



July 21, 2017

Timothy Van Norman, Chief  
Branch of Permits, Division of Management Authority  
U.S. Fish and Wildlife Service  
5275 Leesburg Pike  
Falls Church, VA 22041-3803.

**Via electronic submission and UPS**

Re: PRT-22685C, Submitted by Feld Entertainment, Inc.  
Docket No. FWSHQ-IA-2017-0027-0001

Dear Mr. Van Norman,

People for the Ethical Treatment of Animals (PETA), the Animal Legal Defense Fund (ALDF), and the Animal Rights Foundation of Florida (ARFF)—on behalf of themselves and all their many members, including tens of thousands who have submitted individual comments—submit the following comments urging the U.S. Fish & Wildlife Service (FWS) to deny Feld Entertainment, Inc.'s (FEI) request for an Endangered Species Act (ESA) permit to re-export eight tigers, six lions, and one leopard from the United States to Germany or the Netherlands on behalf of Alexander Lacey (PRT-22685C) (the Application).

For decades, FEI operated the Ringling Bros. circus, forcing big cats and elephants to perform tricks on stage under the threat of pain and punishment, and confining them in parking lots and cramped cages. The circus made millions of dollars using these endangered animals while perpetuating the falsehood that wild animals are better off in captivity than they are in their natural habitats.

Now, Ringling has closed and FEI wants to export the tigers and other big cats to Germany, where trainer Alexander Lacey will continue to exploit them in a circus. The ESA prohibits exporting imperiled animals unless the export will help the species *in the wild*. Using captive tigers, lions, and leopards in a traveling circus obviously doesn't qualify. Instead, FEI is attempting to buy its way around the law by promising to make a payment to a tiger conservation organization in India. Authorizing an ESA permit for activities that exploit wild animals on the basis of a "Pay-to-Play" donation is unlawful, and the permit must be denied.

Please note that reputable sanctuaries in the U.S. stand ready to provide permanent homes for these big cats. These sanctuaries would provide the cats with complex, naturalistic environments that encourage species-appropriate behavior, and would not force the cats to travel, use them to sell tickets, put them on display for human entertainment, or breed them.

PETA, ALDF, and ARFF request notification of the FWS's final action on the Application. Pursuant to 50 C.F.R. § 17.22(e)(2), should the FWS decide to issue the permit despite these objections, we hereby request notice of that decision at least ten days prior to the issuance of the permits via e-mail to [RMathews@petaf.org](mailto:RMathews@petaf.org) and [aelseuson@aldf.org](mailto:aelseuson@aldf.org) or telephone to 202-680-8276.

Very truly yours,



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**Comments of People for the Ethical Treatment of Animals, Animal Legal Defense Fund, and Animal Rights Foundation of Florida in Opposition to PRT-22685C, Submitted by Feld Entertainment, Inc.**

I. Statutory And Regulatory Requirements For ESA Permits..... 4

II. The Application Process ..... 7

III. Issuing A Permit For The Lion And Leopards Will Violate The ESA Because FWS Failed To Publish Notice And Seek Comment On Those Species. .... 9

    A. Section 10(C) Of The ESA Requires Notice And Comment For All Protected Species. 10

    B. The Lions Are Being Held In The Course Of A Commercial Activity And Do Not Qualify For The Pre-Act Exemption..... 11

IV. FWS Cannot Lawfully Issue The Requested Permit Because FEI Is Not The Proper Applicant. Lacey—The Real Party In Interest—Has Not Certified And Bound Himself As Required By Law..... 14

V. FWS Cannot Issue The Requested Permit Because FEI Did Not Submit A Complete Application..... 16

VI. FEI Cannot Meet Applicable Requirements Under The ESA And CITES. .... 20

    A. FEI Fails To Meet The Enhancement Requirement For Tigers, Leopards, And Lions. ... 22

        1. The Proposed Export Has No Relationship To Conservation Of Wild Populations of Tigers, Leopards, and Lions..... 22

        2. FWS Cannot Issue The Requested Permit On The Basis Of The Agency's Illegal Pay-To-Play Policy ..... 24

        3. FEI Has Failed To Meet Even The Arbitrary And Low Threshold Requirement Of FWS' Unlawful Pay-To-Play Loophole. .... 29

    B. Studies Show That Animal Acts Fail To Educate Or Enhance Survival Of The Species. .... 30

    C. By Exhibiting "Generic" Tigers, Who Do Not Exist In The Wild, FEI And Lacey Are Not Enhancing Propagation Or Survival Of The Species..... 36

    D. Lacey's Big Cat Acts Are Likely To Have A Detrimental Impact On Wild Populations. 38

VII. FWS Cannot Issue the Requested Permit Because FEI Has Failed to Demonstrate a Showing of Responsibility ..... 43

    A. The Application Fails To Provide Necessary Information About The Destination..... 43

    B. The Application Fails To Provide Necessary Details Of The Export And Destination Facilities..... 45

    C. Lacey Intends To Confine Animals in Cramped, Barren, Inhumane Cages. .... 48

    D. Lacey Has Not Demonstrated Adequate Expertise And His Training Techniques Are Inhumane..... 52

    E. Lacey Has Made False And Misleading Statements About His Training And Standards of Care..... 54

F. Lacey Does Not Have Adequate Staff .....	56
G. FEI Has A Long History Of Animal Welfare Violations .....	57
H. Circus Charles Knie Has A History of Animal Welfare Problems .....	59
VIII. FWS Cannot Issue The Requested Permit Because FEI Has Not Applied For It In Good Faith, Failed To Disclose Material Information, And Has Made False Statements. ....	61
IX. FWS Must Consider The Environmental Impact Of The Export. ....	62
X. Conclusion and Request for Notice of Issuance .....	63

**I. Statutory And Regulatory Requirements For ESA Permits**

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>1</sup> Section 9 of the ESA prohibits the import or export of any endangered species into or out of the United States without permission from FWS.<sup>2</sup> Section 9 also prohibits "violat[ing] any regulation pertaining to such species or to any threatened species,"<sup>3</sup> and the import and export of threatened species is prohibited by regulation unless specifically allowed by regulation.<sup>4</sup> Section 10 of the ESA affords FWS limited authority to issue permits to allow activities that are otherwise prohibited by Section 9 "for scientific purposes or to enhance the propagation or survival of the affected species."<sup>5</sup> And Section 7 of the ESA requires all federal agencies to "insure that any action authorized . . . by such agency .....is not likely to jeopardize the continued existence of any endangered species or threatened species."<sup>6</sup>

Section 10(c) further provides that the FWS "shall publish notice in the Federal Register of each application for an exemption or permit," that each such notice "shall invite the submission from interested parties..... of written data, views, or arguments with respect to the application," and that "[i]nformation received by the [FWS] 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>7</sup> The Court of Appeals for the D.C. Circuit has made it abundantly clear that this statutory requirement is

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<sup>1</sup> 16 U.S.C. § 1531(c).

<sup>2</sup> *Id.* § 1538(a)(1)(A).

<sup>3</sup> *Id.* § 1538(a)(1)(E).

<sup>4</sup> *See* 50 C.F.R. § 17.31(a).

<sup>5</sup> 16 U.S.C. § 1539(a)(1)(A) (emphasis added).

<sup>6</sup> *Id.* § 1536(a)(2).

<sup>7</sup> *Id.* § 1539(c).

mandatory, and that if an agency fails to abide by it, any related permit issuance is unlawful.<sup>8</sup> Accordingly, FWS may not decide whether to issue a permit until 1) the Applicant provides all material information required by law to complete the Application; and 2) the FWS makes the full and complete application and associated materials available to the public.<sup>9</sup>

Under Section 10(d), the FWS may grant a permit "only" if it finds that such exception: (1) was "applied for in good faith"; (2) "if granted and exercised will not operate to the disadvantage of such endangered species"; and (3) "will be consistent with the purposes and policy" of the ESA.<sup>10</sup> Congress included these procedural requirements in the statute "*to limit substantially the number of exemptions that may be granted under the Act.*"<sup>11</sup>

Under the agency's implementing regulations, persons seeking to commit an act otherwise prohibited by Section 9 on the grounds that such activities will "enhance the propagation or survival" of the species must include with their permit applications: (1) "[a] complete description and address of the institution or other facility where the wildlife sought to be covered by the permit will be used, displayed, or maintained"; (2) a "complete description, including photographs or diagrams, of the facilities to house and/or care for the wildlife"; (3) 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"; and (4) "a statement of the applicant's willingness to participate in a cooperative breeding program."<sup>12</sup> Because all of this information is required as part of the permit application, under the plain language of Section 10(c), it must also be made available to the public for comment "at every stage of the proceeding."<sup>13</sup>

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<sup>8</sup> See *Gerber v. Norton*, 294 F.3d 173, 179-80, 186 (D.C. Cir. 2002) (finding that because the FWS issued a Section 10 permit without complying with the requirements of Section 10(c), the permit was issued "without observance of procedure required by law" in violation of the Administrative Procedure Act).

<sup>9</sup> See *id.* at 174; see also 50 C.F.R. § 17.22(a)(2) ("Upon receiving an application *completed* in accordance with paragraph (a)(1) of this section, the Director will decide whether or not a permit should be issued." (emphasis added)).

<sup>10</sup> 16 U.S.C. § 1539(d).

