]irtually all dealings with endangered species, . . . except in extremely narrow circumstances." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). Section 10 permits are "not for the purpose of stockpiling animals or products." H.R. Rep. No. 93-412, at 156.

Permit applicants are required to "provide a statement on how the activities will **enhance or benefit the wild population**," and provide a full statement to justify their proposed activities. FWS Form 3-200-37 at 4 (emphasis in original). In deciding whether a permit meets the Enhancement Requirement, FWS must consider, *inter alia*:

- "The probable direct and indirect effect which issuing the permit would have on the wild populations of the wildlife sought to be covered by the permit." 50 C.F.R. § 17.22(a)(2)(ii).
- "Whether the purpose for which the permit is required would be likely to reduce the threat of extinction facing the species of wildlife sought to be covered by the permit." *Id.* § 17.22(a)(2)(iv).
- "Whether the purpose for which the permit is required is adequate to justify . . . changing the status of the wildlife sought to be covered by the permit." *Id.* § 17.22(a)(2)(i).

A. Zoological Exhibition Does Not Satisfy the Enhancement Requirement.

San Diego openly admits that moving seven-year-old Ongard to Zoo Miami "**will have no impact on any population of wild Asian elephant**." Application at 156 (emphasis added). It follows that the import will also have no impact on the species' survival or extinction, and therefore the import is not justified.

The primary justification for moving the calf is to exhibit him in a zoo that may one day use him to breed more captive elephants who will also be exhibited in zoos. San Diego entered a contract with Zoos Victoria to exchange elephants deemed "non-essential" to their countries' respective captive gene pools. The purpose is to ensure that zoos will continue to have captive elephants "as conservation and education ambassadors." *Id.* at 15.

This is underscored by the inclusion of the Association of Zoos and Aquariums' (AZA) Asian Elephant Species Survival Plan (SSP), which has concluded that because captive elephants reproduce poorly, "demand for animals exceeds the number available for placement" and zoos face a "continual shortage of animals for exhibits" and "may have challenges finding animals." *Id.* at 28, 29, 21. The SSP is not working towards any benefit to the species in the wild or as a whole; it is working to stock zoo exhibits.

To further justify the permit request, the Application includes a description of Zoo Miami's educational presentations, as well as photographs of its signage that conveys a few basic facts about elephants. There is no need for an elephant to be present to convey this information, which is

generally available to anyone with an internet connection or library card. *Id.* at 68-74. Nor would importing Ongard somehow increase the educational reach of the exhibit, as the Application claims that the zoo already has so many elephants that the public will hardly notice one more. *See id.* at 156.

FWS has long maintained that "[p]ublic education activities may not be the sole basis to justify issuance" of an exemption under Section 10 from the ESA's strict prohibitions. 50 C.F.R. § 17.21(g)(3). When the agency amended its regulations to codify this policy in 1993, it voiced concern that, in the absence of such limitation, "captive-bred animals . . . might be used for purposes that do not contribute to conservation, such as . . . for entertainment." Captive-Bred Wildlife Regulation, 57 Fed. Reg. 548-01, 550 (Jan. 7, 1992). The agency has explained that it has "sincere doubts about the relative conservation benefits that are provided to non-native species in the wild from the public exhibition of living wildlife." Captive-Bred Wildlife Regulation, 58 Fed. Reg. 68,323, 68,324 (Dec. 27, 1993). This conclusion is supported by a scientific consensus.

If zoological exhibition alone fails to meet the ESA's Enhancement Requirement, then so too does breeding endangered animals for the sole purpose of future zoological exhibition.

B. Breeding Asian Elephants in Captivity Does Not Benefit the Species.

Importing Ongard and eventually breeding him will do nothing to reduce the threat of extinction of Asian elephants in the wild. Its impact on captive elephants will probably also be negligible. The AZA SSP concludes that the American population of elephants is "unsustainable," and details the extensive hurdles to maintaining elephants in captivity, including an exceptionally high first-year mortality rate (35 percent for males and 32 percent for females); shortened life expectancies ("few elephants have had the opportunity to live their full lifespans"); "demographic instability"; and low reproduction. *Id.* at 26-30. It admits that "[e]ven with **drastic** changes in management, it was predicted to be difficult to maintain the current population size in the future, let alone grow the population to a larger size." *Id.* at 28 (emphasis added).

