

June 18, 2018

Ms. Brenda Tapia  
Program Analyst/Data Administrator  
Branch of Permits  
Division of Management Authority  
U.S. Fish & Wildlife Service

**Via electronic submission**

Re: PRT-62275C and PRT-63016C, Dub Wallace Ranch, LLC.,  
Sonora, TX. Docket No. FWS-HQ-IA-2018-0011

Dear Ms. Tapia,

On behalf of People for the Ethical Treatment of Animals (PETA) and its more than 6.5 million members and supporters, I urge the U.S. Fish & Wildlife Service (FWS) to deny Dub Wallace Ranch's (DWR) requests under the Endangered Species Act (ESA) for a Captive-Bred Wildlife (CBW) permit, PRT-62275C, and a permit authorizing interstate and foreign commerce, export, and cull (Take Permit), PRT-63016C, for Arabian oryx.

FWS cannot lawfully grant DWR's permit applications. DWR is a canned hunting facility that irresponsibly breeds endangered species without any consideration of the species' genetic vitality or conservation. As DWR's applications make abundantly clear, DWR's sole interest in securing the CBW registration and Take Permit is to further its business of "breeding exotic bovids and cervids for sport hunting as well as for sport hunting itself." These aims are fundamentally inconsistent with the purpose and intent of the ESA.

As detailed in the enclosed comments and documented by the accompanying exhibits, granting DRW's applications would be arbitrary, capricious, an abuse of discretion, not in accordance with law, and in excess of FWS' statutory authority and limitations.

Should FWS nevertheless decide to issue either of these permits, PETA hereby requests notice of that decision, pursuant to 50 C.F.R. § 17.22(e)(2), at least ten days prior to issuance, via e-mail to [DelciannaW@petaf.org](mailto:DelciannaW@petaf.org) or telephone to (202) 309-4697.

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PETA FOUNDATION IS AN  
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- PETA France
- PETA Australia
- PETA Germany
- PETA Netherlands
- PETA Foundation (U.K.)

Very truly yours,

A handwritten signature in black ink, appearing to read "Delcianna Winders". The signature is written in a cursive style with a long, sweeping underline that extends to the right.

Delcianna Winders  
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Captive Animal Law Enforcement  
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**Comments of People for the Ethical Treatment of Animals in Opposition to PRT-62275C<sup>5</sup> and PRT-63016C,<sup>6</sup> Submitted by Dub Wallace Ranch, LLC, Sonora, TX. Docket No. FWS-HQ-IA-2018-0011**

**Factual Background**

DWR is a canned hunting<sup>7</sup> operation located in Sonora, Texas. DWR “specializes in breeding exotic bovids and cervids for sport hunting as well as for sport hunting itself.”<sup>8</sup> DWR offers Whitetail deer hunting, guided exotic hunts, and live sales of domestic and exotic animals—including “beef cattle,” sheep, goats, Axis deer (*Axis axis*), Fallow deer (*Dama dama*), Blackbuck (*Antilope cervicapra*), Addax (*Addax nasomaculatus*), Zebra (*Equus quagga*), Gemsbok (*Oryx gazelle*), Scimitar oryx (*Oryx dammah*), Waterbuck (*Kobus ellipsiprymnus*), Mouflon (*Ovis orientalis*), and Arabian oryx (*Oryx leucoryx*).<sup>9</sup>

As a component of its canned hunting business, DWR offers “two on-site living accommodations,” for hunters who visit the ranch, including a “fully-furnished house for up to ten people,” and an “RV campsite with water, electricity, and a fire pit.”<sup>10</sup> Exotic hunts are offered when DWR “[has] a guaranteed trophy available.”<sup>12</sup> DWR’s website boasts that “[p]ast scimitar oryx kills have scored a 277.9 with Trophy Game Records and a 93 4/8 with Safari Club International (high enough to earn the prestigious Gold Award)”<sup>13</sup> and includes a “trophy album” of two dozen photos of the ranch’s hunting customers posing with their kills.<sup>14</sup>

DWR seeks a CBW registration and a Take Permit for the Arabian oryx (*Oryx leucoryx*), which would authorize “interstate and foreign commerce, export, and cull of excess Arabian oryx . . . from a captive herd maintained at [DWR].”<sup>15</sup> FWS has listed the Arabian oryx as “endangered wherever found” since 1970.<sup>16</sup>

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<sup>5</sup> Dub Wallace Ranch, LLC., Federal Fish and Wildlife Permit Application Form – Captive-Bred Wildlife Registration (CBW), Form No. 3-200-41 (Nov. 1, 2017), Ex. 1.

<sup>6</sup> Dub Wallace Ranch, LLC., Federal Fish and Wildlife Permit Application Form – Export/Re-Export/Interstate and Foreign Commerce/Take of Animals, Form No. 3-200-37 (Nov. 7, 2017), Ex. 2.

<sup>7</sup> Ex. 3, Manny Fernandez, *Blood and Beauty on a Texas Exotic-Game Ranch*, N.Y. TIMES (Oct. 19, 2017) (description of a canned hunting facility); *see also About Us*, DUBWALLACERANCH.COM

[www.dubwallaceranch.com/about](http://www.dubwallaceranch.com/about) (last visited June 5, 2018) (“Dub Wallace Ranch is a fourth-generation working ranch in Sutton and Edwards Counties (Sonora and Rocksprings, Texas). We specialize in domestic and exotic animal management, guided exotic hunts, and Texas Whitetail hunting.”).

<sup>8</sup> Ex. 1 at 3; Ex. 2 at 3.

<sup>9</sup> *See generally* Dub Wallace Ranch, LLC., DUBWALLACERANCH.COM, [www.dubwallaceranch.com](http://www.dubwallaceranch.com) (last visited June 5, 2018).

<sup>10</sup> About Us, DUBWALLACERANCH.COM, [www.dubwallaceranch.com/about](http://www.dubwallaceranch.com/about) (last visited June 5, 2018).

<sup>12</sup> Exotic Hunts, DUBWALLACERANCH.COM, [www.dubwallaceranch.com/exotics/](http://www.dubwallaceranch.com/exotics/) (last visited June 5, 2018).

<sup>13</sup> *Id.*

<sup>14</sup> Trophy Album, DUBWALLACERANCH.COM, [www.dubwallaceranch.com/trophy-album](http://www.dubwallaceranch.com/trophy-album) (last visited June 8, 2018).

<sup>15</sup> Foreign Endangered Species; Receipt of Permit Applications, 83 Fed. Reg. 22988, 22989 (May 17, 2018) (Docket No. FWS-HQ-IA-2018-0011).

<sup>16</sup> Species Profile for Arabian Oryx (*Oryx Leucoryx*), U.S. Fish and Wildlife Service – Environmental Conservation Online System, ECOS.FWS.GOV, [www.ecos.fws.gov/ecp0/profile/speciesProfile?sid=767](http://www.ecos.fws.gov/ecp0/profile/speciesProfile?sid=767); *see also* Part 17 –

As of October 1, 2017, DWR maintained an inventory of eleven Arabian oryx.<sup>17</sup> All told, DWR holds over 900 bovids and cervids, including 600 Axis deer, 18 Gemsbok, 60 Scimitar-horned oryx, and 120 Blackbuck.<sup>18</sup>

### **Legal Background**

The ESA establishes a national policy “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 [the Act].”<sup>19</sup> In relevant part, Section 9 of the ESA prohibits persons from taking, importing or exporting, or “possess[ing], sell[ing], carry[ing], transport[ing], or ship[ping], by any means whatsoever” any species taken within the US, its territorial seas, or upon the high seas.<sup>20</sup> Further, the ESA prohibits persons from delivering, receiving, carrying, transporting, or shipping, in the course a commercial activity, any endangered species, or selling or offering such species for sale in interstate or foreign commerce.<sup>21</sup> “Persons” subject to the ESA include any “individual, corporation, partnership, trust, association, or any other private entity,” as well as all State and Federal departments, agencies, employees, and officers.<sup>22</sup>

The ESA defines the term “take” to include “harass, harm, . . . wound, kill, . . . or to attempt to engage in any such conduct,”<sup>23</sup> and further defines the term “commercial activity” to include “all activities of industry and trade, including, but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling.”<sup>24</sup> “Harass” is defined by regulation as “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.”<sup>25</sup> As it pertains to captive animals, the definition of “harass” expressly exempts “generally accepted” animal husbandry practices “that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act,” and “generally accepted” breeding procedures, when those practices or procedures are “not likely to result in injury to the wildlife.”<sup>26</sup> “Harm” means “an act which actually kills or injures wildlife.”<sup>27</sup>

Section 10 of the ESA grants FWS limited authority to issue permits allowing activities that are otherwise prohibited by Section 9. Congress intended “to *limit substantially* the number of

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Conservation of Endangered Species and Other Fish or Wildlife, 35 Fed. Reg. 8491 (June 02, 1970), *available at*: [https://ecos.fws.gov/docs/federal\\_register/fr21.pdf](https://ecos.fws.gov/docs/federal_register/fr21.pdf).

<sup>17</sup> Ex. 1 at 4.

<sup>18</sup> *Id.* at 6-7.

<sup>19</sup> 16 U.S.C. § 1531(c).

<sup>20</sup> *Id.* § 1538(a)(1)(A)-(D).

<sup>21</sup> *Id.* § 1538(a)(1)(E)-(F).

<sup>22</sup> *Id.* § 1532(13).

<sup>23</sup> *Id.* § 1532(19).

<sup>24</sup> *Id.* § 1532(2).