<sup>11</sup> Ex. 1, H.R. Rep. No. 93-412, at 156 (1973) (emphasis added); *accord Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978) (Congress intended to limit exemptions "except in extremely narrow circumstances.").

<sup>12</sup> 50 C.F.R. § 17.22(a)(1).

<sup>13</sup> 16 U.S.C. § 1539(c).

Permit applicants must also comply with the FWS' general permit requirements, which require the applicant to "certify" that the information submitted in support of a permit application is "complete and accurate" to the best of the applicant's knowledge.<sup>14</sup> The general permit requirements further provide that the FWS may deny a permit if, among other things, "[t]he applicant has failed to disclose material information," "made false statements as to any material fact," "failed to demonstrate a valid justification for the permit," or "is not qualified."<sup>15</sup> Issuance of a permit is also precluded if "the authorization requested potentially threatens a wildlife . . . population."<sup>16</sup> An applicant's "failure to submit timely, accurate, or valid reports as required" with the application will disqualify a person from receiving a permit.<sup>17</sup>

Upon submission of a complete application, FWS "shall consider" criteria, including: "[t]he probable direct and indirect effect which issuing the permit would have on the wild populations of the wildlife sought to be covered by the permit"; "[w]hether the purpose for which the permit is required would be likely to reduce the threat of extinction facing the species of wildlife sought to be covered by the permit"; "[t]he opinions or views of scientists or other persons or organizations having expertise concerning the wildlife or other matters germane to the application"; and "[w]hether the expertise, facilities, or other resources available to the applicant appear adequate to successfully accomplish the objectives stated in the application."<sup>18</sup> The regulations also require that FWS "*shall* consider all relevant facts or information available,"<sup>19</sup> including "assessment of civil or criminal penalt[ies],"<sup>20</sup> and "any reports of State or local officials."<sup>21</sup>

Upon request, FWS is required to provide interested parties with ten days advance notice prior to the issuance of a permit.<sup>22</sup>

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<sup>14</sup> 50 C.F.R. § 13.12(a)(5).

<sup>15</sup> *Id.* § 13.21(b)(2), (3), (5).

<sup>16</sup> *Id.* § 13.21(b)(4).

<sup>17</sup> *Id.* § 13.21(c)(4).

<sup>18</sup> *Id.* § 17.22(a)(2).

<sup>19</sup> *Id.* § 13.21(d).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* § 17.22(e)(2).

## II. The Application Process

On February 10, 2017, FEI submitted an application to FWS for an ESA/CITES permit to re-export eight tigers, six lions, and one leopard from the United States to either Germany or the Netherlands on behalf of its former contactor, Alexander Lacey.

On May 26, 2017, FWS published notice of the Application in the Federal Register, commencing a comment period ending June 26, 2017.<sup>23</sup> PETA and ALDF downloaded the Application materials—a 78-page PDF file<sup>24</sup>—from regulations.gov on the same day. The only species mentioned in the Federal Register notice was tigers.<sup>25</sup>

On May 31, 2017, counsel for PETA contacted FWS to confirm whether, as required by 16 U.S.C. § 1539(c), it would also be publishing notice for the lions and leopard discussed in the Application materials.<sup>26</sup> This request also included an extensive list of materials required by the ESA and FWS Form 3-200-37 that were not contained in the Application, as well as a request for "Facility File 013257," which FEI repeatedly incorporated by reference in the Application.<sup>27</sup> PETA also requested that, once FWS provided the public with the missing application materials and the required Federal Register notice for the lions and leopard, it also provide a full 30 days to comment on those materials as required by 16 U.S.C. § 1539(c).<sup>28</sup>

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<sup>23</sup> Endangered Species; Marine Mammals; Receipt of Applications for Permit, 82 Fed. Reg. 24,381, 24,328 (May 26, 2017).

<sup>24</sup> Exs. 2a & 2b, Initial Application.

<sup>25</sup> See Endangered Species; Marine Mammals; Receipt of Applications for Permit, 82 Fed. Reg. 24,381, 24,328 (May 26, 2017).

<sup>26</sup> Ex. 3, Letter from Rachel Mathews, PETA Foundation, to Joyce Russell, FWS (May 31, 2017).

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

<sup>28</sup> "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[.] . . . Information 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." See also *Gerber* 294 F. 3d at 180-82 (FWS' failure to provide *everything* that is part of an ESA permit application violates section 10 of the ESA.).

Also on May 31, counsel for ALDF requested a copy of Facility File 013257, as well as a similar list of materials required by the ESA and FWS Form 3-200-37 but missing from the Application.<sup>29</sup>

On the evening of June 1, 2017, FWS responded to PETA's request stating that "our office has corrected the docket in regulations.gov for the materials that were inadvertently missing from application PRT-22685c, Feld Entertainment."<sup>30</sup> The agency refused to provide a new 30-day comment period, stating "[w]hile we regret any inconvenience this may have caused, we feel there is sufficient time remaining to submit your comments."<sup>31</sup> The response did not address FWS's failure to provide notice or comment on the lions or the leopard.

That same evening, counsel for PETA replied to FWS to reiterate its request that FWS publish proper notice of the Application for *all* species requested, clarify in the notice that new Application materials were made available, and provide the public a full 30 days from the date of publication of the new notice to submit comments.<sup>32</sup> FWS did not respond.

On June 2, 2017, FWS responded to ALDF's request, stating that it had uploaded "a new version" of the Application that was the "most current."<sup>33</sup> The agency did not provide Facility File 013257, and instead stated that ALDF must submit a Freedom of Information Act (FOIA) request to obtain Facility File 013257.<sup>34</sup> ALDF submitted an expedited FOIA request that same day.<sup>35</sup>

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<sup>29</sup> Ex. 4, Email from Carney Anne Nasser, Esq., to Brenda Tapia, FWS (May 31, 2017, 1:12 PM).

<sup>30</sup> Ex. 5, Email from Joyce Russell, FWS, to Rachel Mathews, PETA Foundation (Jun. 1, 2017, 5:21 PM).

<sup>31</sup> *Id.*

<sup>32</sup> Ex. 6, Email from Rachel Mathews, PETA Foundation, to Joyce Russell, FWS (June 1, 2017, 6:13 PM).

<sup>33</sup> Ex. 7, Email from Brenda Tapia, FWS, to Carney Anne Nasser, Esq., (June 2, 2017, 8:24 AM).

<sup>34</sup> *Id.*

<sup>35</sup> Ex. 8, Letter from Sarah K. Hanneken, ALDF, to Carrie Hyde-Michaels, FWS FOIA Officer (June 5, 2017). FWS did not grant ALDF's request for an expedited response. The agency fulfilled ALDF's request on July 10, 2017, stating that a copy of Facility File 013257 had been posted on Regulations.gov along with FEI's Application. Ex. 9, Letter from Timothy Van Norman, FWS, to Sarah K. Hanneken, ALDF (July 10, 2017).



The new version of the Application<sup>36</sup> posted on regulations.gov was a 149-page PDF file—nearly double the length of the original file—that did not contain Facility File 013257.

On June 13, counsel to PETA contacted FWS to notify the agency that PETA would be filing comments objecting to the Application, and requested confirmation that the agency would provide notice in accordance with 50 C.F.R. § 17.22(e)(2) if the permit is issued.<sup>37</sup>

On June 16, FWS called PETA and emailed ALDF to inform both organizations that it had received additional Application materials.<sup>38</sup> It also agreed that Facility File 013257 was a part of the Application and must be disclosed.<sup>39</sup> As such, the Agency would open a new comment period.

On June 21, 2017, FWS published a second notice of the Application in the Federal Register, commencing a comment period ending July 21, 2017.<sup>40</sup> Again, the only species mentioned in the Federal Register notice was tigers.<sup>41</sup> The Final Application was a 685-page PDF file that included a new destination for the export in Germany, as well as Facility File 013257, which primarily consisted of elephant-related materials.<sup>42</sup>

### **III. Issuing A Permit For The Lion And Leopards Will Violate The ESA Because FWS Failed To Publish Notice And Seek Comment On Those Species.**

According to the Application, FEI has applied for a permit to re-export six African lions and one African leopard, but FWS did not publish notice in the Federal Register for these species and has not sought public comment on them. Issuing a permit for these species without first publishing notice in the Federal Register and accepting public comment would violate Section 10(c) of the ESA. Granting the permit for these animals without complying with the procedural mandates set forth in Section 10(c) would be unlawful.<sup>43</sup>

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<sup>36</sup> Ex. 10, Second Application (to be sent by UPS only, as the file is too large to be uploaded on Regulations.gov).

<sup>37</sup> Ex. 11, Email from Rachel Mathews, PETA Foundation, to Timothy Van Norman, Chief, Branch of Permits, Div. of Mgmt. Auth., FWS, et al., FWS (June 13, 2017, 11:12 AM).

<sup>38</sup> Ex. 12, Email from Brenda Tapia, FWS, to Carney Anne Nasser (June 16, 2017, 1:32 PM).

<sup>39</sup> *Id.*

<sup>40</sup> Endangered Species; Receipt of Applications for Permit, 82 Fed. Reg. 28,347, 28,349 (June 21, 2017).

<sup>41</sup> *See id.*

<sup>42</sup> Exs. 13a & 13b, Final Application (to be sent by UPS only).