Nevertheless, the SSP recommends that zoos power forward with costly and Sisyphean efforts to breed elephants through highly invasive and largely unsuccessful artificial insemination attempts, with a goal of every viable female churning out a calf every five years. But the AZA's claim that Ongard will "help achieve the goals" of the SSP to stabilize the population of captive elephants in the US is all but delusional. *See* Application at 19. The SSP couldn't be more clear that zoo breeding is failing, and it doesn't have a viable solution. The Application has failed to show that importing one male elephant calf will make a meaningful difference in the overall population of elephants in zoos, let alone that it will somehow prevent wild populations from going extinct.

C. Ongard Will Be Subjected to Invasive Breeding Procedures That Are Usually Unsuccessful.

The MOU between San Diego and Zoos Victoria loftily claims that breeding elephants benefits their "biological and psychological welfare," Application at 15, yet this is plainly not the case for elephants such as Ongard, who are taken from their families and homes and subjected to invasive sperm collection procedures.

Zoo Miami only has one female Asian elephant—49-year-old Nellie—and she is well past reproductive age. This means that Ongard will not have the purported benefit of natural breeding

opportunities at Zoo Miami. If he is to breed, he must either undergo the stress of further transfers (or a female elephant must do so), or he will be "collected" by humans.

Collection is a highly invasive procedure. For bulls, "[t]he penis [i]s stimulated to protrusion and erection by rectal massage of the pelvic portion of the urethra" through the rectal wall. D.L. Schmitt & T.B. Hildebrandt, Short Communication, *Manual collection and characterization of semen from Asian elephants* (*Elephas maximus*), 53 *Animal Repro. Sci.* 309, 309 (1998). In some cases, electric prods are used on elephants during semen collection "to keep them from going after you while you collect semen." Trial Test. of Gary Jacobson Trial Tr. at 52, *ASPCA v. Feld Entm't Inc.*, 677 F.Supp.2d 55 (Mar. 9, 2009) (Civ. No 03-2006).

Artificial insemination procedures have a very low success rate in elephants. Studies have reported that female elephants may be subjected to the hours-long procedure—involving the insertion of probes, catheters and scopes into their rectum and vagina—dozens of times over the course of years before ever conceiving. See Janine L. Brown, et al., *Successful Artificial Insemination of an Asian Elephant at the National Zoological Park*, 23 *Zoo. Bio* 45, 54 (2004); Nikorn Thongtip, et al., *Successful artificial insemination in the Asian elephant* (*Elephas maximus*) *using chilled and frozen-thawed semen*, 7 *Repro. Bio & Endocrinology* 75, 3 (2009).

A Seattle Times investigation explained the procedure performed at an AZA zoo on an elephant named Chai as follows:

Because it was an unnatural and invasive procedure, keepers had to train Chai to accept artificial insemination. First, they needed her to learn how to stand still for long periods without panicking. Zookeepers chained Chai's four legs to anchors, pulling them tight so she couldn't move an inch — a technique called "short chaining."

In the next phase, zookeepers got her used to having a long, flexible hose inserted into her winding, 3-foot-long reproductive tract. Zookeepers conducted mock inseminations on Chai for about two years.

In 1992, using elephant sperm shipped by Greyhound bus from the Oregon Zoo, zookeepers performed the first artificial insemination on Chai. They had recruited a staffer who had the "longest arms," records show. The sperm was pumped through the hose.

They repeated the procedures on Chai up to 10 times a month — sometimes twice a day, medical records show — with no success.

Michael J. Berens, *Elephants Are Dying Out in America's Zoos*, Seattle Times, (Dec. 1, 2012), http://old.seattletimes.com/html/nationworld/2019809167_elephants02m.html. Over the course of four years, Chai endured 91 unsuccessful artificial insemination attempts before being shipped to another zoo in hopes that she would breed with a bull there. *Id.*

The European Elephant Group has strongly criticized efforts to make artificial insemination a "priority" in the U.S. after an analysis of artificial insemination outcomes provided "sobering" results. Fred Kurt & Joachim Endres, *Some Remarks on the Success of Artificial Insemination in Elephants*,

29 Gajah 39 (2008) (criticizing Wendy K. Kiso, et al., *Current Investigations of Asian Elephant Semen in North America*, 27 Gajah 31 (2007)). That analysis revealed that artificial insemination results in a male-biased sex ratio, and the rate of stillbirths following artificial insemination was three times as high as after natural mating. *Id.* at 39.