<sup>25</sup> 50 C.F.R. § 17.3.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

exemptions that may be granted under the Act, . . . given that these exemptions apply to species which are in danger of extinction.”<sup>28</sup> As noted by the Supreme Court, “[v]irtually all dealings with endangered species, . . . were prohibited except in *extremely narrow* circumstances.”<sup>29</sup> Pursuant to Section 10, FWS may issue permits authorizing the take, transport, shipment, and sale of listed species *only* “for scientific purposes or to enhance the propagation or survival of the affected species.”<sup>30</sup>

Here, DWR ostensibly seeks its CBW registration pursuant to the second of these exceptions, which requires that DWR demonstrate that its activities will enhance the propagation or survival of the Arabian oryx—hereinafter referred to as the “Enhancement Requirement.” DWR’s application makes clear that it is not seeking the CBW registration for Arabian oryx for scientific purposes, as it admits it does not conduct any research directly related to maintaining or propagating the oryx and that “Wallace Ranch is primarily a breeding and sport hunting facility.”<sup>31</sup>

An applicant for a CBW registration must submit information specified in 50 C.F.R. § 17.22(a)(1), including “[a] full statement of the reasons why the applicant is justified in obtaining a permit including the details of the activities sought to be authorized by the permit.”<sup>34</sup> In deciding whether to grant a CBW registration, FWS “will consider” the issuance criteria specified in § 17.21(g)(3)(i), including whether “the expertise, facilities, or other resources available to the applicant appear adequate to enhance the propagation or survival of the affected wildlife.”<sup>35</sup> FWS is not authorized to issue a CBW registration where the applicant has “failed to demonstrate a valid justification for the permit and a showing of responsibility” or FWS finds that the applicant is “not qualified.”<sup>36</sup>

Critically, FWS has repeatedly recognized that, to meet the Enhancement Requirement, CBW registration applicants must demonstrate how their proposed activities directly relate to the survival of the species *in the wild*.<sup>37</sup> The applicant—not FWS or private commenters—bears the burden of demonstrating whether it satisfies the Enhancement Requirement.<sup>38</sup>

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<sup>28</sup> Ex. 4, H.R. Rep. No. 93-412, at 156 (1973) (emphasis added).

<sup>29</sup> *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978) (emphasis added) (internal citations omitted).

<sup>30</sup> 16 U.S.C. § 1539(a)(1)(A) (emphasis added).

<sup>31</sup> Ex. 1 at 6 (Question 8).

<sup>34</sup> 50 C.F.R. § 17.22(a)(1)(vii).

<sup>35</sup> *Id.* § 17.21(g)(3)(i) (emphasis added); *see also id.* § 17.22(a)(2) (in deciding whether to issue an enhancement permit, FWS “shall consider” whether “the expertise, facilities, or other resources available to the applicant appear adequate to successfully accomplish the objective stated in the application” (emphasis added)).

<sup>36</sup> *Id.* § 13.21(b)(3)-(5).

<sup>37</sup> *See, e.g.*, Fax from Anna Barry, Senior Biologist, Division of Management Authority (DMA), FWS, to John F. Cuneo, Jr., Hawthorn Corp. (Mar. 12, 2012), Ex. 5; E-mail from Anna Barry to Anton and Ferdinand Fercos-Hantig (Feb. 8, 2012) Ex. 6.

<sup>38</sup> *See* 50 C.F.R. § 13.21(b) (“fail[ure] to demonstrate a valid justification for the permit” warrants denial); *see also, e.g.*, Fax from Anna Barry to John F. Cuneo Jr. (Oct. 14, 2011), Ex. 7 (“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.” (emphasis added)).

Take Permits, like CBW registrations, are issued pursuant to Section 10(a) of the ESA and allow the permittee to take, cull, or kill listed species in a manner otherwise prohibited by Section 9 of the ESA and 50 C.F.R. § 17.21. Take Permit applications must comply with the general application procedures and requirements set forth in 50 C.F.R. §§ 13.11 and 13.12, respectively. Take Permits are also subject to the issuance criteria detailed in 50 C.F.R. § 13.21, and FWS may not issue a Take Permit if, among other things, the applicant fails to disclose material information in their application, the applicant has failed to demonstrate a valid justification for the permit and a showing of responsibility, or if FWS determines that the applicant is not qualified.<sup>39</sup> There are no specific FWS regulations governing Take Permits.

Finally, Section 10(c) of the ESA requires FWS to “publish notice in the Federal Register of each application,” and allow at least a thirty-day comment period on those applications.<sup>40</sup> Section 10(c) also requires that “[i]nformation received by the Secretary as a part of any application shall be available to the public as a matter of public record *at every stage of the proceeding.*”<sup>41</sup> The requirements in Section 10(c) are mandatory, and if an agency fails to abide by them, any related permit issuance is unlawful and subject to being overturned.<sup>42</sup>

### **Legal Argument**

DWR’s applications should be denied because (1) as a canned hunting facility, DWR does not and cannot meet the required criteria for obtaining the CBW registration and Take Permit; (2) DWR’s applications fail to provide required material information and otherwise give facially insufficient responses to the applications’ questions; (3) FWS cannot legally issue blanket five-year CBW registrations or Take Permits; and (4) FWS has failed to make all application materials available as a matter of public record in accordance with Section 10(c) of the ESA.

#### **I. FWS Cannot Lawfully Issue DWR’s CBW Registration**

##### **A. DWR Has Failed to Demonstrate a Valid Justification for the Registration**

An applicant for a CBW registration must include information specified in 50 C.F.R. § 17.22(a)(1), including “[a] full statement of the reasons why the applicant is justified in obtaining a permit including the details of the activities sought to be authorized by the permit.”<sup>43</sup> Accordingly, FWS is not authorized to issue a CBW registration where the applicant has “failed

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<sup>39</sup> 50 C.F.R. § 13.21(b)(2), (3), (5), respectively.

<sup>40</sup> 16 U.S.C. § 1539(c).

<sup>41</sup> *Id.* (emphasis added).

<sup>42</sup> See *Gerber v. Norton*, 294 F.3d 173, 186 (D.C. Cir. 2002) (ESA permit approved without making application material available for public comment in accordance with Section 10 is issued “‘without observance of procedure required by law’ and . . . ‘otherwise not in accordance with law’” (quoting 5 U.S.C. § 706(2)(D), (A))); 5 U.S.C. § 706(2) (authorizing a reviewing court to “hold unlawful and set aside agency action . . . found to be . . . not in accordance with law . . . [or] without observance of procedure required by law”).

<sup>43</sup> 50 C.F.R. § 17.22(a)(1)(vii).

to demonstrate a valid justification for the permit and a showing of responsibility” or FWS finds that the applicant is “not qualified.”<sup>44</sup>

As the ESA and FWS’ implementing regulations make clear, CBW registrations may only be issued when the purpose of the applicant’s proposed activity is “for scientific purposes or to enhance the propagation or survival of the affected species.”<sup>45</sup>

As a canned hunting operation, DWR has not—and cannot—establish a valid justification for its sought CBW registration. DWR’s application makes clear that it does not seek CBW coverage for the Arabian oryx for any scientific purposes or in order to enhance the species’ propagation or survival.<sup>46</sup> Rather, as DWR flatly admits, it seeks CBW registration in order “to breed Arabian oryx . . . for hunting and for sale to other hunting ranches.”<sup>47</sup>

### **1. DWR Is a Canned Hunting Facility That Does Not Conduct Any Activity That Would Meet the Enhancement Requirement**

FWS may only issue a CBW registration for an otherwise-prohibited activity if “[t]he *purpose* of such activity is to enhance the propagation or survival of the affected species” (the “enhancement requirement”).<sup>48</sup> In the context of listed species in captivity, “enhance the propagation or survival of the species” is defined as encompassing normal animal husbandry practices.<sup>49</sup> These practices include, providing “health care, management of populations by culling, contraception, euthanasia, [and] grouping or handling of wildlife to control survivorship and reproduction.”<sup>50</sup> However, these practices only meet the definition of enhancement if they are “*needed to maintain captive populations that are self-sustaining and that possess as much genetic vitality as possible.*”<sup>51</sup> Moreover, none of the practices meet the enhancement requirement unless “it can be shown that such activities would not be detrimental to the survival of wild or captive populations of the affected species.”<sup>52</sup>

As a canned hunting facility, DWR cannot establish that the purpose of its planned activities are to enhance the propagation or survival of the Arabian oryx. Canned hunting is not the type of

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<sup>44</sup> *Id.* § 13.21(b)(3), (5).

<sup>45</sup> 16 U.S.C. § 1539(a)(1)(A); 50 C.F.R. § 17.21(g)(1)(ii) (“[t]he purpose of such activity is to enhance the propagation or survival of the affected species.”); 50 C.F.R. § 17.22 (“Upon receipt of a complete application, the Director may issue a permit authorizing any activity otherwise prohibited by § 17.21, in accordance with the issuance criteria of this section, for scientific purposes, for enhancing the propagation or survival, or for the incidental taking of endangered wildlife.”).

<sup>46</sup> DWR admits that its proposed activities have nothing to do with scientific research and are not even tangentially related to any legitimate scientific purpose. In response to Question 8, which seeks descriptions of the applicant’s research goals and methods if the applicant conducts research “directly related to maintaining and propagating the types of wildlife to be covered,” DWR notes that this question is “[n]ot applicable” because “Wallace Ranch is primarily a breeding and sport hunting facility.” Ex. 1 at 6.

<sup>47</sup> *Id.* (Response to Question 7).

<sup>48</sup> 50 C.F.R. § 17.21(g)(1)(ii) (emphasis added).

<sup>49</sup> *See* 50 C.F.R. § 17.3.

<sup>50</sup> *Id.* § 17.3(a).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* § 17.3.

“culling” contemplated by the ESA, and thus does not meet the enhancement requirement. The purpose of the ESA is conservation of endangered species.<sup>53</sup> The term “conserve” is defined as using “all methods and procedures which are necessary” to bring endangered species back from the brink of extinction.<sup>54</sup> Culling, or regulated taking, is contemplated in the definition of conservation, but only “in the *extraordinary* case where population pressures within a given ecosystem *cannot be otherwise relieved*.”<sup>55</sup>

Thus, while the culling of animals can be considered enhancement, the culling must be necessary to relieve “population pressures.”<sup>56</sup> The breeding of endangered species for the sole purpose of killing them for profit—which is the only purpose of a canned hunting operation—is not “culling” within the terms of the ESA, and it certainly does not fall within the limited exception for regulated take authorized by the ESA.