<sup>43</sup> *See* 5 U.S.C. § 706(2)(D) (a court shall "hold unlawful and set aside" permits issued "without observance of procedure required by law.").

**A. Section 10(C) Of The ESA Requires Notice And Comment For All Protected Species.**

Leopards are listed as endangered "wherever found," except those who are found "[i]n Africa, in the wild, south of, and including, . . . Gabon, Congo, Zaire, Uganda, Kenya," who are listed as threatened.<sup>44</sup> The leopard who Feld intends to export, Mogli, is neither "in the wild" nor in any of these locations—indeed, he was born in captivity in Germany<sup>45</sup> and is currently in captivity in the U.S.—and therefore is endangered. FWS has treated him as endangered in the past, and published public notice of Feld's application to import him in 2011.<sup>46</sup>

Likewise, all lions are listed under the ESA. The subspecies *Panthera leo leo* is listed as endangered, while *Panthera leo melanochaita* is listed as threatened.<sup>47</sup> A lion whose subspecies is undetermined is treated as endangered.<sup>48</sup> The Application contains no information about the lions' parents, lineage, country of birth (as required in 50 C.F.R. §§ 17.22(a)(1)(iv) and 17.32(a)(1)(iv)), or genetics. Only after FWS requested to know the subspecies of the lions did FEI state that, according to Lacey, they are of the *Panthera leo melanochaita* subspecies because the founders of their breeding lines were from Eastern Africa.<sup>49</sup> This claim is not substantiated through any documentation or genetic testing. There are no breeders' statements or other information on the parentage of the lions contained in the Application. The FWS must, at the very least, require FEI to provide evidence that these lions are the subspecies that it claims they are, and in the absence of such evidence it must consider them to be endangered and entitled to the full protection of the ESA, as applicants bear the burden of providing a complete, properly executed application fully justifying their proposed activities.

Regardless of whether FWS considers these animals to be endangered or threatened, the ESA requires the agency to publish notice of and accept comment on "*each application* for an

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<sup>44</sup> 50 C.F.R. § 17.11(h) (emphasis added).

<sup>45</sup> Final Application at 35 (breeding certificate indicating that Mogli was bred at Nadermanns Tierpark, an unaccredited zoo in Germany and that his parents were captive-bred as well).

<sup>46</sup> See, e.g., Endangered Species; Receipt of Applications for Permit, 76 Fed. Reg. 39,432 (July 6, 2011) (publishing notice of Feld's application for an ESA permit to import the leopard and other animals).

<sup>47</sup> 50 C.F.R. § 17.11(h).

<sup>48</sup> Final Application at 148, Email from Anna Barry, FWS, to Thomas Albert, FEI (Mar. 22, 2017, 11:20 AM).

<sup>49</sup> *Id.* at 147, Email from Thomas Albert, FEI, to Anna Barry, FWS (Mar. 22, 2017, 3:21 PM).

exemption or permit which is made under [Section 10]."<sup>50</sup> This includes applications for an exemption to Section 9(a)(1)(G), which makes it unlawful to "*violate any regulation pertaining to . . . any threatened species* of fish or wildlife listed pursuant to [Section 3 of the ESA] and promulgated by the Secretary pursuant to authority provided by [the ESA]."<sup>51</sup> The special regulations governing threatened leopards and lions, 50 C.F.R. § 17.40(f) and (r), were promulgated by the Secretary pursuant to that authority.<sup>52</sup> It is a violation of the ESA's implementing regulations to export threatened leopards and lions.<sup>53</sup> An applicant seeking to export threatened lions and leopards is therefore seeking an exemption under Section 10 to the prohibition in Section 9(a)(1)(G). Accordingly, even if the lions and leopard do not qualify as endangered, FWS was required to publish notice and accept comment on the portion of FEI's Application relating to these animals.

**B. The Lions Are Being Held In The Course Of A Commercial Activity And Do Not Qualify For The Pre-Act Exemption.**

An email included in the Application from FWS Senior Biologist Anna Barry to FEI Vice President Thomas Albert states: "Due to the date these lions were born, they will be treated as Pre-Act under the ESA."<sup>54</sup> This suggests that FWS has made an unlawful determination that the lions are not protected by the ESA at all and therefore will not require permits for their export. Although the lions that FEI seeks to export were all held in captivity prior to 2015 when FWS listed lions under the ESA,<sup>55</sup> none of the lions qualify for the Pre-Act Exemption because FEI and Lacey have held them in the course of a commercial activity—as part of for-profit circus acts—for years.

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<sup>50</sup> 16 U.S.C. § 1539(c) (emphasis added).

<sup>51</sup> *Id.* § 1538(a)(1)(G) (emphasis added).

<sup>52</sup> See Final Rule: Listing Two Lion Subspecies, 80 Fed. Reg. 80,000 (Dec. 23, 2015); Endangered and Threatened Wildlife and Plants; Threatened Status for the Leopard in Southern Africa, 47 Fed. Reg. 4,204 (Jan. 28, 1982).

<sup>53</sup> All prohibitions of 50 C.F.R. § 17.31 apply to captive, living threatened leopards and lions. 50 C.F.R. § 17.40(f)(1), (r)(1). That rule, in turn, states that "all of the provisions in [50 C.F.R.] § 17.21 shall apply to threatened wildlife. *Id.* §17.31(a). Section 17.21 prohibits exports of listed wildlife. *Id.* § 17.21(b).

<sup>54</sup> Final Application at 148, Email from Anna Barry, FWS, to Thomas Albert, FEI (Mar. 22, 2017, 11:20 AM).

<sup>55</sup> See Final Rule: Listing Two Lion Subspecies, 80 Fed. Reg. at 80,000; Final Application at 56-61 (cancelled CITES certificates listing the birthdate of each lion, ranging from 2009 to 2013).

Section 9(b)(1)<sup>56</sup> of the ESA contains a so-called "Pre-Act Exemption" to the ESA's prohibitions against exporting endangered species and violating regulations pertaining to threatened species for animals

held in captivity or in a controlled environment on . . . the date of the publication in the Federal Register of a final regulation adding such fish or wildlife species to any list published pursuant to subsection (c) of section 1533 of this title: *Provided, That such holding and any subsequent holding or use of the fish or wildlife was not in the course of a commercial activity.*<sup>57</sup>

"Commercial activity" includes

*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: Provided, however, that it does not include exhibitions of commodities by museums or similar cultural or historical organizations.*<sup>58</sup>

FWS has in turn defined "industry or trade" as "the actual or intended transfer of wildlife or plants from one person to another in pursuit of gain or profit."<sup>59</sup>

Under the Pre-Act Exemption, if a prohibited act—such as an export—occurs more than 180 days after the publication of the final regulation listing the species under the ESA, "there shall be a rebuttable presumption that the fish or wildlife involved in such act is *not entitled to the exemption.*"<sup>60</sup> Because lions were listed in 2015, well over 180 days before the Application was submitted, the burden of claiming and proving the Pre-Act Exemption falls to FEI, which provided no evidence to rebut the presumption that the lions are entitled to the ESA's protections. The FWS' presumption that the lions are Pre-Act is therefore invalid on the face of the statute.

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<sup>56</sup> 16 U.S.C. § 1538(b)(1).

<sup>57</sup> *Id.* (emphasis added); *see also* 50 C.F.R. § 17.4 (setting forth means of establishing that pre-Act exception applies, including affidavit attesting that the animal has not been held "in the course of a commercial activity" accompanied by "records or other available evidence" "to establish that no commercial activity was involved" in holding animal).

<sup>58</sup> 16 U.S.C. § 1532(2) (first two emphases added).

<sup>59</sup> 50 C.F.R. § 17.3.

<sup>60</sup> 16 U.S.C. § 1538(b)(1) (emphasis added); *see also* Notice of Intent to Propose Rule: Captive-Bred Wildlife Regulation, 58 Fed. Reg. 32,632, 32,635 (June 11, 1993) (describing this as "a presumption that a specimen is not entitled to the pre-Act exemption claimed for it absent a rebuttal in the form of documentation of pre-Act, non-commercial status").

Although FWS expressly characterized circuses as commercial activity more than twenty years ago,<sup>61</sup> FWS has relied on the overly-narrow regulatory definition of "industry and trade" to claim that commercial circus exhibition does not constitute commercial activity. This is inconsistent with the ESA's plain language, the policies and purposes of the Act, its legislative history, and common sense.

FEI is "one of the world's largest live entertainment companies" whose billionaire CEO Kenneth Feld "sits atop an empire" of circuses, monster truck shows, and Disney on Ice productions.<sup>62</sup> In Feld's own words, "That's what this business [the circus] is all about. . . . Generating the smiles—and the dollars."<sup>63</sup> As recently as October 2016, Thomas Albert, who signed and submitted FEI's Application, echoed this statement, admitting repeatedly in a legislative hearing that "we are first a[nd] foremost about entertainment."<sup>64</sup> In fact, FEI decided to close Ringling Bros. circus *because it was not profitable enough*.<sup>65</sup> There is no question that FEI and Lacey have used these lions *solely* for commercial entertainment purposes—to sell tickets as a part of the Ringling Bros. circus—and the purpose of the export is to allow Lacey to continue to use them solely for commercial purposes in circuses in Europe.