The amount of time, money, brainpower, and resources devoted to trying to impregnate captive elephants and then trying to keep the few babies born alive (neither of which is particularly successful) could have a much greater impact on the survival of the species if it was spent on in-situ conservation efforts.

D. Zoo Miami's Pay-to-Play Donations Are Irrelevant.

San Diego's Application includes a list of donations that Zoo Miami made from 2007-2015 to the International Elephant Foundation (IEF), a US-based elephant industry group that actively works against regulatory measures to protect captive elephants in the United States, such as bans on the use of wild animals in entertainment and tuberculosis eradication efforts. IEF's outgoing president, Randy Reiches, is the curator of mammals at the San Diego Zoo's Safari Park.

The largest donation—\$7,500—went to the failed National Elephant Center, a \$2.5 million AZA facility that closed soon after it opened after four of the six resident elephants (plus a full-term fetus) died in the span of three years. *See* Melissa E. Holsman, *New Details Emerge About Elephant Deaths at Fellsmere Center*, TCPalm.com (Apr. 5, 2017), <http://www.tcpalm.com/story/news/local/indian-river-county/2017/04/05/new-details-emerge-elephant-deaths-fellsmere-center/99748330/>.

The purpose of including this list of prior donations is not clear, although it appears to be a nod to FWS's "Pay-to-Play" policy whereby facilities are granted ESA permits in exchange for a promise to donate money to a conservation organization. But the listed donations do not represent a future commitment to in-situ conservation by San Diego (or even a past commitment). And regardless, Zoo Miami is not the applicant. It is a third party, and its past donations to IEF have no bearing on San Diego's Application, especially given the conflict of interest that arises from San Diego's curator of mammals leading the organization that accepted the payments.

The Enhancement Requirement was proposed and implemented "to permit otherwise prohibited acts" only when the *underlying acts themselves* are undertaken "to enhance the propagation or survival of the affected species." Cong. Research Serv., 97th Cong., *A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, and 1980* 358 (1982). Senator John Tunney of California, who proposed the Enhancement Requirement, stated that it "would permit otherwise prohibited acts when *they* are undertaken to enhance the propagation or survival of the affected species." *Id.* He explained that "[t]his is a needed management tool recommended by all wildlife biologists, . . . for example, where a species is destroying its habitat or where the species is diseased." *Id.* at 396. Indeed, the sole example of an enhancement activity provided in the ESA—"acts necessary for the establishment and maintenance of experimental populations"—underscores that there must be a nexus between the otherwise prohibited activity and the enhancement. 16 U.S.C. § 1539(a)(1)(A); *see also* H.R. Rep. No. 93-412, at 156 (1973) ("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.").

FWS has defied Congress's stated intent "to limit substantially the number of exemptions that may be granted under the Act" by allowing exhibitors pay for the privileges authorized by an ESA permit simply by making donations that are wholly collateral to the activity for which the permit is sought and thus provide no actual benefit or enhancement to the protected species. The agency attempted to formally adopt this Pay-to-Play policy fourteen years ago, but the effort failed following strong backlash from conservationists who pointed out that the policy was unlawful. *See* Notice: Draft Policy for Enhancement-of-Survival Permits for Foreign Species Listed Under the Endangered Species Act, 68 Fed. Reg. 49,512 (Aug. 8, 2003). Without a formal policy in place, the agency pressed forward with Pay-to-Play informally, guiding zoos and circuses to make payments in exchange for permits allowing them to import and export endangered animals for commercial exhibition.³

FWS has even explained that although the sale of endangered animals for commercial exhibition is "unlikely" to "provide a direct benefit to the species," the agency would authorize such a sale "if the parties involved in the transaction are carrying out activities that enhance the propagation or survival of the species," such as a zoo that "provide[s] support (e.g., via the solicitation of donations from visitors) to carry out in-situ conservation efforts in the [species'] native range." Final Rule: U.S. Captive-Bred Inter-subspecific Crossed or Generic Tigers, 81 Fed. Reg. 19,923, 19,927 (Apr. 6, 2016); *see also id.* ("The Service prefers a clear, ongoing commitment of several years on the part of the applicant to provide in-situ conservation or research support. This ongoing commitment could be fulfilled by a group of institutions working together to maximize their resources for the benefit of tigers in the wild."); Final Rule: Listing All Chimpanzees as Endangered Species, 80 Fed. Reg. 34,500, 34,517 (June 16, 2015) ("Enhancement may be direct, such as developing a vaccination to be administered to chimpanzees in the wild (in situ), or indirect such as contributions that are made to in situ conservation.").