To grant DWR’s CBW registration application, FWS would have to find that canned hunting enhances the propagation or survival of the Arabian oryx because killing Arabian oryx for profit is a “normal practice[] of animal husbandry needed to maintain captive populations that are self-sustaining and that possess as much genetic vitality as possible,” and that such killing is not detrimental to the captive populations of the species.<sup>57</sup> DWR’s naked assertion that its inventory of oryx and other animals for the purposes of sport hunting “provides ample proof that our facility and its management have a long history of success with all species already in our collection,”<sup>58</sup> provides no basis for FWS to conclude that DWR’s proposed activities “would not be detrimental to the survival of wild or captive populations” of Arabian oryx.<sup>59</sup> Indeed, DWR’s proposed activities of breeding Arabian oryx “for hunting and for sale to other hunting ranches”<sup>60</sup> is directly detrimental to the members of its captive herd who will be killed for sport, and DWR’s application provides no evidence that the oryx it does not kill will be used as a part of a legitimate conservation breeding program or will be otherwise utilized to support wild oryx populations.<sup>61</sup>

FWS must also make specific findings that the permit was “applied for in good faith” (meaning “not for the purpose of stockpiling animals or products”<sup>62</sup>), and that the proposed activities “will

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<sup>53</sup> 16 U.S.C. § 1531(b) (“The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.”).

<sup>54</sup> *Id.* at § 1532(3).

<sup>55</sup> *Id.* (emphasis added).

<sup>56</sup> *Id.*

<sup>57</sup> 50 C.F.R. §§ 17.21(g)(1)(ii), 17.3, 13.21(b).

<sup>58</sup> Ex. 1 at 4.

<sup>59</sup> 50 C.F.R. § 17.3.

<sup>60</sup> Ex. 1 at 6.

<sup>61</sup> *See id.* (Response to Question 7, “The applicant is not a member of any SSP or other zoo-based management program.”). *See also* discussion *infra* Section II.A.2 (detailing how DWR’s proposed activities are detrimental to captive and wild populations of Arabian oryx). FWS has an independent obligation under Section 7 of the ESA to ensure that its actions are “not likely to jeopardize the continued existence of any endangered species.” 16 U.S.C. § 1536(a)(2) (“Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species . . .”).

<sup>62</sup> Ex. 4, H.R. Rep. No. 93-412, at 156 (1973).



not operate to the disadvantage of such endangered species” and “will be consistent with the purposes and policy set forth” in the ESA.<sup>63</sup> The record does not support such findings.

## **2. DWR Has Failed to Demonstrate—and Cannot Demonstrate—that Its Proposed Activities Will Enhance the Propagation or Survival of Arabian Oryx in the Wild**

As noted above, FWS has repeatedly recognized that, to meet the Enhancement Requirement, CBW registration applicants must demonstrate how their proposed activities directly relate to the survival of the species *in the wild*.<sup>64</sup> Indeed, FWS has noted that purposes of the ESA are “best served by conserving species *in the wild* along with their ecosystems,” and that captive animals “have a role in the survival of the species *only* to the extent that they maintain genetic integrity and offer the potential of restocking natural ecosystems.”<sup>65</sup>

Here, DWR has not, and indeed cannot, demonstrate that its proposed activities of “breed[ing] Arabian oryx . . . for hunting and sale to other hunting ranches”<sup>66</sup> will enhance the propagation or survival of Arabian oryx *in the wild*. As noted above, DWR’s response to Question 5 fails to provide a *specific* description of *how* its proposed activities will facilitate captive breeding of the Arabian oryx; instead, DWR simply notes that its ranch is divided into various large pastures, that it rotates captive animals from pasture to pasture, and that it is a member of the canned hunting advocacy group EWA.<sup>67</sup> Further, DWR admits that it is not a member of any zoological society or participant in any Species Survival Plan in order to maintain the genetic vitality of its captive animals.<sup>68</sup>

Simply put DWR’s primary purpose in seeking this CBW registration is to hold and breed Arabian oryx so that its customers can kill them for sport. DWR’s application flatly admits this.<sup>69</sup> Breeding Arabian oryx so that they can be killed for sport does nothing to enhance the propagation or survival of this species in the wild. DWR has thus failed to meet its burden to demonstrate that its proposed activities satisfy the CBW scheme’s Enhancement Requirement. FWS must accordingly deny DWR’s CBW application.<sup>70</sup>

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<sup>63</sup> 16 U.S.C. § 1539(d); 50 C.F.R. § 17.21(g)(3)(iii).

<sup>64</sup> See Ex. 5, 6.

<sup>65</sup> Ex. 8, Advanced Notice of Proposed Rulemaking: Captive Wildlife Regulation, 43 Fed. Reg. 16,144, 16,144 (Apr. 14, 1978) (second emphasis added); see also Ex. 9, Proposed Rule: Captive-Bred Wildlife Regulation, 58 Fed. Reg. 32,632, 32,633 (June 11, 1993) (“The Service considers the purpose of the Act to be best served by conserving species in the wild along with their ecosystems. Populations of species in captivity are, in large degree, removed from their natural ecosystems and have a role in survival of the species only to the extent that they maintain genetic integrity and offer the potential of restocking natural ecosystems where the species has become depleted or no longer occurs.”).

<sup>66</sup> Ex. 1 at 6.

<sup>67</sup> *Id.* at 4.

<sup>68</sup> *Id.* at 5 (Question 6); *id.* at 6 (Question 7).

<sup>69</sup> *Id.* at 6 (“Our intention is to breed Arabian oryx (and other ungulates) for hunting and for sale to other hunting ranches.”).

<sup>70</sup> See 50 C.F.R. § 13.21(b) (“fail[ure] to demonstrate a valid justification for the permit” warrants denial).

**B. DWR Lacks the Experience, Expertise, Staff, and Facilities Necessary to Enhance the Propagation or Survival of the Arabian Oryx**

In deciding whether to grant a CBW registration, FWS regulations require the agency to consider “whether the expertise, facilities or other resources available to the applicant appear adequate to enhance the propagation or survival of the affected wildlife.”<sup>71</sup>

FWS has repeatedly denied CBW registration applications where applicants have failed to provide sufficient information to demonstrate that either themselves or their staff have the necessary experience in handling or maintaining the species sought to be covered by the CBW registration.<sup>72</sup> For example, in 2015, FWS denied a CBW registration the fact that the application failed to provide “specific information on [the applicant’s] husbandry and breeding experience” with the species.<sup>73</sup>

Here, as with numerous other applications for CBW registrations that FWS has denied, DWR’s application fails to demonstrate that the ranch possesses the expertise, staff, and facilities to operate a successful and humane conservation breeding program to enhance the propagation or survival of Arabian oryx. Namely, Question 9 of the application seeks, “[f]or each requested species,”<sup>74</sup> a description of DWR’s “experience in maintaining and propagating the requested species or similar species.”<sup>75</sup> DWR’s response, however, does not detail any experience in maintaining the Arabian oryx or similar species and simply notes that the ranch has maintained Arabian oryx since 2012.<sup>76</sup>

DWR’s lack of expertise, staff, and facilities sufficient to operate a successful captive breeding program that enhances the propagation or survival of the Arabian oryx is most clearly underscored by DWR’s responses to subparts b, c, and d to Question 9. Subparts b and c seek, for the past five years, data concerning successful births and mortalities, respectively, of the requested species or similar species.<sup>77</sup> Tellingly, DWR’s responses to subparts b and c fail to provide any concrete figures—vaguely noting that “exact numbers of young born by year has not been recorded in the past,”<sup>78</sup> and “[n]atural mortalities other than by harvest are extremely low, ca. 1-2% annually.”<sup>79</sup> These responses, even when supplemented with the inventory table

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<sup>71</sup> 50 C.F.R § 17.21(g)(3)(ii); *see also id.* § 17.22(a)(2)(vi) (FWS “shall consider” whether “the expertise, facilities, or other resources available to the applicant appear adequate to successfully accomplish the objectives stated in the application.” (emphasis added)).

<sup>72</sup> *See, e.g.*, Ex. 10, Letter from Timothy J. Van Norman, Chief, Branch of Permits, DMA, FWS, to Shawn Ho (Jan. 29, 2016); *id.*, Letter from Timothy J. Van Norman, Chief, Branch of Permits, DMA, FWS, to Ricky Garrett, Zoofari Animal Park and Preserve (July 1, 2014); *id.*, Letter from Timothy J. Van Norman, Chief, Branch of Permits, DMA, FWS, to Sandy Thomas (Jan. 5, 2017).

<sup>73</sup> Ex. 11, E-Mail from Michael Moore, Supervisory Policy Specialist, Branch of Permits, DMA, FWS, to Scott Gregory, Great Bend-Brit Spough Zoo (May 27, 2015); *see also id.*, Letter from Timothy J. Van Norman, Chief, Branch of Permits, DMA, FWS, to Scott Gregory, Great Bend-Brit Spough Zoo (Sept. 15, 2015).

<sup>74</sup> Ex. 1 at 6.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* (response to Question 9, subpart a).

<sup>77</sup> *See id.* at 7.

<sup>78</sup> *Id.* (response to Question 9, subpart b)

<sup>79</sup> *Id.* (response to Question 9, subpart c).

submitted in response to subpart a of Question 9, fail to answer the application’s questions—specifically, these responses do not note how many of the births at DWR within past five years survived beyond thirty days and fails to identify the cause(s) of any non-hunting related mortalities.<sup>80</sup>

Indeed, when FWS promulgated its final CBW rule in 1979, it emphasized that annual reporting was a critical part of the CBW scheme, noting that “annual reports will be required summarizing all takings that result in death or permanent loss of reproductive ability and all interstate or foreign transactions,” and that the “primary uses” of such reports are to “assess compliance with the regulations, to determine the effectiveness of the regulations, and to measure the success of captive propagation of Endangered and Threatened wildlife.”<sup>81</sup> FWS underscored that detailed annual reporting by CBW participants is necessary because of the importance of knowing “not only the number of otherwise prohibited transactions and takings that occurred, but also the number of births, deaths, and non-prohibited transactions,” and further stressed that “[i]nventories of the species in captivity could be developed from these [annual report] data that would be useful to the public as well as the Service.”<sup>82</sup> In its Final Rule, FWS explicitly rejected the suggestion that “record-keeping should not be required of registrants” as this suggestion “runs counter to normal practices of animal propagation, which require careful record-keeping.”<sup>83</sup>

Here, for at least the last five years, DWR has plainly failed to maintain detailed annual records as it failed to provide any exact numerical figures for birth and mortality data as required in Question 9, subparts b and c. This suggests DWR has not, and does not, keep detailed records of its operations, which “runs counter to normal practices of animal propagation”<sup>84</sup> and underscores DWR’s complete lack of experience, expertise, staff and facilities to run a successful captive breeding program for the Arabian oryx.