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<sup>61</sup> Notice of Intent to Propose Rule: Captive-Bred Wildlife Regulation, 58 Fed. Reg. at 32,634 ("first-time imports of Asian elephants not qualifying for the pre-Convention exemption are not allowed for primarily commercial purposes such as for circus use.").

<sup>62</sup> Ex. 14, Ryan Mac, *Ringling Bros. Owner Not Clowning Around, Cannons to Billionaire Status*, Forbes.com (Jan. 28, 2014), <https://www.forbes.com/sites/ryanmac/2014/01/28/ringling-bros-owner-not-clowning-around-with-business-cannons-to-billionairecec-status/>.

<sup>63</sup> Ex. 15, Marc Gunther, *The Greatest Business on Earth Okay, so P.T. Barnum is a tough act to follow. But impresario Kenneth Feld owns three circuses, nine ice shows, and an elephant ranch*, Fortune.com (Nov. 8, 1999), [http://archive.fortune.com/magazines/fortune/fortune\\_archive/1999/11/08/268505/index.htm](http://archive.fortune.com/magazines/fortune/fortune_archive/1999/11/08/268505/index.htm) (emphasis added).

<sup>64</sup> Ex. 16, N.Y.C. City Council, Transcript of the Minutes of the Comm. on Health 122, 123-24 (Oct. 20, 2016) [hereinafter "N.Y.C. City Council Transcript"]; *id.* at 123-24 ("first and foremost we're about making people happy. We're about entertainment. We're about putting smiles on kids' faces.").

<sup>65</sup> *See, e.g.*, Ex. 17, Tamara Lush, *APNewsBreak: Ringling Bros. circus to close after 146 years*, APNews.com (Jan. 15, 2017), <https://apnews.com/020bc7b2f16f4446ade338bcf4a500ed/apnewsbreak-ringling-bros-circus-close-after-146-years> (explaining that Ringling Bros. would close because of a decade of declining ticket sales combined with high operating costs, while FEI's other "profitable shows" would continue).

Even if the narrow regulatory definition of "industry or trade" were consistent with the plain language of the ESA and applicable here (and it's not), the lions do not qualify for the Pre-Act Exemption because the re-export involves "the actual or intended transfer of wildlife or plants from one person to another in pursuit of gain or profit."<sup>66</sup> Although Lacey "owns" the lions, he was allowed to import them and has since exhibited them under a contract with FEI.<sup>67</sup> FEI has exercised possession and control over the cats by obtaining all permits and licenses required to exhibit, transport, and import them. For example, it is unlawful to transport or exhibit big cats in the U.S. without an exhibitor's license under the federal Animal Welfare Act.<sup>68</sup> Lacey never obtained such a license; instead, he acted under FEI's license. It's also unlawful to possess and exhibit big cats in Florida, where Lacey purportedly has the cats now, without a permit from the state.<sup>69</sup> Lacey never obtained such a permit; instead, he acted under FEI's permit. The lions traveled in FEI's vehicles, performed in FEI's shows, appeared in FEI's marketing materials, and were exhibited in Mexico under an ESA permit issued to FEI. But with this re-export, Feld is transferring all control, care, and responsibility for the cats back to Lacey, who intends to continue to exhibit the lions in for-profit, commercial entertainment circus shows. Hence, this re-export constitutes an actual or intended transfer in pursuit of gain or profit.

For all of these reasons, the lions do not qualify for the Pre-Act Exemption and allowing them to be re-exported without a permit would violate the ESA.

**IV. FWS Cannot Lawfully Issue The Requested Permit Because FEI Is Not The Proper Applicant. Lacey—The Real Party In Interest—Has Not Certified And Bound Himself As Required By Law.**

FWS may only issue a permit upon receipt of a "complete" and "properly executed" application.<sup>70</sup> Permits are specific, and are not transferable or assignable to anyone other than the permittee.<sup>71</sup> Only a person who is "under the direct control of the permittee, or who is employed by or under contract to the permittee for purposes authorized by the permit, may carry out the activity authorized by the permit."<sup>72</sup>

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<sup>66</sup> 50 C.F.R. § 17.3.

<sup>67</sup> Final Application at 7.

<sup>68</sup> 7 U.S.C. § 2134.

<sup>69</sup> Fla. Stat. Ann. § 379.3761(1).

<sup>70</sup> 50 C.F.R. §§ 17.22, 13.21(b).

<sup>71</sup> *Id.* §§ 13.42, 13.25(a).

<sup>72</sup> *Id.* § 13.25(d).

The Application makes clear Lacey owns and trains the cats, and that Lacey—not FEI—will be re-exporting them.<sup>73</sup> This is also clear from Lacey's own website, which urges people to comment on the Application and "defend Alexander's right to bring his animals home and to continue to share them with audiences who enjoy circuses,"<sup>74</sup> as well as from multiple comments posted on regulations.gov indicating that this re-export has nothing to do with FEI.<sup>75</sup> There are no contracts included in the Application, but FEI states that "[t]hese animals were imported into the United States and have been performing under a contract with the *Ringling Bros. Blue Unit*."<sup>76</sup> Because Ringling Bros. closed in May, "the animals will be returning to Europe with their owner/trainer."<sup>77</sup> This signifies an end to the contractual relationship that allowed FEI to import the cats on Lacey's behalf. There is no evidence in the Application that FEI will be arranging the export—indeed, the Application suggests that FEI has virtually no knowledge of the details of the export. In Europe, Lacey will continue to own, train, handle, transport, exhibit, and maintain the cats on his own, with no demonstrated involvement from FEI.<sup>78</sup> The Application also indicates that Lacey—not FEI—is responsible for obtaining a CITES import permit from Germany.<sup>79</sup>

Lacey—not FEI—would be re-exporting the cats and responsible for their transport, handling, and care while in Europe. There is no evidence Lacey is any longer "employed by or under contract to [FEI] for purposes authorized by the permit." Nor is there evidence that FEI has

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<sup>73</sup> Final Application at 7.

<sup>74</sup> Ex. 18, *Alex Lacey's Tigers*, <https://laceystigers.com/> (last visited July 18, 2017).

<sup>75</sup> See, e.g., Comment of Cathalina Liebel, Tracking No. 1k1-8woc-m3ea (May 30, 2017), <https://www.regulations.gov/document?D=FWS-HQ-IA-2017-0031-1231> ("To deny the permit of independent, foreign contractor Alexander Lacey would be stealing plain and simple. These tigers do not nor have they ever belonged to RBBB Circus. They belong to Mr Lacey ..... To send him home without his beloved animals (his legal property btw) is unamerican and not right." (errors in original)); Comment of Katie Azzario-Lacey, Tracking No. 1k1-8wp2-d9om (May 31, 2017), <https://www.regulations.gov/document?D=FWS-HQ-IA-2017-0031-5183> ("My husband, Alexander Lacey has every right to bring his big cats back to his continent. They are PRIVATELY OWNED animals.").

<sup>76</sup> Final Application at 7.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 9-10.

<sup>79</sup> *Id.* at 13.

power of attorney authorizing it to act on Lacey's behalf.<sup>80</sup> Lacey is therefore the proper applicant, FEI is not, and the Application was improperly executed.

This is particularly problematic given that the Application requires a signed certification that "legally binds the applicant to the statement of certification," including certifications that the applicant has read and understands the regulations that apply to the permit; has submitted "complete and accurate" information; and understands that he is subject to felony criminal liability for any false statement made in the application.<sup>81</sup> Because Lacey has not signed the Application, he is not bound by that certification. FWS therefore has no assurance that the person who will actually be conducting activities that are otherwise prohibited by the ESA has any understanding of the law, let alone any intention of following it. Because Lacey is no longer an agent of FEI, it's also unclear whether any permit conditions would be enforceable against him.

#### **V. FWS Cannot Issue The Requested Permit Because FEI Did Not Submit A Complete Application.**

An ESA permit application must be both "properly executed" and "complete" before FWS can act on a permit application.<sup>82</sup> Likewise, no permit may be issued where the "applicant has failed to disclose material information required, or has made false statements as to any material fact, in connection with his application."<sup>83</sup>

The Application and the related materials are missing a substantial amount of required material information. The Application cannot, therefore, be considered "complete." The missing material information requested in FWS Form 3-200-37, includes:

- Information responsive to Section E.3, which requests the "current location of the specimens."<sup>84</sup> FEI represents that the cats are being held at the Florida State Fairgrounds in Tampa,<sup>85</sup> but this appears to be false. The fairgrounds confirmed by phone on June 14, 2017,

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<sup>80</sup> FWS Form 3-200-37 at 7 ("If you are applying on behalf of a client, a document evidencing power of attorney must be included with the application.").

<sup>81</sup> *Id.* at 1; *see also id.* at 7 ("This signature legally binds the applicant to the statement of certification.").

<sup>82</sup> 50 C.F.R. §§ 13.21(b), 17.22.

<sup>83</sup> *Id.* § 13.21(b)(2).

<sup>84</sup> FWS Form 3-200-37 at 2.

<sup>85</sup> Final Application at 20.



and July 19, 2017, that FEI had *no* animals there. This suggests that FEI has provided the agency with false information.