As a federal judge recently noted, "[t]he plain language of Section 10(a) does not say" that the Enhancement Requirement can be "satisfied upon nothing more than the permittee's promise to donate money to an unrelated conservation effort," and "FWS's broad interpretation appears to thwart the dynamic of environmental protection that Congress plainly intended when it mandated that *no* export of endangered species be allowed unless the agency permits such export *pursuant to certain specified circumstances.*" *New England Anti-Vivisection Soc'y v. FWS*, 208 F. Supp. 3d 142, 176 (D.D.C. 2016) (citing 16 U.S.C. §§ 1538, 1539(a)).

³ *See, e.g.*, Email from Anna Barry, FWS, to Harriet, TZ Prods. (Jan. 6, 2014, 4:50 PM) (advising the Tarzan Zerbini Circus that it could meet the Enhancement Requirement by donating money to "in situ conservation work in the species' range states," and providing information on how to document the circus's donation as well as examples of donations for this purpose); Fax from Anna Barry, FWS, to John F. Cuneo, Jr., Hawthorn Corp. (Mar. 12, 2012) ("To meet the requirements under the ESA you need to be able to demonstrate how your proposed activities directly relate to the survival of this species in the wild. Many of our applicants achieve this goal by donating to a well-established conservation program in the range state."); Fax from Anna Barry, FWS, to John F. Cuneo, Jr., Hawthorn Corp. (Oct. 19, 2011) ("Contribut[ing] money to an organization that participates in in-situ work in the range state for tigers" is "[a]n [e]xample of an activity applicants participate in to show enhancement."); Fax from Anna Barry, FWS, to John F. Cuneo, Jr., Hawthorn Corp. (Oct. 14, 2011) (recommending that Hawthorn meet the Enhancement Requirement by "undertak[ing] activities that will benefit the survival of the tigers in the wild," such as "[p]articipat[ing] [in] in situ conservation work in the species range states" through a commitment "financial and otherwise"); Email from Anna Barry, FWS, to Anton & Ferdinand Fercos-Hantig (Feb. 8, 2012, 3:23 PM) (listing projects that would meet the Enhancement Requirement, including "[d]onat[ing] money to organizations working to help protect tigers," "making contribution towards anti-poaching costs or compensation of livestock kill," making "contribution towards fuel and field expenditures, salaries, camera-trap surveys," and making "contribution towards research involving ecological and biomedical information").

FWS's Pay-to-Play policy, the judge continued,

essentially . . . read[s] those circumstances out of the statute, such that Section 10(a)'s enhancement-finding requirement actually places no meaningful constraints on FWS's ability to authorize prohibited activities, because, as a practical matter, the agency can always condition the granting of a permit on the permittee's undertaking some *other* act that advances scientific knowledge or benefits the species, regardless of the intentions of the permittee with respect to the particular animals it seeks to access and/or the permittee's avowed lack of interest in furthering the species as a whole.⁴

Id. at 176-77.

FWS's elimination of the Enhancement Requirement through Pay-to-Play has been criticized by U.S. Representative Brendan Boyle for "undermining our collective, global efforts to help preserve animal species," and for being inconsistent with the ESA, which clearly requires that "the action the permit holder seeks to take must in and of itself benefit the species in some way." Letter from Brendan Boyle, Member of Congress, to Daniel Ashe, Director, FWS, 2, 1 (June 24, 2016).

Using Zoo Miami's past donations as a basis for granting a permit to the San Diego Zoo would violate the strict limits on FWS's permitting authority set forth in the ESA and thus would be unlawful.

⁴ The judge further added:

[F]ar from viewing Section 10(a) as a *limit* on the circumstances in which the permitting of activities that impact endangered species can occur, FWS now apparently views that provision as a green light to launch a permit-exchange program wherein the agency brokers deals between, on the one hand, anyone who wishes to access endangered species in a manner prohibited by the ESA and has sufficient funds to finance that desire, and on the other, the agency's own favored, species-related recipients of funds and other services. This Court considers doubtful FWS's insistence that, when Congress penned Section 10(a) it intended to authorize the agency to 'sell' its permits in this fashion so long as the affected species might (as a whole) be conceived of as benefitting from the exchange.

Id. at 177.