Finally, subpart d of Question 9 requires “[a] brief resume for all senior animal care staff or personnel that will be working with or maintaining of each species requested.”<sup>85</sup> DWR’s response notes that the ranch is managed by Keith Wallace, but provides no detail of any qualifications to run a conservation breeding program for Arabian oryx or similar animals, stating only that he is part of the Wallace family and has worked on the ranch for an unspecified period of time.<sup>86</sup> Mr. Wallace apparently has experience in raising “Angora goats, Rambouillet

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<sup>80</sup> *See id.*

<sup>81</sup> Final Rule, Captive Wildlife Regulation, 44 Fed. Reg. 54002, 54004 (Sept. 17, 1979), *available at* <https://cdn.loc.gov/service/ll/fedreg/fr044/fr044181/fr044181.pdf>.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*; *see also* Proposed Rule, Captive-Bred Wildlife Regulation, 58 Fed. Reg. 32632, 32634 (Jun. 11, 1993) <https://cdn.loc.gov/service/ll/fedreg/fr058/fr058111/fr058111.pdf> (noting that the records permittees are required to keep under 50 C.F.R. § 17.21(g) are those “one would normally expect a careful breeder or dealer to keep, such as bills of sale, purchase receipts, transfer records, breeding records, births, deaths (including cause of death), etc.”).

<sup>85</sup> Ex. 1 at 7 (response to Question 9, subpart c).

<sup>86</sup> *Id.*

sheep, deer and cattle,”<sup>87</sup> but this experience has nothing to do with his ability to successfully operate a conservation breeding program for the Arabian oryx. The facts that “Mr. Wallace has a passion for the land and the animals,” and that “he feels his ranch has a good mix of domestic animals and wildlife/exotics to carry on for future generations” do nothing to establish Mr. Wallace expertise sufficient to run a captive breeding program to enhance the propagation or survival of Arabian oryx.<sup>88</sup>

The only other employee listed in subpart d is Dr. Gibbens, a veterinarian who serves as the ranch’s veterinarian.<sup>89</sup> No information about Dr. Gibbens is provided other than his redacted address.<sup>90</sup> This is not a “brief resume,” or any resume for that matter, and does nothing to establish Dr. Gibbens’ qualifications in caring for Arabian oryx. Thus, FWS must deny DWR’s CBW application for failure to demonstrate the “expertise, facilities [and] other resources . . . adequate to enhance the propagation or survival of the affected wildlife.”<sup>91</sup>

DWR has not even shown that it possesses the experience, expertise, staff, and facilities necessary to maintain the genetic vitality of the Arabian oryx. Question 6 of the CBW application requires applicants to provide “documentation showing how your captive population is being managed to maintain its genetic vitality,” and further notes that if the applicant “do[es] not currently maintain sufficient specimens in each species request to maintain the genetic vitality of the species, you *must* participate in an organized breeding program, such as a Species Survival Plan.”<sup>92</sup> DWR’s application indicates that, as of October 1, 2017, the ranch held 11 Arabian oryx,<sup>93</sup> but noted that “[s]ome of these 11 oryx are pregnant” and so by the end of 2017, the ranch would have a herd of Arabian oryx larger than 11.<sup>94</sup> As of the date of this comment, it is unclear how many oryx DWR has on hand.

DWR provides a largely non-responsive answer to Question 6 which fails to provide any documentation describing any activities that are key to scientifically maintaining genetic diversity, such as documenting the pedigree and demographic history of each individual species member; monitoring and documenting all births, deaths, and transfers; making breeding decisions to enhance genetic diversity; and developing a breeding and transfer plan.<sup>95</sup>

Instead, DWR simply notes that it “exchanges males or pairs in our breeding herds for stock from other ranches that have not received stock from us.”<sup>96</sup> Similarly, in response to Question 3, which seeks the name, address, and CBW registration number of person(s) or institution(s) from

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *See id.* at 8.

<sup>90</sup> *Id.*

<sup>91</sup> 50 C.F.R. § 17.21(g)(3)(ii).

<sup>92</sup> Ex. 1 at 5 (emphasis added).

<sup>93</sup> *Id.* at 4 (Question 4),

<sup>94</sup> *Id.*

<sup>95</sup> *See* Ex. 12, Association of Zoos and Aquariums (AZA), Species Survival Plan Programs (listing these activities as central components of its program to maintain genetic diversity); *Id.*, AZA, Studbooks (same).

<sup>96</sup> Ex. 1 at 5.

which DWR plans to acquire Arabian oryx, DWR notes that while the “Arabian oryx for which we are requesting coverage are already present in our collection and breed annually,”<sup>97</sup> “future stock involving this species will be acquired from large herds to which we have not dealt in the past.”<sup>98</sup> That there are “there are a large number of CBW holders and other breeders within Texas that hold this species, many of whom [DWR] know[s] well,”<sup>99</sup> falls far short of providing the required “name, address, and CBW registration number” and does not provide adequate assurances that DWR will maintain its captive oryx in a manner that adequately maintains their genetic vitality.

Aside from this, DWR’s only other means of maintaining its Arabian oryx’s genetic vitality appears to be its practice of rotating oryx from pasture-to-pasture on the ranch “when new blood is needed, or if new stock is acquired from outside the ranch.”<sup>100</sup> Finally, despite only maintaining eleven Arabian oryx, DWR does not participate in an SSP, which it is required to do if it “do[es] not currently maintain sufficient specimens . . . to maintain the genetic vitality of the species.”<sup>101</sup>

The AZA has identified target SSP numbers for the following three antelope species commonly held in captivity for sport-hunting: 250 (*Addax nasomaculatus*), 250 (*Oryx dammah*), and 200 (*Gazella dama ruficollis*).<sup>102</sup> In contrast, a 2010 survey conducted by EWA estimates that there are over 11,000 scimitar-horned oryx, 5000 addax, and 800 dama gazelle on private ranches in the U.S.<sup>103</sup> This illustrates the stark difference between a well-planned management program driven by conservation goals—where animal numbers are not the only consideration—and the frivolous breeding for recreational use conducted by commercial ranches, such as DWR. Indeed, this type of breeding just to breed is a concern because, as FWS has noted, “[c]aptive-bred animals of the listed non-native species might be used for purposes that *do not contribute to conservation*, such as for pets, for research that does not benefit the species, or for entertainment.”<sup>104</sup>

DWR’s vague, deficient responses to Questions 3, 5, and 6; its non-participation in a SSP; and its intent to “breed Arabian oryx . . . for hunting and for sale to other hunting ranches,”<sup>105</sup> readily indicate that DWR is ill-equipped to manage a captive breeding program for the Arabian oryx in a way that adequately maintains the species’ genetic vitality.

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<sup>97</sup> *Id.* at 4.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* (Question 5).

<sup>101</sup> *Id.* at 5 (Question 6).

<sup>102</sup> See Association of Zoos and Aquariums Antelope and Giraffe Taxon Advisory Group, Steering Committee, Advisors and Program Leaders, *AZA Antelope and Giraffe TAG Regional Collection Plan 22-27*, Table 8 (6th ed., Nov. 1, 2014), available at [https://ams.aza.org/iweb/upload/RCP\\_AntelopeGiraffe2014-7a2d8ac1.pdf](https://ams.aza.org/iweb/upload/RCP_AntelopeGiraffe2014-7a2d8ac1.pdf).

<sup>103</sup> Endangered and Threatened Wildlife and Plants; Removal of the Regulation That Excludes U.S. Captive-Bred Scimitar-Horned Oryx, Addax, and Dama Gazelle From Certain Prohibitions, 77 Fed. Reg. 431, 431 (Jan. 5, 2012).

<sup>104</sup> Proposed Rule, Captive-bred Wildlife Regulation, 57 Fed. Reg. 548, 550 (Jan. 7, 1992).

<sup>105</sup> Ex. 1 at 6.

### C. DWR's Application Fails to Disclose Material Information and Otherwise Contains Facially Insufficient Responses to Application Questions

FWS also cannot issue DWR's requested CBW registration because it has failed to submit a complete application as required by 50 C.F.R. § 13.11. FWS "may not issue a permit for any activity . . . unless [an applicant] ha[s] filed an application under the following procedures,"<sup>106</sup> which include the requirement that "[a]pplications must be submitted in writing on a Federal Fish and Wildlife License/Permit Application (Form 3-200) or as otherwise specifically directed by the Service."<sup>107</sup> The agency may only issue a permit "[u]pon receipt of a properly executed application."<sup>108</sup>

As detailed *supra*, DWR's responses to a number of the questions in the application are facially incomplete, including, but not limited to:

- "Provide a specific description of how your proposed activities are going to facilitate captive breeding of the species identified above, including your long-term goals and intended disposition of any progeny."<sup>109</sup> Aside from cursory notes of the size of the ranch and how the animals are occasionally rotated to different-sized pastures, DWR's response does not provide a specific description of how its proposed activities will facilitate the captive breeding of the Arabian oryx or of any long-term management goals. Despite the fact that DWR's response to Question 7 admits that its intent is to breed Arabian oryx for hunting and "for sale to other hunting ranches,"<sup>110</sup> DWR's response to Question 5 fails to identify any intended disposition of any progeny.<sup>111</sup>
- "Provide documentation showing how your captive population is being managed to maintain its genetic vitality. If you do not currently maintain sufficient specimens in each species request to maintain the genetic vitality of the species, you must participate in an organized breeding program, such as a Species Survival Plan. Please indicate this and provide documentation describing the objectives and goals of the program."<sup>112</sup> DWR's response does not detail how its captive population of Arabian oryx is managed other than, due to its membership in the canned-hunting advocacy group EWA, "the ranch exchanges males or pairs in out breeding herds for stock from other ranches that have not received stock from us."<sup>113</sup> Further, in response to Question 7, DWR admits that it is not a member of any SSP "or other zoo-based management program,"<sup>114</sup> but provides no further information as to how DWR plans to restrict or control breeding. DWR's responses instead indicate that it employs a largely hands-off approach with the intention to breed as many oryx as possible, regardless of the damage this does to the species'

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<sup>106</sup> 50 C.F.R. § 13.11.