- With respect to lions, information responsive to Section F.5, including the name and address of the facility where each lion was born, the location of parental stock, and a chain of ownership of the animals.<sup>86</sup> No such information is included for the lions.
- Information responsive to Section G.7.a, which seeks a "full statement justifying the proposed activity," including its purpose and objectives.<sup>87</sup> Where the purpose is conservation education, as FEI claims,<sup>88</sup> applicants must include "copies of educational materials (e.g., handouts, text of signage or public presentations), and include the purpose and objectives of the proposed activity."<sup>89</sup> The Application does not include any such educational materials for Lacey's future exhibitions in Germany.
- Information responsive to Section G.7.b, which requires a CV or résumé of each person involved.<sup>90</sup> The Application states that Alexander Lacey, who owns the cats, and Narcis Crețcu will care for the cats but fails to include a résumé or CV for either.<sup>91</sup>
- Information responsive to Section G.7.c, including "[c]opies of contracts, agreements or other documents that identify persons involved and dates of activities for which authorization is being requested."<sup>92</sup> This should include contracts between Lacey, who owns the cats, and FEI, the applicant; contracts and arrangements for the transport of the animals; and contracts or agreements between Lacey and Circus Charles Knie.
- With respect to all of the cats—but particularly the lions and leopards—information responsive to Section G.8, which requires "a statement on how the activities will enhance or benefit the wild population."<sup>93</sup> The Application contains no enhancement information for these species.
- Information responsive to Section G. 9.a, including "photographs or diagrams . . . clearly depicting the existing facilities **where the wildlife will be maintained**"; "a full description

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<sup>86</sup> FWS Form 3-200-37 at 3.

<sup>87</sup> *Id.* at 4; 50 C.F.R. § 17.22(a)(1)(vii).

<sup>88</sup> *See* Final Application at 2-3.

<sup>89</sup> FWS Form 3-200-37 at 4.

<sup>90</sup> *Id.*; 50 C.F.R. § 17.22(a)(1)(vi).

<sup>91</sup> Final Application at 3-4.

<sup>92</sup> FWS Form 3-200-37 at 4.

<sup>93</sup> *Id.*

of each facility" where the animals will be confined in the next year; and, if the applicant is "unsure of which facilities may be receiving specimens," the "candidates and the mechanism that will be used to determine recipient facilities."<sup>94</sup> The Application fails to include photographs and diagrams of the transport enclosures or facilities where the animals will be held in Europe. Indeed, FEI doesn't seem to know where the cats will end up. The Application initially listed Circus Krone in Munich as the cats' destination, but elsewhere the Application indicates that Lacey may actually export the cats to Amsterdam, where they will be held "in a private winter quarters in the Amsterdam area prior to road transport to Germany."<sup>95</sup> There is no further information about this facility, the amount of time that the cats may spend there, or how Lacey will choose his final destination. Later, well into the first comment period, FEI submitted a new destination for the cats at a location in Einbeck, Germany, which it characterizes as Lacey's family residence.<sup>96</sup> However, this address is the business address of Circus Charles Knie,<sup>97</sup> a fact that is not disclosed anywhere in the Application.

- Information responsive to Section G. 9.e, including the causes of mortalities *at the facility* in the past five years, and "steps taken to avoid or decrease such mortalities."<sup>98</sup> The Application indicates that five of the 21 cats that FEI imported on Lacey's behalf have died.<sup>99</sup> However, FEI has owned over two dozen tigers of its own in the past decade,<sup>100</sup> yet it failed to disclose

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<sup>94</sup> *Id.* (emphasis original); 50 C.F.R. § 17.22(a)(1)(v), (vi).

<sup>95</sup> Final Application at 8, 12.

<sup>96</sup> *Id.* at 149.

<sup>97</sup> See Ex. 19, Zirkus Charles Knie, *Kontakt*, <http://www.zirkus-charles-knie.de/> (last visited July 7, 2017) (listing the address CHARLES KNIE GmbH, Braunschweiger Strasse 2, D-37574, Einbeck)

<sup>98</sup> FWS Form 3-200-37 at 4.

<sup>99</sup> Final Application at 11.

<sup>100</sup> For example, Ringling acquired 11 tigers from Lancelot Ramos Kollman and Jennifer Caudill in 2010 (Singapur, Princess, Tasha, Tyra, Bali, Dragon, Blanca, Isis, Katana, Kimba, and India (aka Tinkerbelle)). Ex. 20, Purchase Agreement between Jennifer Caudill and FEI (Apr. 30, 2010). It also purchased eight tigers from the G.W. Exotic Animal Memorial Park on October 2, 2012 (Irsula aka Tabata; Kadacku aka Taba; Daruba aka Napoleon; Bella aka Judy; Mellow aka Janet, SoHaun aka Tarzan; Gabriel; and Cookie). Ex. 21, Record of Acquisition, Disposition or Transport of Animals for G.W. Exotic Animal Memorial Park (Oct. 2, 2012); see also FWS Files for PRT-21674B, 21676B, 21677B, 21679B, 21680B, 21681B. A September 2016 inventory includes 18 tigers (Tyra, Tabata, Taba, Sundarun, Singapur, Shakira, Rambo, Blanca, Bali, Govinda, Hercules, India, Janet, Judy, Katana, Napoleon, Lu, and Princess), at least six of whom

the morality data for those animals.<sup>101</sup> Indeed, Facility File 013257 indicates that FEI has a history of "forgetting" to disclose animal deaths to FWS, such as in 2014 when it failed to include elephant and tiger morality information in a previous permit application and in 2013 when the U.S. Department of Agriculture (USDA) pointed out that FEI failed to disclose two elephant deaths to FEI.<sup>102</sup> Likewise, the Application fails to include any mortality information for Circus Charles Knie, the purported destination for Lacey's cats.

- Information responsive to Section H.10.i, including the size of shipping containers.<sup>103</sup> The dimensions provided by FEI do not include a unit of measurement or information on how many animals will be confined in each container.<sup>104</sup>
- Information responsive to Section H.10.i, including the "arrangements for watering or otherwise caring for the wildlife during transport."<sup>105</sup> This question is not addressed in the Application.<sup>106</sup>
- Information responsive to Section H.13, including "a copy of the CITES import permit, or evidence one will be issued by the Management Authority of the country to which you plan to export the specimen(s)."<sup>107</sup> No such permit is included in the Application, nor is there evidence that one will be issued, such as a copy of a permit application, or correspondence between Lacey and the German CITES management authority. In fact, the Application indicates that Lacey may actually export the cats to the Netherlands, not to Germany.<sup>108</sup>

Under CITES, an export permit "shall only be granted" when the "Management Authority of

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were not a part of the Kollman or G.W. purchases. Ex. 22, Certificate of Veterinary Inspection for Ringling Bros. Red Unit, no. 16-KY-883829 (Sept. 9, 2016). *Seven* of the tigers purchased in 2010 and 2012 were apparently no longer traveling with Ringling (Tasha, Dragon, Isis, Kimba, Tarzan, Gabriel, Cookie), suggesting that at least some of those animals may have died.

<sup>101</sup> Facility File 013257 does include the death of one additional cat who died within 5 years of FEI's Application. The tiger Mika died on April 2, 2012, of feline distemper—a disease that can be prevented through vaccination. Final Application at 615.

<sup>102</sup> *Id.* at 478-79, Letter from Laura Farhang, FEI, to Anna Barry, FWS (Feb. 3, 2014); *id.* at 169, Letter from Barbara Kohn, Staff Vet., USDA, to Anna Barry, FWS (Mar. 15, 2013) ("In the document submitted in response to your questions regarding recent deaths of elephants, we have found that 2 elephants are not accounted for in the response document- Minyak and Banana.").

<sup>103</sup> FWS Form 3-200-37 at 5.

<sup>104</sup> Final Application at 12.

<sup>105</sup> FWS Form 3-200-37 at 5.

<sup>106</sup> Final Application at 12.

<sup>107</sup> FWS Form 3-200-37 at 5.

<sup>108</sup> Final Application at 12.

the State of export is satisfied that an import permit has been granted for the specimen."<sup>109</sup> For this reason, FWS has told previous applicants that "we cannot consider issuing a CITES Appendix I Export permit until we either see a copy of the CITES Import permit from [the destination country] or obtain confirmation from them that a permit will be issued."<sup>110</sup>

As discussed in Part II, PETA and ALDF requested this extensive list of materials missing from FEI's Application from FWS while the comment period was open.<sup>111</sup> FWS responded by posting some additional materials that it had received from FEI; however, none of the materials in the list above, which are required by the ESA, its regulations, and FWS Form 3-200-37, were included. FWS cannot issue the requested permit because FEI's Application is neither "properly executed" nor "complete," and because FEI has "failed to disclose material information required."

## **VI. FEI Cannot Meet Applicable Requirements Under The ESA And CITES.**

ESA permits are available only "for scientific purposes or to *enhance the propagation or survival of the affected species*" ("Enhancement Requirement").<sup>112</sup> It is the applicant's obligation to provide information that meets the Enhancement Requirement during the application process for *each* of the affected species<sup>113</sup> and to demonstrate how the *underlying activities for which the permits are being sought* enhance the propagation or survival of the affected species. The Enhancement Requirement originally was proposed and implemented "to permit otherwise prohibited acts" only when the *underlying acts themselves* are undertaken "to enhance the propagation or survival of the affected species."<sup>114</sup> However, FWS has defied Congress's stated intent to "to limit substantially the number of exemptions that may be granted under the Act" by allowing exhibitors to purchase their way around this requirement simply by making donations

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<sup>109</sup> CITES, art. III, Mar. 3, 1973, 27 U.S.T 1087, 993 U.N.T.S. 243.