<sup>107</sup> *Id.* § 13.11(a).

<sup>108</sup> *Id.* § 13.21(b); *see also id.* § 13.11(e) (providing that FWS will "consider [an] application abandoned" if it "receive[s] an incomplete or improperly executed application," and the applicant "fail[s] to supply the correct information").

<sup>109</sup> Ex. 1 at 4 (Question 5).

<sup>110</sup> *Id.* at 6.

<sup>111</sup> *See id.* at 4.

<sup>112</sup> *Id.* at 5 (Question 6).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 6.

genetic vitality: “we have been very successful in maintaining this large group of Arabian oryx . . . in large pastures which led themselves better to propagation.”<sup>115</sup>

- “For each requested species, provide a description of your experiences in maintaining and propagating the requested or similar species.”<sup>116</sup> DWR’s response does not provide any description of its experience in maintaining or propagating Arabian oryx or similar species. The table provided in subpart a to Question 9 only details the number of each species DWR maintains, the numbers of births and deaths for each species since January 1, 2012, and the year of first acquisition of each species.<sup>117</sup>
- “During the past five years, how many (by species, by year) successful births/hatches of each requested species or similar species have occurred at your facility? How many survived beyond 30 days?”<sup>118</sup> DWR’s response fails to answer the question, and does not provide any by species, by year births data for the Arabian oryx or similar species.<sup>119</sup> Instead, DWR admits that the ranch has not recorded the “exact numbers of young born by year” and vaguely notes that “virtually every female gives birth every year.”<sup>120</sup> While DWR’s table submitted in response to Question 9, subpart a notes that five Arabian oryx have been born since January 1, 2012, DWR fails to provide a yearly breakdown for this figure and does not indicate whether or not these five oryx survived beyond thirty days, as is required by the question. For similar species, DWR likewise omits to include any yearly breakdowns or explanation of whether any of the births since January 1, 2012, survived beyond thirty days.<sup>121</sup>
- “How many mortalities of requested species or similar species, have occurred at your facility during the past five years? What were the causes? What measures have you taken to prevent future mortalities?”<sup>122</sup> DWR fails to provide any concrete data, instead noting generally that “[n]atural mortalities other than by harvest are extremely low, ca. 1-2% annually.”<sup>123</sup> While DWR’s table in response to subpart a of Question 9 details the number of mortalities in each species managed by the ranch since January 1, 2012, DWR’s answer to subpart c of Question 9 fails to detail the cause(s) of death for any mortalities listed in the table, and does not indicate whether the ranch has taken any steps to prevent future mortalities.
- “A brief resume for all senior animal care staff or personnel that will be working with or maintaining of each species requested.”<sup>124</sup> DWR’s response fails to include any resume for the two people listed, Keith Wallace, the ranch manager, and Dr. Gibbens, the ranch’s veterinarian.<sup>125</sup> Mr. Wallace’s only purported qualifications in managing Arabian oryx appear to be that he was born into the Wallace family and has been employed on the ranch for an unspecified period of time. No educational experience or qualifications for Mr. Wallace are detailed aside from his graduation from an unnamed high school and

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.* (Question 9).

<sup>117</sup> *See id.* at 6-7 (Question 9, subpart a).

<sup>118</sup> *Id.* at 7 (Question 9, subpart b).

<sup>119</sup> *See id.*

<sup>120</sup> *Id.*

<sup>121</sup> *See id.*

<sup>122</sup> *Id.* (Question 9, subpart c).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* (Question 9, subpart d).

<sup>125</sup> *See id.* at 7-8.

one-and-a-half year attendance at an unnamed college.<sup>126</sup> DWR also fails to provide *any* information concerning Dr. Gibbens’ education, experience, or credentials.<sup>127</sup>

FWS cannot issue a permit pursuant to the ESA if “[t]he applicant has failed to disclose material information required . . . in connection with [its] application.”<sup>128</sup> Thus, DWR’s failure to provide the required material information bars FWS from issuing its requested CBW registration.

#### **D. DWR Has Failed to Make—and Cannot Make—the Required Showing of Responsibility**

FWS regulations require that applicants “demonstrate . . . a showing of responsibility” before they may be issued a permit.<sup>129</sup> Demonstrating a “showing of responsibility” means that DWR must establish that it can meet the requirements of a CBW registration scheme.<sup>130</sup>

In addition to the reasons detailed above, FWS must deny DWR’s CBW application because DWR has not—and cannot—make the required showing of responsibility due to the fundamental nature of its business as a canned hunting facility. DWR admits as much on multiple occasions throughout its application.<sup>131</sup>

Instead of seeking the instant CBW registration for the *purpose* of enhancing the propagation or survival of the Arabian oryx,<sup>132</sup> DWR seeks the registration so that it can “breed Arabian oryx . . . for hunting and sale to other hunting ranches.”<sup>133</sup> Since DWR’s plainly-stated purpose for seeking the CBW registration is contrary to the underlying rationale of the entire CBW scheme, DWR has not—and cannot—make the required showing of responsibility.<sup>134</sup> FWS must therefore deny DWR’s CBW registration application.

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<sup>126</sup> *Id.* at 7.

<sup>127</sup> *Id.* at 8.

<sup>128</sup> 50 C.F.R. § 13.21(b)(2) (“Upon receipt of a properly executed application for a permit, the Director shall issue the appropriate permit *unless* . . . [t]he applicant has failed to disclose material information required . . . in connection with his application.” (emphasis added)); *see also id.* § 17.22 (FWS may only issue a § 10 permit “[u]pon receipt of a complete application”).

<sup>129</sup> *Id.* § 13.21(b)(3).

<sup>130</sup> *See OSG Prods. Tankers LLC v. United States*, 82 Fed. Cl. 570, 575 (Fed. Cl. 2008) (in making a responsibility determination in the context of government contracts, the “contracting officer must satisfy herself that that plaintiff can meet the requirements of the contract”).

<sup>131</sup> *See Ex. 1* at 3 (Response to Question 2, noting that the ranch “specializes in breeding exotic bovinds and cervinds for sport hunting as well as for sport hunting itself”); *id.* at 4 (Response to Question 5, noting that DWR is a “breeding and hunting ranch”); *id.* at 6 (Response to Question 7, noting that DWR’s intention “is to breed Arabian oryx (and other ungulates) for hunting and for sale to other hunting ranches”); *id.* (Response to Question 8, “Wallace Ranch is primarily a breeding and sport hunting facility”); *id.* at 8 (Response to Question 11, “This facility is not licensed by USDA because Wallace Ranch is a hunting ranch . . .”).

<sup>132</sup> 50 C.F.R. § 17.21(g)(1)(ii).

<sup>133</sup> *Ex. 1* at 6.

<sup>134</sup> Perhaps most significantly underscoring DWR’s lack of responsibility is the fact that it has not kept sufficient records for the past five years to provide detailed numerical data for its birth and mortality figures in response to Question 9, subparts b and c. *See supra* Part I.B; *see also Ex. 1* at 7.



## II. FWS Cannot Lawfully Issue DWR's Take Permit

### A. DWR Has Failed to Demonstrate a Valid Justification for the Permit

Since Take Permits, like CBW registrations, are “enhancement permits,” FWS may only issue a Take Permit if “[t]he *purpose* of such activity is to enhance the propagation or survival of the affected species.”<sup>135</sup> As noted above, in the context of listed species in captivity, “enhance the propagation or survival of the species” is defined in the regulations as encompassing normal animal husbandry practices,<sup>136</sup> which includes providing “health care, management of populations by culling, contraception, euthanasia, [and] grouping or handling of wildlife to control survivorship and reproduction.”<sup>137</sup> However, these practices only meet the definition of enhancement if they are “*needed* to maintain captive populations that are self-sustaining and that possess as much *genetic vitality as possible*.”<sup>138</sup> Moreover, none of the practices meet the enhancement requirement unless “it can be shown that such activities would not be detrimental to the survival of wild or captive populations of the affected species.”<sup>139</sup>

As with DWR's CBW application, DWR's Take Permit application fails to demonstrate a valid justification for the permit because breeding endangered Arabian oryx for the sole purpose of killing them for profit is not the sort of “culling” that meets the ESA's Enhancement Requirement, and certainly does not fall within the limited exception for regulated take authorized by the ESA.

#### 1. DWR's Proposed Donations to Conservation Force Are Irrelevant

Here, DWR seeks a Take Permit in order to cover “sport-hunted trophies” of Arabian oryx, all of which will be “specimens that are surplus to [its] collection.”<sup>140</sup> DWR estimates that the number of oryx taken under the Take Permit will be “less than 5 a year, and will probably be as few as 1 – 2/year.”<sup>141</sup> DWR's admitted purpose for seeking the Take Permit is so that DWR can “over sport hunting opportunities to hunters wishing to take Arabian oryx.”<sup>142</sup>

DWR seeks to support its impermissible purpose for seeking the Take Permit by explaining that in return for each take “the ranch will contribute 10% of the cost of the hunt for each specimen to a FWS-approved conservation for this species in nature,” which is expected to amount to \$100 to \$1,000 per animal, “depending on the specimen harvested.”<sup>143</sup> Specifically, these donations will help fund “John Jackson's Conservation Force initiative.”<sup>144</sup>

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<sup>135</sup> 50 C.F.R. § 17.21(g)(1)(ii) (emphasis added).

<sup>136</sup> *Id.* at § 17.3.

<sup>137</sup> *Id.* § 17.3(a).

<sup>138</sup> *Id.* (emphasis added).

<sup>139</sup> *Id.*

<sup>140</sup> Ex. 2 at 3 (Response to Question 2, subpart a).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 5 (Response to Question 7, subpart a).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 6 (Response to Question 8).

The ESA does not authorize this type of Pay-to-Play scheme, and thus, it cannot be the basis for an enhancement permit. ESA Enhancement Permits are available only “for scientific purposes or to *enhance the propagation* or survival of the affected species.”<sup>145</sup> FWS has defied Congress’s stated intent to “to limit substantially the number of exemptions that may be granted under the [ESA]” by allowing permit applicants to 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 this “Pay-to-Play” policy fifteen years ago, but the effort failed following strong backlash from conservationists who pointed out that the policy was unlawful.<sup>146</sup> Without a formal policy in place, the agency pressed forward with Pay-to-Play informally.<sup>147</sup> That the ESA requires a *direct connection* between the otherwise prohibited activity and the enhancement is explicitly supported by FWS’ implementing regulations. Specifically, FWS regulations concerning enhancement permits require that applicants provide a “full statement of the reasons why the applicant is justified in obtaining a permit including the details of the activities sought to be authorized by the permit.”<sup>148</sup> If donating money to a conservation organization can justify issuance of a Section 10 permit, there is no reason why FWS should require applicants to detail the “activities sought to be authorized by the permit” to show why they are “justified in obtaining [the] permit.”<sup>149</sup>

As a federal judge noted in 2016, “[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.”<sup>150</sup> The judge continued:

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<sup>145</sup> 16 U.S.C. § 1539(a)(1)(A) (emphasis added).

<sup>146</sup> See Notice: Draft Policy for Enhancement-of-Survival Permits for Foreign Species Listed Under the Endangered Species Act, 68 Fed. Reg. 49,512-02 (Aug. 8, 2003).

<sup>147</sup> See, e.g., Ex. 13, 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); Ex. 14, 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.”); Ex. 15, 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.”); Ex. 16, 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”).

<sup>148</sup> 50 C.F.R. § 17.22(a)(1)(vii) (emphasis added).

<sup>149</sup> *Id.*

<sup>150</sup> *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)).

[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.<sup>151</sup>

FWS's elimination of the enhancement requirement through Pay-to-Play has also 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."<sup>152</sup>

Even assuming DWR's proposed donations of between \$100 and \$1,000 per Arabian oryx taken was relevant to its Take Permit activities, using such payments as a basis for granting a Take permit would violate the strict limits on FWS' permitting authority under the ESA, and thus would be unlawful. Further, given that DWR anticipates that less than five and likely as few as one to two Arabian oryx will be taken each year,<sup>153</sup> donations of between \$200 to \$2000 per year over the course of the Take Permit's five-year period is far too paltry to claim any conservation benefit to the Arabian oryx.

Moreover, Conservation Force is not a reputable in-situ conservation organization. Despite the myriad of "conservation projects" listed on its website,<sup>154</sup> Conservation Force is a law firm that "provides counsel for some 200 organizations and countries around the world," whose work is largely "pro bono, litigation, and trophy imports."<sup>155</sup> This is not conservation. This is free legal work, and advocacy. Regardless of whether a percentage of donations to Conservation Force makes its way to actual species conservation, there is nothing in the record that demonstrates that

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<sup>151</sup> 208 F. Supp. 3d at 177. The judge further added:

[E]ssentially . . . 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.

*Id.* at 176-77.

<sup>152</sup> Ex. 17, Letter from Brendan Boyle, Member of Congress, to Daniel Ashe, Director, FWS, 2, 1 (June 24, 2016).

<sup>153</sup> Ex. 2 at 3.

<sup>154</sup> Conservation Force – A Force for Wildlife Conservation, CONSERVATIONFORCE.ORG, <http://www.conservationforce.org/> (last visited June 11, 2018).

<sup>155</sup> Ex. 18, James Swan, *Hunting as a Force for Conservation: John Jackson, III*, Outdoorhub ("The law firm became an around-the-clock international communication headquarters and advocacy "war room" for governmental and sportsmen's conservation organizations. The firm legally processed an unprecedented number of successful test trophy import permits at no charge to the public because they had become engines for conservation."); *see also* Ex. 19, Hoovers Report on Conservation Force (Nov. 14, 2017) (listing the line of business as "[l]egal services").

donations forming the basis of an enhancement finding are not being used for the “pro bono, litigation, and trophy import work” of this organization.

Much of the work that Conservation Force does is focused on protecting the rights of hunters to sport-hunt rare species and import and export big-game trophies. In fact, Conservation Force has spearheaded countless lawsuits aimed at relaxing prohibitions on importing big-game trophies from imperiled species.<sup>156</sup> The organization also advertised free legal services for “anyone who takes an elephant in Tanzania in 2015” to help those hunters obtain import permits from FWS.<sup>157</sup>

Conservation Force has also spent significant effort on down listing endangered species to enable greater access to those species for hunting. For example, in 2010, Conservation Force petitioned FWS to down list the Torghar Hills population of the Suleiman markhor, a wild goat species in Pakistan and Afghanistan.<sup>158</sup> As a result, FWS down listed the species to threatened, and created a 4(d) rule allowing “the import of sport-hunted markhor trophies taken from established conservation programs.”<sup>159</sup> Conservation Force also lobbied FWS against listing the African lion as endangered, arguing that sport hunting was the “driving force for conservation.”<sup>160</sup>

All told, regardless of whether a percentage of donations to Conservation Force make its way to actual species conservation, there is nothing in the record that demonstrates that donations to forming the basis of an enhancement finding are not being used for the “pro bono, litigation, and trophy import work” of this organization. Thus, DWR’s proposed donations to Conservation Force,<sup>161</sup> irrelevant and cannot legally be used to satisfy the Enhancement Requirement for its Take Permit application.<sup>162</sup>

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<sup>156</sup> See, e.g., Ex. 20, Compl., *Conservation Force v. Porrino, et. al*, No. 3:16-cv-04124 (D. N.J., July 8, 2016) (challenging two New Jersey state laws prohibiting the possession, import, export, and transport of hunting trophies for African elephant, leopard, lion and black and white rhinos); Ex. 21, Compl., *Conservation Force v. Delta Airlines, Inc.*, No. 15-cv-3348 (N.D. Tex., Oct. 15, 2015) (challenging Delta Airlines’ decision to not transport sport-hunting trophies); Ex. 22, Compl., *Conservation Force, v. Salazar*, No. 3:09-cv-011790 (N.D. Cal., May 21, 2009) (challenging FWS seizure, petition for remission, and forfeiture practices with respect to hunting trophies); Ex. 23, Compl., *Conservation Force v. Salazar*, No. 1:09-cv-01912 (D.D.C., Oct. 7, 2009) (challenging the constructive denial of multiple permit applications to import sport-hunted elephant trophies from Zambia); Ex. 24, Compl., *Atcheson v. Salazar*, No. 1:09-cv-00941 (D.D.C., May 21, 2009) (challenging the denial of enhancement permits to import polar bear trophies); Ex. 25, Compl., *Franks v. Salazar*, No. 1:09-cv-00942 (D.D.C., May 21, 2009) (challenging the denial of permits for importing sport-hunted elephant trophies from Mozambique).

<sup>157</sup> Ex. 26, Free Legal Aid to Import 2015 Tanzania Elephant Trophies, *Exotic Classifieds* (June 23, 2015).

<sup>158</sup> Ex. 27, Petition to Downlist Straight-Horned Markhor of Torghar Hills from “Endangered” to “Threatened” (Aug. 17, 2010); see also Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition to Reclassify the Straight-Horned Markhor (*Capra falconeri jerdoni*), 76 Fed. Reg. 31903 (June 2, 2011).

<sup>159</sup> Endangered and Threatened Wildlife and Plants; Listing the Straight-Horned Markhor as Threatened with a Rule Under Section 4(d) of the ESA, 79 Fed. Reg. 60365, 60377 (Oct. 7, 2014).

<sup>160</sup> Ex. 28, Conservation Force Comments on ESA Status Review of African Lion 8 (Jan. 28, 2013).

<sup>161</sup> Ex. 2 at 5 (Response to Question 7, subpart a), 6 (Response to Question 8).

<sup>162</sup> Notably, DWR includes a Conservation Force promotional brochure as a part of its Take Permit application, see Ex. 2 at 23. Many of the benefits touted in the Conservation Force brochure promoting its “Ranching for Restoration” program have nothing at all to do with in situ conservation. See *id.* (touting Conservation Force’s services in acting as ranchers’ “legal representative at no charge to obtain permits” and noting that ranchers’ participation in the Ranching for Restoration program “[i]mproves the image of the exotic game hunting industry”).

## 2. DWR's Activities Are Detrimental to the Arabian Oryx

Even if FWS incorrectly determines that DWR's proposed activities to be covered by the Take Permit—offering sport hunting opportunities to hunters wishing to kill Arabian Oryx—are acceptable, FWS regulations only allow an enhancement finding for the requested activity “when it can be shown that such activities would not be detrimental to the survival of wild or captive populations of the affected species.”<sup>164</sup> FWS also has an independent obligation under Section 7 of the ESA to ensure that its actions are “not likely to jeopardize the continued existence of any endangered species.”<sup>165</sup> This is a hurdle that DWR cannot overcome, and thus FWS must deny the Take Permit application.