<sup>110</sup> Ex. 23, Email from Anna Barry, FWS, to Frank Vitello & Joan Galvin (Jan. 29, 2016, 3:20 PM).

<sup>111</sup> Letter from Rachel Mathews, PETA Foundation, to Joyce Russell, FWS (May 31, 2017); Email from Carney Anne Nasser, to Brenda Tapia, FWS (May 31, 2017, 1:12 PM).

<sup>112</sup> 16 U.S.C. § 1539(a)(1)(A) (emphasis added).

<sup>113</sup> See 16 U.S.C. § 1539(a)(1)(A) (authorizing permits "for scientific purposes or to enhance the propagation or survival of the affected species" (emphasis added)).

<sup>114</sup> Exs. 24a & 24b, Cong. Research Serv., 97th Cong., *A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, and 1980* 358 (1982).

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.

FWS attempted to formally adopt this "Pay-to-Play" policy fourteen years ago, but the effort failed following strong backlash from conservationists who pointed out that the policy was unlawful.<sup>115</sup> Without a formal policy in place, the agency pressed forward with Pay-to-Play informally, guiding circuses to make payments in exchange for permits allowing them to import and export endangered animals for commercial exhibition.<sup>116</sup> In extending ESA protections to "generic" tigers—such as those included in this Application—FWS has even explained that although the sale of endangered animals for commercial exhibition is "unlikely" to "provide a direct benefit to the species," the agency would authorize such a sale "if the parties involved in the transaction are carrying out activities that enhance the propagation or survival of the species," such as a zoo that "provide[s] support (e.g., via the solicitation of donations from visitors) to carry out in-situ conservation efforts in the tiger's native range."<sup>117</sup>

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<sup>115</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>116</sup> See, e.g., Ex. 25, 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. 26, 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. 27, 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. 28, Fax from Anna Barry, FWS, to John F. Cuneo, Jr., Hawthorn Corp. (Oct. 14, 2011) (recommending that Hawthorn meet the Enhancement Requirement by "undertak[ing] activities that will benefit the survival of the tigers in the wild," such as "[p]articipat[ing] [in] in situ conservation work in the species range states" through a commitment "financial and otherwise"); Ex. 29, 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>117</sup> Final Rule: U.S. Captive-Bred Inter-subspecific Crossed or Generic Tigers, 81 Fed. Reg. 19,923, 19,927 (Apr. 6, 2016); see also *id.* ("The Service prefers a clear, ongoing commitment of several years on the part of the applicant to provide in-situ conservation or research support.

FWS's elimination of the Enhancement Requirement through Pay-to-Play has been criticized by U.S. Representative Brendan Boyle for "undermining our collective, global efforts to help preserve animal species," and for being inconsistent with the ESA, which clearly requires that "the action the permit holder seeks to take must in and of itself benefit the species in some way."<sup>118</sup>

Regardless of the standard that FWS employs in applying the Enhancement Requirement to the instant Application, FEI has failed to meet the requirement. On top of failing to make the requisite forgoing demonstrations for species enhancement, the proposed export does not meet the requirements of the ESA or CITES because it is for primarily commercial purposes, lacks educational value, and will operate to the detriment of wild populations of the affected species.

#### **A. FEI Fails To Meet The Enhancement Requirement For Tigers, Leopards, And Lions.**

##### **1. The Proposed Export Has No Relationship To Conservation Of Wild Populations of Tigers, Leopards, and Lions.**

Section 10 of the ESA provides that "the Secretary may permit . . . any act otherwise prohibited by section 9 . . . to enhance the propagation or survival of the affected species[.]"<sup>119</sup> FEI's Application to export endangered tigers, lions, and a leopard makes one thing clear: the proposed export of big cats from a US circus to a German circus is not an endangered-species conservation activity. It is a commercial exchange in captive endangered animals to be kept and displayed as objects of amusement to garner profit.

FEI attempts to show enhancement by asserting that circus acts "provide[] an unparalleled educational value" to audiences, and even claims to have provided "lengthy and convincing evidence substantiating this finding."<sup>120</sup> This purported evidence appears nowhere in

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This ongoing commitment could be fulfilled by a group of institutions working together to maximize their resources for the benefit of tigers in the wild."); Final Rule: Listing All Chimpanzees as Endangered Species, 80 Fed. Reg. 34,500, 34,517 (June 16, 2015) ("Enhancement may be direct, such as developing a vaccination to be administered to chimpanzees in the wild (in situ), or indirect such as contributions that are made to in situ conservation.").

<sup>118</sup> Ex. 30, Letter from Brendan Boyle, Member of Congress, to Daniel Ashe, Director, FWS, 2, 1 (June 24, 2016).

<sup>119</sup> 16 U.S.C. § 1539(a)(1).

<sup>120</sup> Final Application at 8.

the Application or in Facility File 013257—because *it doesn't exist*. Moreover, the Application provides *no* details about the actual acts the cats will be forced to perform in Germany or how those acts might somehow "enhance the survival" of the species.

And in response to the Application's request that FEI "[p]rovide a statement on how the activities will enhance or benefit the wild population," FEI lauds its "Asian elephant captive breeding program," which is totally irrelevant to the requested permit in this case and has no benefit to wild populations of elephants—let alone tigers, leopards, and lions.<sup>121</sup>

FEI also pays lip service to the Enhancement Requirement by attempting to justify the export using its *previous* donations to foreign tiger conservation organizations (the Wildlife Conservation Society and Aaranyak)—donations that have nothing to do with circus exhibition and that were already used by FEI to obtain ESA permits to *import* Lacey's cats. Even under FWS's unlawful Pay-to-Play policy, none of these older payments can have any bearing on the Application, because they do not relate to the future export of Lacey's big cats.<sup>122</sup>

Only after FWS pressed FEI on this did it claim to " earmark" money in its 2017 budget for a tiger conservation organization, Aaranyak.<sup>123</sup> There is no grant proposal, agreement, or plan to indicate what the purportedly earmarked money would be used for, though the director of the recipient organization commented that it would be used for, among other things, t-shirts with FEI's logo on it.<sup>124</sup> A recent article even suggests that FEI's money is being used for "raincoats

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<sup>121</sup> *Id.* at 10.

<sup>122</sup> *See, e.g.*, Ex. 31, Email from Anna Barry, FWS, to Heidi San Nicolas, FEI (Aug. 27, 2012, 1:47 PM) ("[T]he amount you are contributing to these projects cannot be used for every application you submit to our office. *Every time an application is submitted either more contributions should be submitted to those projects or other contributions are submitted to a new project.* Thus, the \$50,000.00 contributions that was also mentioned in your last two application submissions cannot be used to satisfy the enhancement of this recent application." (emphasis added)); *see also* Final Application at 81-82, Email from Anna Barry, FWS, to Heidi SanNicolas, FEI (Apr. 19, 2013, 3:02 PM) ("Please be aware that different application packages cannot use the same enhancement project(s) without showing incremental benefits.").

<sup>123</sup> Final Application 126, Email from Thomas Albert, FEI, to Dr. Bibhab Kumar Talukdar, Aaranyak (Mar. 17, 2017, 3:51 PM).

<sup>124</sup> *Id.* at 127, Email from Dr. Bibhab Kumar Talukdar, Aaranyak, to Thomas Albert, FEI (Mar. 17, 2017, 7:44 AM).

and torch-lights for field duties to enhance their efforts to protect *elephants* and other wildlife in the sanctuary."<sup>125</sup>

Further, FEI makes no attempt at all to meet the Enhancement Requirement for lions or leopard populations—its Pay-to-Play money, at most, only relates to tigers.

As Congressman Boyle wrote, it is improper for FWS to issue permits for activities—such as commercial circus exhibitions—that "that do not help the animal in question, nor the species to which it belongs," and have no nexus to species enhancement or conservation.<sup>126</sup> "The law is clear that the action the permit holder seeks to take must in and of itself benefit the species in some way," and to accept token monetary contributions to "often un-vetted and questionable entit[ies]" in exchange for Section 10 application approval violates the ESA.<sup>127</sup> Indeed, 24 members of Congress have commented in opposition to this Application, calling FEI's Pay-to-Play payment a "deceitful attempt" to meet the Enhancement Requirement "[d]espite the clear lack of conservation benefit in [FEI's] request."<sup>128</sup>

## **2. FWS Cannot Issue The Requested Permit On The Basis Of The Agency's Illegal Pay-To-Play Policy.**

As discussed in Part VI, FWS's unlawful "Pay-to-Pay" policy allows permit holders to conduct purely commercial activities prohibited by the ESA that do not themselves enhance the propagation or survival of the species in the wild in exchange for *de minimis* contributions to conservation. The agency cannot authorize the export of 15 protected cats for use in the circus on the basis of FEI's "earmarked" payment to a tiger conservation organisation because its Pay-to-Play policy is contrary to the plain language of the ESA and the FWS regulations, is inconsistent with the statutory and regulatory scheme as well as the purpose of the ESA, and flies in the face of the legislative history.