DWR's activities are detrimental to the captive population of Arabian oryx it holds. For one, DWR acknowledges that the planned sport hunting that would be authorized under the Take Permit could lead to up to five Arabian oryx deaths per year.<sup>166</sup> While DWR's inventory table notes that no Arabian oryx have died since January 1, 2012, a number of similar species have died at DWR since that time, including one Addax, two Gemsbok, and eight Scimitar-horned oryx.<sup>167</sup> Most notably, these figures do not appear to include those animals who are hunted for profit and the precise cause of each death is not identified, despite the requirement that DWR submit such information as a part of its Take Permit application.<sup>168</sup>

Further, FWS has recognized that “consumptive uses” of captive wildlife “can be detrimental to wild populations” because they “stimulate a demand for products which might further be satisfied by wild populations.”<sup>169</sup> Indeed, the rarer the species the more valuable it is to a trophy hunter: “[r]arer species are harder to find, so greater hunting skill—and greater wealth—is required, and greater prestige is gained by killing them.”<sup>170</sup> There is ample evidence that creating legal markets for endangered species creates demand that can negatively affect wild members of the species.<sup>171</sup> Sport hunting of captive members of a listed species is not for the benefit of the species. It is commercial exploitation and has a detrimental effect on the listed species.

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<sup>164</sup> 50 C.F.R. § 17.3.

<sup>165</sup> 16 U.S.C. § 1536(a)(2) (“Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species . . .”).

<sup>166</sup> See Ex. 2 at 3 (Response to Question 2, subpart a “[t]he number of specimens to be taken annually has yet to be determined but is expected to be less than 5 a year, and will probably be as few as 1 – 2/year”).

<sup>167</sup> *Id.* at 9 (Response to Question 9, subpart c).

<sup>168</sup> See *id.* (Question 9, subpart e) (requiring applicants submit information concerning “[m]ortalities resulting from your activities with these or similar species in the last 5 years, *causes of such mortalities*, and steps taken to avoid or decrease such mortalities” (emphasis added)).

<sup>169</sup> Proposed Rule: Captive Wildlife Regulation, 44 Fed. Reg. 30045 (May 23, 1979).

<sup>170</sup> Ex. 29, Frank Courchamp, et al., *Rarity Value and Species Extinction: The Anthropogenic Allee Effect*, PLOS Biology (2006).

<sup>171</sup> Ex. 30, Valerius Geist, *How Markets in Wildlife Meat and Parts, and the Sale of Hunting Privileges, Jeopardize Wildlife Conservation*, Conservation Biology, Vol. 2, Issue 1 at 16 (Mar. 1988) (U.S. wildlife conservation has been “based on three primary policies . . . 1) the *absence* of market in the meat, parts, and products of [wildlife,] 2) the allocation of the material benefits of wildlife by law, not by the market place . . . , 3) the prohibition on frivolous

FWS must accordingly deny DWR's Take Permit application because DWR cannot show that its proposed activities will enhance the propagation or survival of the Arabian oryx and that such activities will not be detrimental to the survival of wild or captive populations of the Arabian oryx.

**B. DWR's Application Fails to Disclose Material Information and Otherwise Contains Facially Insufficient Responses to Application Questions**

FWS also must deny DWR's Take Permit application because it has failed to submit a complete application as required by 50 C.F.R. § 13.11. DWR's responses to a number of the questions in the Take Permit application are facially incomplete, including, but not limited to:

- “Describe the purpose of your proposed activity. For example . . . [i]f the purpose is for propagation or conservation purposes, provide a description of how the species will be propagated, disposition of progeny, and cooperative agreements that are/will be established for re-introduction.”<sup>172</sup> DWR's response provides no description of how it intends to propagate the Arabian oryx, how the progeny of its breeding efforts will be disposed of, and fails to note the existence of any cooperative agreements the ranch has entered into for re-introduction of the Arabian oryx into the wild. This is due to the fact that DWR seeks the take permit for the impermissible purpose of “offer[ing] sport hunting opportunities to hunters wishing to take the Arabian oryx.”<sup>173</sup>
- “Description of the technical expertise of each person, as it relates to the proposed activities. If the proposed activity involves the import of live animals, include the experience of each animal caretaker working with the species.”<sup>174</sup> DWR's response is a verbatim copy of the response to Question 9, subpart b on DWR's CBW registration application.<sup>175</sup> DWR's response fails to detail any of Mr. Wallace's technical expertise in maintaining and breeding a genetically viable population of Arabian oryx, and fails to list any qualifications or technical expertise whatsoever for Dr. Gibbens, DWR's veterinarian.<sup>176</sup>
- “A statement on how the activities will enhance or benefit the *wild population* (in situ and ex-situ projects).”<sup>177</sup> DWR's response simply notes that the ranch will “donate 10% of the proceeds received for each sport-hunted animal to an approved in situ conservation project for each of these species for as long as the permit is in force,” with the donations ranging between \$100 and \$1,000.<sup>178</sup> Specifically, the donations will help fund John Jackson's Conservation Force initiative.<sup>179</sup> As detailed above, this donation does nothing

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killing of wildlife.”); Ex. 31, Brian Christy, *Blood Ivory*, Nat. Geo. (Oct. 2012); Ex. 32, Env'tl Invest. Agency, *Blood Ivory: Exposing the Myth of a Regulated Market* (2012).

<sup>172</sup> Ex. 2 at 5 (Question 7, subpart a).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* (Question 7, subpart b).

<sup>175</sup> *See* Ex. 1 at 7.

<sup>176</sup> Ex. 2 at 6.

<sup>177</sup> *Id.* (Question 8) (emphasis added).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

to “enhance or benefit the wild population” of Arabian oryx since John Jackson’s Conservation Force is a not a legitimate in situ conservation program. Rather, it is a law firm that works to protect the rights of hunters to sport-hunt rare species and import and export big-game trophies. DWR’s response to Question 8 does nothing to establish how DWR’s proposed activities under the Take Permit—allowing hunters to kill Arabian oryx for sport—will enhance or benefit the wild population of Arabian oryx.

- “A statement of the specific technical experience available to the recipient(s) for maintaining and propagating live specimens of the same or similar species . . . .”<sup>180</sup> DWR’s response to Question 7, subpart b of the Take Permit application is a more-or-less verbatim copy of its response to Question 9, subpart d of the CBW registration application. DWR’s response fails to detail any technical experience of Mr. Keith Wallace or Dr. Gibbens, let alone their “*specific* technical experience,”<sup>181</sup> in maintaining and propagating Arabian oryx or similar species.
- “A list of the number of successful births by pear for each species for the last 5 years.”<sup>182</sup> DWR’s response is a verbatim copy of its response to Question 9, subpart b of its CBW application, and fails to provide specific yearly data as required by the question. DWR’s response flatly admits that the ranch has not kept proper records as the “exact numbers of young born by year has not been recorded in the past.”<sup>183</sup> While DWR’s response to Question 9, subpart c of its Take Permit application includes the table from Question 9, subpart a of its CBW application, which details the numbers of births and deaths per species at the ranch since January 1, 2012, this table does not provide year-by-year data as is required.
- “Mortalities resulting from your activities with these or similar species in the last 5 years, causes of such mortalities, and steps taken to avoid or decrease such mortalities.”<sup>184</sup> DWR’s response, like that provided in response to Question 9, subpart c of its CBW application, fails to provide any year-by-year data, providing only vague estimates that annual mortalities are only around 1-2%.<sup>185</sup> While DWR’s table submitted in response to Question 9, subpart c of the Take Permit application lists the number of deaths for each species since January 1, 2012, DWR’s response to Question 9, subpart e fails to provide the causes of any of these deaths, or the steps taken to avoid or decrease such deaths.

FWS cannot issue a permit pursuant to the ESA if “[t]he applicant has failed to disclose material information required . . . in connection with [its] application.”<sup>186</sup> Thus, DWR’s failure to provide the required material information bars FWS from issuing its requested Take Permit.

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<sup>180</sup> *Id.* at 8 (Question 9, subpart b).

<sup>181</sup> *Id.* (emphasis added).

<sup>182</sup> *Id.* at 9 (Question 9, subpart d).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* (Question 9, subpart e).

<sup>185</sup> *Id.*

<sup>186</sup> 50 C.F.R. § 13.21(b)(2) (“Upon receipt of a properly executed application for a permit, the Director shall issue the appropriate permit *unless* . . . [t]he applicant has failed to disclose material information required . . . in connection with his application.” (emphasis added)); *see also id.* § 17.22 (FWS may only issue a § 10 permit “[u]pon receipt of a complete application”).

### C. DWR Has Failed to Make—and Cannot Make—the Required Showing of Responsibility

As with DWR’s CBW application, FWS must deny DWR’s Take Permit application because DWR has not—and cannot—make the required showing of responsibility due to the fundamental nature of its business as a canned hunting facility. Canned hunting is not the sort of “culling” contemplated by the ESA, and thus does not meet the Enhancement Requirement.

Instead of seeking this Take Permit to engage in culling so as to manage its Arabian oryx populations in order to control survivorship and reproduction for the purpose of “maintain[ing] captive populations that are self-sustaining and that possess as much genetic vitality as possible,” 50 C.F.R. § 17.3, DWR seeks the instant Take Permit in order to “offer sport hunting opportunities to hunters wishing to take Arabian oryx.”<sup>187</sup> DWR’s plainly-stated purpose for seeking the Take Permit is contrary to the underlying rationale of the entire enhancement permit scheme. Thus, DWR has not—and cannot—make the required showing of responsibility. FWS must therefore deny DWR’s Take Permit application.

### III. FWS Cannot Lawfully Issue Blanket Five-Year Permits

According to the Federal Register notice for DWR’s CBW registration and Take Permit applications, if granted, the registration and permit would “cover[] activities to be conducted by the applicant over a 5-year period.”<sup>188</sup> Issuing DWR a blanket five-year CBW registration or Take Permit to engage in activities that would otherwise require individual permits, and without an opportunity for public comment on each of these activities, would contravene the letter and spirit of the ESA, which requires that permits be *specific* and narrowly tailored.<sup>189</sup>

The plain language of § 1539(a)(1)(a) (“any act”) contemplates a *single, identifiable* act of taking, delivering, receiving, carrying, transporting, or shipping—not any vague, unspecified series of activities involving captive-bred wildlife performed over several years.<sup>190</sup> To broadly authorize DWR to engage in innumerable unspecified otherwise prohibited activities with unspecified individual Arabian oryx would directly contravene this language and would allow the exception to swallow the rule.

Issuing such a broad permit would also directly contravene the public’s right to information under Section 10(c) of the ESA. Section 10(c) mandates:

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<sup>187</sup> Ex. 2 at 5.

<sup>188</sup> Foreign Endangered Species; Receipt of Permit Applications, 83 Fed. Reg. 22988, 22989 (May 17, 2018) (Docket No. FWS-HQ-IA-2018-0011).

<sup>189</sup> See 16 U.S.C. § 1539(a)(1)(a) (authorizing FWS to permit “*any act* otherwise prohibited by section 1538 . . .” (emphasis added)).

<sup>190</sup> See also 50 C.F.R. § 13.42 (providing that ESA permits are “specific” and should “describe certain *circumscribed* transactions,” setting forth “*specific* times, dates, places, methods of taking or carrying out the permitted activities, numbers and kinds of wildlife or plants, location of activity, and associated activities that must be carried out” (emphases added)).



The Secretary *shall* publish notice in the Federal Register of each application for an exemption or permit which is made under this section. Each notice *shall* invite the submission from interested parties, within thirty days after the date of the notice, of written data, views, or arguments with respect to the application; except that such thirty-day period may be waived by the Secretary in an emergency situation where the health or life of an endangered animal is threatened and no reasonable alternative is available to the applicant, but notice of any such waiver *shall* be published by the Secretary in the Federal Register within ten days following the issuance of the exemption or permit. *Information received by the Secretary as part of any application shall be available to the public as a matter of public record at every stage of the proceeding.*<sup>191</sup>

Bypassing the act-by-act assessment mandated by the ESA in favor of blanket permission to engage in any and all captive-breeding and take-related activities over a five-year span deprives the public, including PETA and its members, of information to which it would be entitled “as a matter of public record at every stage of the proceeding,”<sup>192</sup> but for FWS’s issuance of the blanket CBW registration and/or Take Permit.

Blanket five-year permits are particularly inappropriate here because DWR admittedly cannot identify the result or impact of each take—e.g., whether the taken specimen is one which was bred at DWR or whether the taken specimen was bred at, and obtained from, a different ranch—until it occurs.<sup>193</sup> This inherent uncertainty surrounding the genetic lineage of each taken specimen, coupled with DWR’s non-participation in a recognized SSP,<sup>194</sup> only underscores the necessity for a case-by-case Take Permit, as the genetic vitality of DWR’s small<sup>195</sup> population of Arabian oryx could be substantially damaged if certain essential breeding specimens are taken during a given hunting season.

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<sup>191</sup> 16 U.S.C. § 1539(c) (emphases added); *see also Friends of Animals v. Salazar*, 626 F. Supp. 2d 102, 114-15 (D.D.C. 2009) (“Plaintiffs argue that the FWS violated subsection 10(c) of the ESA when it issued a blanket exception for *all* persons who breed the antelope species in captivity in the United States without any requirement for an application and case-by-case assessment of that application. They argue that the plain language of subsection 10(c) demands that permits be issued on a case-by-case basis. . . . The court concludes that the plaintiffs are correct and that the *text, context, purpose and legislative history of the statute make clear that Congress intended permits for the enhancement of propagation or survival of an endangered species to be issued only on a case-by-case basis following an application and public consideration of that application.*” (emphasis added)); *Cary v. Hall*, No. C05-4363 VRW, 2006 WL 6198320, at \*11 (N.D. Cal. Sept. 30, 2006) (declining to dismiss for lack of subject matter jurisdiction plaintiff’s claims that “the ESA requires that the [Fish and Wildlife] Service consider whether to grant § 10 permits on a case-by-case basis and after the public has had an opportunity to participate”).

<sup>192</sup> 16 U.S.C. § 1539(c).

<sup>193</sup> *See* Ex. 2 at 4 (Responses to Question 5, subparts a and b. Subparts a and b to Question 5 seek information on the source of each taken specimen—whether the taken specimen was bred at the prospective licensee’s facility or elsewhere, respectively. DWR’s responses are inherently vague because DWR won’t know whether a taken specimen was bred on their ranch or whether it was bred elsewhere until the specimen is taken). *See id.* (Response to Question 5, subpart a: “Some of the specimens [taken] . . . may be born on the Dub Wallace Ranch but no specimens have been identified at this time.”); *id.* (Response to Question 5, subpart b: “In the future, some of the specimens to be used for breeding may be acquired from other ranches within the state of Texas but no specimens or holders have yet to be identified.”).

<sup>194</sup> *See* Ex. 1 at 5-6

<sup>195</sup> *Id.* at 4; Ex. 2 at 9 (each noting a captive population of only eleven Arabian oryx).

#### IV. FWS Has Failed to Comply with Section 10(c) of the ESA

Section 10(c) of the ESA mandates that “[i]nformation received by the Secretary as a part of any application shall be available to the public as a matter of public record at every stage of the proceeding.”<sup>196</sup> In *Gerber v. Norton*,<sup>197</sup> the U.S. Court of Appeals for the District of Columbia Circuit held that FWS had violated Section 10 of the ESA by failing to provide the plaintiffs with *everything* that was part of an ESA permit application.<sup>198</sup>

Take Permits applications must also comply with Section 10(c), and FWS must make “[i]nformation received . . . as a part of any [Take Permit] application . . . available to the public as a matter of public record at every stage of the proceeding” and for the full duration of the 30-day notice-and-comment period.<sup>199</sup>

Here, FWS has failed to comply with Section 10(c) for both DWR’s CBW registration and Take Permit application materials. FWS published its notice of receipt of six applications “to conduct certain activities with foreign endangered species” and invitation for public comment in the Federal Register on May 17, 2018.<sup>200</sup> The six permit applications were finally uploaded to FWS’ online docket on May 30, 2018, almost two full weeks after the initial notice.<sup>201</sup>

PETA contacted FWS regarding this deficiency on May 24 and May 30, 2018,<sup>202</sup> and did not receive a response until June 5, 2018.<sup>203</sup> FWS’ June 5 response does not address any of the Section 10(c) points PETA raised and irrelevantly references the fact that FWS amended its notice in the Federal Register on May 22, 2018, to correct a subject heading.<sup>204</sup>

This nonsensical response does not address the fact that FWS has failed to comply with Section 10(c) in the instant notice-and-comment period and provides no indication whether FWS intends to do so by re-issue notice and open a new 30-day comment period.<sup>205</sup> PETA followed-up with

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<sup>196</sup> 16 U.S.C. § 1539(c).

<sup>197</sup> 294 F.3d 173 (D.C. Cir. 2002).

<sup>198</sup> *Id.* at 180-82.

<sup>199</sup> 16 U.S.C. § 1539(c).

<sup>200</sup> Foreign Endangered Species; Receipt of Permit Applications, 83 Fed. Reg. 22988 (May 17, 2018) (Docket No. FWS-HQ-IA-2018-0011).

<sup>201</sup> Ex. 33, Foreign Endangered Species; Receipt of Permit Applications, REGULATIONS.GOV, <https://www.regulations.gov/docket?D=FWS-HQ-IA-2018-0011> (noting, for each of the applications included under “Supporting Documents,” that the file was “Posted: 05/30/2018”).

<sup>202</sup> Ex. 34, E-mail from Michelle Sinnott, Counsel, Captive Animal Law Enforcement, PETA Foundation, to Brenda Tapia, U.S. Fish and Wildlife Service (May 24, 2018, 4:26 PM EST); E-mail from Michelle Sinnott, Counsel, Captive Animal Law Enforcement, PETA Foundation, to Brenda Tapia, U.S. Fish and Wildlife Service (May 30, 2018, 7:24 PM EST).

<sup>203</sup> Ex. 35, E-mail from Brenda Tapia, U.S. Fish and Wildlife Service, to from Michelle Sinnott, Counsel, Captive Animal Law Enforcement, PETA Foundation (June 5, 2018, 5:14 AM EST).

<sup>204</sup> *Id.* (“The second publication was a correction due to the Office of the Federal Register published our notice with an incorrect title. No information was deleted or added to the notice nor to the supporting documents.”).

<sup>205</sup> See Ex. 33 (each Supporting & Related Material entry for Docket No. FWS-HQ-IA-2018-0011 clearly notes that the materials were “Posted: 05/30/2018”).

FWS on June 7, 2018, reiterating that “FWS needs to reissue notice and open a new comment period” for the applications in Docket No. FWS-HQ-IA-2018-0011.<sup>206</sup> As of the date of this comment, PETA has not received a response from FWS and FWS has not extended the comment period for Docket No. FWS-HQ-IA-2018-0011.

This facially violates Section 10(c). FWS is statutorily required to reissue notice and open a new thirty-day public comment period, but has not done so. Accordingly, any CBW registration or permit FWS issues under Docket No. FWS-HQ-IA-2018-0011 is in violation of Section 10(c) and is thus invalid and subject to being overturned, since the information FWS received as a part of the applications was not “available to the public as a matter of public record *at every stage of the proceeding*”—i.e., for the full duration of the thirty-day notice-and-comment period.<sup>207</sup>

### **Conclusion**

For all the reasons detailed above, the FWS must deny DWR’s CBW registration and Take Permit applications, PRT-62275C and PRT-63016C. Should the agency decide to issue the CBW Registration and/or the Take Permit despite these objections, PETA reiterates its request to notice of that decision, pursuant to 50 C.F.R. § 17.22(e)(2), at least ten days prior to the issuance of the registration and/or permit via e-mail to [DelciannaW@petaf.org](mailto:DelciannaW@petaf.org) or telephone to (202) 309-4697.

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<sup>206</sup> Ex. 35, E-mail from Michelle Sinnott, Counsel, Captive Animal Law Enforcement, PETA Foundation, to Brenda Tapia, U.S. Fish and Wildlife Service (June 7, 2018, 1:12 PM EST).

<sup>207</sup> 16 U.S.C. § 1539(c) (emphasis added).