Section 10(a)(1)(A) of the ESA provides that the FWS may permit "any act otherwise prohibited by Section 1538 [Section 9] . . . to enhance the propagation or survival of the affected

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<sup>125</sup> Ex. 32, *Field Gear to Staff of Wildlife Sanctuary*, Assam Tribune (June 28, 2017), <http://www.assamtribune.com/scripts/detailsnew.asp?id=jun2917/city051> (emphasis added).

<sup>126</sup> Letter from Brendan Boyle, Member of Congress, to Daniel Ashe, Director, FWS 1 (June 24, 2016).

<sup>127</sup> *Id.* at 1-2.

<sup>128</sup> Ex. 33, Letter from Raul M. Grijalva, et al., Members of Congress, to Ryan Zinke, Sec'y, Dep't of Interior (June 29, 2017), available at <https://www.regulations.gov/document?D=FWS-HQ-IA-2017-0027-0030>.



species."<sup>129</sup> On the face of these provisions, an applicant only qualifies for an exemption if it demonstrates that the otherwise-prohibited activity—i.e., the export in this case—will enhance the propagation or survival of the species. The conservation benefit must directly stem from the proposed use of the endangered animals. It is irrelevant whether the applicant conducts collateral activities not otherwise prohibited by Section 9 that enhance the species' survival—such as giving money to unrelated conservation efforts.

Senator John Tunney of California, who proposed the Enhancement Requirement, stated that the requirement "would permit otherwise prohibited acts when *they* are undertaken to enhance the propagation or survival of the affected species."<sup>130</sup> He explained that "[t]his is a needed management tool recommended by all wildlife biologists, . . . for example, where a species is destroying its habitat or where the species is diseased."<sup>131</sup> Indeed, the sole example of an enhancement activity provided in the statute—"acts necessary for the establishment and maintenance of experimental populations"—underscores that there must be a nexus between the otherwise prohibited activity and the enhancement.<sup>132</sup> But the Pay-to-Play policy allows otherwise prohibited acts undertaken for *any* reason, so long as permit applicants pay for the privilege with a donation to conservation.

Issuing an ESA permit to any applicant who says they will donate money to a conservation organization is directly inconsistent with Congress' goal of substantially limiting the number of exemptions granted under Section 10.<sup>133</sup> Congress intended to limit exemptions by prohibiting "[v]irtually all dealings with endangered species, . . . except in extremely narrow

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<sup>129</sup> 16 U.S.C. § 1539(a)(1)(A); *see also* Final Rule: Listing All Chimpanzees as Endangered Species, 80 Fed. Reg. 34,500, 34,518 (June 16, 2015) ("when considering whether a permit can be issued to authorize activities that would otherwise be prohibited with an endangered species, *the purposes of the activity* must be for either scientific purposes or for enhancement, not solely for educational or exhibition purposes." (emphasis added)).

<sup>130</sup> Cong. Research Serv., 97th Cong., *A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, and 1980* 358 (1982) (emphasis added).

<sup>131</sup> *Id.* at 396.

<sup>132</sup> 16 U.S.C. § 1539(a)(1)(A); *see also* H.R. Rep. No. 93-412, at 156 (1973) ("Any such activities to encourage propagation or survival may take place in captivity, in a controlled habitat or even in an uncontrolled habitat so long as this is found to provide the most practicable and realistic opportunity to encourage the development of the species concerned.").

<sup>133</sup> *See* H.R. Rep. No. 93-412, at 156 (1973) (safeguards in Section 10 were intended "to *limit substantially* the number of exemptions that may be granted under the Act, . . . *given that these exemptions apply to species which are in danger of extinction.*" (emphases added)).

circumstances."<sup>134</sup> Authorizing a permit for any business that pays a small percentage of profits made from the commercial exploitation of the endangered species at issue causes Section 10's "extremely narrow" exemption to effectively eliminate the Enhancement Requirement completely.

It also conflicts with the core purposes and policies underlying the ESA. The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."<sup>135</sup> It "encompasses a vast range of economic . . . enterprises and endeavors."<sup>136</sup> "[L]iterally every section of the statute" reflects the "plain intent of Congress . . . to halt and reverse the trend toward species extinction, whatever the cost."<sup>137</sup> Therefore, the Supreme Court has "expansively interpret[ed] ESA [prohibitions] in light of the statute's 'broad purpose' of saving species from extinction."<sup>138</sup> The FWS's permissive Pay-to-Play policy is utterly inconsistent with the broad scope of the ESA's prohibitions.

That Section 10(a)(1)(A) requires a direct connection between the otherwise prohibited activity and the enhancement is further supported by FWS's regulations. Pursuant to 50 C.F.R. § 17.21, the FWS may only issue a captive-bred wildlife (CBW) registration—one iteration of a Section 10 permit—to engage in otherwise prohibited activities with non-native" endangered wildlife bred in captivity in the United States if "[t]he purpose of *such activity* is to enhance the propagation or survival of the affected species."<sup>139</sup> It is plainly irrelevant whether the purpose of *other* activities for which a permit is *not* required—such as the tiger conservation efforts of an organization in India—is to enhance propagation or survival of the species. Furthermore, 50 C.F.R. § 17.22, which governs enhancement permits generally, requires that applicants provide a "full statement of the reasons why the applicant is justified in obtaining a permit including the

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<sup>134</sup> *Tenn. Valley Auth.*, 437 U.S. at 180 (emphasis added).

<sup>135</sup> *Babbitt v. Sweet Water Home Chapter of Cmtys. for a Greater Or.*, 515 U.S. 687, 698 (1995).

<sup>136</sup> *Id.* at 708.

<sup>137</sup> *Tenn. Valley Auth.*, 437 U.S. at 184; *see, e.g.*, Ex. 34, S. Rep. No. 93-307, at 7 (1973) (noting that the Act defines "take" "in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife"); H.R. Rep. No. 93-412, at 154 (1973) (stating that the ESA uses the "broadest possible terms" to define restrictions on takings).

<sup>138</sup> *United States v. Snapp*, 423 F. App'x 706, 708 (9th Cir. 2011) (citing *Babbitt*); *see also Aransas Project v. Shaw*, 835 F. Supp. 2d 251, 270-71 (S.D. Tex. 2011) ("[A] broad interpretation of ESA Section 9" is "in harmony with the ESA's purpose [and] legislative history.").

<sup>139</sup> 50 C.F.R. § 17.21(g) (emphasis added).

details of the activities sought to be authorized by the permit."<sup>140</sup> If donating money to a conservation organization can justify issuance of a Section 10 permit, there is no reason why the 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."

Under the FWS's Pay-to-Play scheme, the "justification" for the permit—the donation—is wholly independent of the "activities sought to be authorized by the permit"—such as exporting endangered tigers. Likewise, in issuing a Section 10 permit, 50 C.F.R. § 17.22 mandates that the Director consider "[w]hether *the purpose for which the permit is required* is adequate to justify removing from the wild or otherwise changing the status of the wildlife sought to be covered by the permit."<sup>141</sup> If making a donation for conservation were "adequate to justify removing from the wild or otherwise changing the status of the wildlife sought to be covered by the permit," "the purpose for which the permit is required" would be irrelevant. Clearly, the FWS's Pay-to-Play policy is inconsistent with the requirements of 50 C.F.R. § 17.22.

The Pay-to-Play policy also conflicts with the regulations of the National Marine Fisheries Service (NMFS), which shares responsibility with the FWS for administering the ESA. To obtain a Section 10 enhancement permit, the NMFS regulations require an applicant to demonstrate that "[t]he proposed activity furthers a bona fide . . . enhancement purpose."<sup>142</sup> An applicant must also demonstrate that "the activity will likely contribute significantly to maintaining or increasing distribution or abundance, enhancing the health or welfare of the species or stock, or ensuring the survival or recovery of the affected species or stock in the wild."<sup>143</sup> "Only" endangered wildlife "necessary for enhancement of the survival, recovery, or propagation of the affected stock may be taken, imported, exported, or otherwise affected under the authority of an enhancement permit."<sup>144</sup> The regulations do not authorize permit holders to import and export endangered wildlife for purposes wholly unconnected to enhancement and

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<sup>140</sup> *Id.* § 17.22(a)(1)(vii) (emphasis added).

<sup>141</sup> *Id.* § 17.22(a)(2)(i) (emphasis added).

<sup>142</sup> *Id.* § 216.41(b)(1) (emphasis added); *see also* NMFS, Application Instructions for a Permit for Scientific Purposes or to Enhance the Propagation or Survival of Threatened and Endangered Species 1 (Exp. Aug. 31, 2015) ("Permitted activities must . . . enhance the propagation or survival of the listed species.").

<sup>143</sup> 50 C.F.R. § 216.41(b)(6)(ii) (emphasis added).

<sup>144</sup> *Id.* § 216.41(b)(6)(i); *see also id.* § 216.33(c)(2) (requiring that "the proposed activity" be "for enhancement purposes").

survival, so long as they make a donation to a conservation project. Rather, unlike FWS's Pay-to-Play policy, the NMFS regulations are faithful to the plain meaning of the Enhancement Requirement: that permit applicants must establish a direct relationship between the activities for which the permit is sought and the survival of endangered species in the wild.

Finally, FWS has long interpreted the Enhancement Requirement to require that "the *purpose* of" the otherwise prohibited activity—and not of a collateral activity, such as donating to conservation—be "enhancing propagation or survival of the affected species."<sup>145</sup> As far back as 1979, the agency explained that "permission may be granted for [otherwise prohibited] activities *if they are conducted for certain purposes*. In the case of endangered wildlife, the Act limits them to scientific purposes or to purposes of enhancing the propagation or survival of the affected species."<sup>146</sup> Based on its longstanding interpretation,<sup>147</sup> FWS cannot issue FEI the requested permit unless it shows that the *purpose of exporting* the protected species—and not of earmarking money for tiger conservation—is to enhance the survival and propagation of the species.

As a federal judge recently noted, "[t]he plain language of Section 10(a) does not say" that the Enhancement Requirement can be "satisfied upon nothing more than the permittee's promise to donate money to an unrelated conservation effort," and "FWS's broad interpretation appears to thwart the dynamic of environmental protection that Congress plainly intended when it mandated that *no* export of endangered species be allowed unless the agency permits such

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<sup>145</sup> Final Rule: Captive Wildlife Regulation, 44 Fed. Reg. 54,002, 54,002 (Sept. 17, 1979) (emphasis added) (stating that, under the ESA, "persons may be permitted to undertake otherwise prohibited activities for the purpose of enhancing propagation or survival of the affected species"); *see also id.* at 54,005 (explaining that the rule pertaining to Section 10 exemptions for captive-bred wildlife "is intended to facilitate activities for the purpose of enhancing propagation or survival of the affected species").

<sup>146</sup> *Id.* at 54,002 (emphasis added); *see also id.* at 54,005 ("Only those activities conducted to enhance propagation or survival of the affected species may be authorized by the present rule." (emphasis added)).

<sup>147</sup> It is black letter law that "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). The FWS failed "to supply a reasoned analysis" for the abandonment of its policy that the purpose of *the proposed activity* must be to enhance the propagation or survival of the species. This failure provides an independent reason why the FWS cannot rely on the Pay-to-Play policy as a basis for issuing FEI the requested permit.

export *pursuant to certain specified circumstances*."<sup>148</sup> FWS's Pay-to-Play policy, the judge continued:

essentially . . . read[s] those circumstances out of the statute, such that Section 10(a)'s enhancement-finding requirement actually places no meaningful constraints on FWS's ability to authorize prohibited activities, because, as a practical matter, the agency can always condition the granting of a permit on the permittee's undertaking some *other* act that advances scientific knowledge or benefits the species, regardless of the intentions of the permittee with respect to the particular animals it seeks to access and/or the permittee's avowed lack of interest in furthering the species as a whole.<sup>149</sup>

In short, granting this permit to Feld based on Pay-to-Play would violate the strict limits on FWS's permitting authority set forth in the ESA and thus would be unlawful.<sup>150</sup>

### **3. FEI Has Failed To Meet Even The Arbitrary And Low Threshold Requirement Of FWS' Unlawful Pay-To-Play Loophole.**

As discussed above, FEI claims to have \$20,000 "earmarked" for a tiger conservation organization if FWS authorizes this export. While the whole system of Pay-to-Play is unlawful the amount of money FEI claims it will pay falls short.

FWS has previously advised tiger exhibitors that "[a]lthough [FWS has] no minimum amount one could contribute in order to meet the enhancement requirement of the ESA, the donation should be substantive enough to have an impact on one or more aspects of the threat of

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<sup>148</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)).

<sup>149</sup> *Id.* at 176-77. The judge further added:

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

*Id.* at 177.

<sup>150</sup> *See* 5 U.S.C. § 706(2)(C) (authorizing a court to set aside permits issued "in excess of statutory jurisdiction, authority, or limitations").

the extinction of the species."<sup>151</sup> In similarly advising Las Vegas-based tiger exhibitors who sought permits to export tigers abroad for use in a magic show, FWS informed the applicants that "[w]hen furnishing donations one could *look at the proportion of the revenues which could be generated by your exhibition activities* and the needs of the Project to assist in determining an appropriate donation amount."<sup>152</sup>

As of 2015, revenue from the Ringling Bros. circus was reportedly about \$195,000,000 annually; and parent company FEI, whose other entertainment shows include Disney on Ice, Disney Live, Monster Jam, Marvel Universe Live, was worth approximately \$1.3 *billion*.<sup>153</sup> That makes the total alleged proportion of the revenues "earmarked" by FEI for tiger conservation in 2017 equal to a mere 0.0015 percent of the company's value, and 0.01 percent of the circus' revenue.

The contribution for leopard and lion conservation is exactly 0 percent.

FEI can hardly claim that its \$1.3 billion-dollar operation is making a significant commitment to, or difference in, tiger conservation with \$20,000 "earmarked" for a tiger conservation group, and \$0 to leopard or lion conservation. Indeed, the amount that FEI may donate to tiger conservation is statistically insignificant given the scope of the corporation's operations and profit from the use of exotic animals for entertainment.

### **B. Studies Show That Animal Acts Fail To Educate Or Enhance Survival Of The Species.**

FEI's "justification" for the export, such as it is, relies on a legally insufficient and unsupported assertion that "exhibition and education purposes" are sufficient to meet the Enhancement Requirement.<sup>154</sup> Despite FEI's unsupported claims that "awareness through

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<sup>151</sup> Ex. 35, E-mail from Anna Barry, FWS, to Mitchel Kalmanson (Apr. 28, 2015, 2:17 PM); *see also* Ex. 36, Letter from Timothy Van Norman, Chief, Branch of Permits, Div. of Mgmt. Auth., FWS, to Ferdinand & Anton Fercos-Hantig (June 19, 2014).

<sup>152</sup> Ex. 37, Letter from Timothy Van Norman, Chief, Branch of Permits, USFWS Division of Management Authority, to Ferdinand and Anton Fercos-Hantig (Sept. 15, 2014) (emphasis added).

<sup>153</sup> Ex. 38, Kate Vinton, *Ringmaster of the Universe: How Billionaire Kenneth Feld Keeps the Ringling Bros. Circus Alive*, *Forbes* (Nov. 30, 2016), <https://www.forbes.com/sites/katevinton/2016/11/30/how-billionaire-kenneth-feld-keeps-ringling-bros-circus-alive/#66a4ceef443a>.

<sup>154</sup> Final Application at 2.

exhibition benefits the survival of the species,"<sup>155</sup> and its failure to include the "lengthy and convincing evidence" that "the presentation of endangered species before a live audience . . . provides an unparalleled educational value,"<sup>156</sup> FWS has made it abundantly clear that

when considering whether a permit can be issued to authorize activities that would otherwise be prohibited with an endangered species, the purposes of the activity must be for either scientific purposes or for enhancement, not solely for educational or exhibition purposes.<sup>157</sup>

Notably missing from the Application is *any support* for FEI's contention that commercial exhibition of tigers supports conservation of the species—because none exists. In fact, experts have found the opposite—use of big cats in circuses "reduces rather than heightens concern for the species."<sup>158</sup> FEI has offered *no* evidence that Lacey's intended use of the cats will have any impact on conservation of the affected species whatsoever. FEI's presentation of big cats in its now-defunct Ringling Bros. circus included no meaningful conservation education, and FEI has presented no evidence that Lacey will offer a conservation message with the traveling circuses in Europe, either. Indeed, FEI has no control over Lacey's activities in Europe.

As discussed above, FEI hasn't even identified with certainty the country to which these cats will be exported, let alone information about education or details about how the exhibition of the cats overseas will educate or enhance the propagation or survival of the species. By forcing big cats to travel from city to city and country to country to perform unnatural tricks for large audiences, FEI and Lacey merely have showcased *unnatural* behaviors for the species—creating a misimpression in the audience's mind, not an educational one. In the wild, leopards don't ride around in clown cars, tigers don't hop in circles on their hind legs, and lions from Africa would never encounter tigers from Asia—let alone allow one to stand on his back.

The late Dr. Ronald Tilson, a world-renowned tiger expert who served as Conservation Director at the Minnesota Zoo Foundation from 1987-2011 and the Coordinator of the

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> Final Rule: Listing All Chimpanzees as Endangered Species, 80 Fed. Reg. 34,500, 34,518 (June 16, 2015); *see also* Fax from Anna Barry, FWS, to John F. Cuneo, Jr., Hawthorn Corp. (Mar. 12, 2012) ("Conservation Education alone can no longer suffice for meeting the enhancement requirements under the Endangered Species Act. 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.").

<sup>158</sup> Ex. 39, Statement of Dr. Ronald Tilson (Sept. 30, 2011).

Association of Zoos and Aquariums' (AZA) Tiger Species Survival Plan from 1987-2011, stated that the unnatural tricks that circuses force big cats to perform "reduces rather than heightens concern for the species."<sup>159</sup>

Similarly, the late Dr. Mel Richardson, an exotic animal veterinarian with decades of experience working with big cats and elephants prior to his death, stated in connection with FEI and Lacey's initial Section 10 Application to import the cats who are the subject of the instant Application:

It is unnatural for tigers to hop like bunnies on their back feet, jump through hoops, cavort with each other or African lions. A three ring circus is an artificial construct by its very nature. Tigers do not run away from home to join the circus. Tigers are primarily solitary animals essentially nocturnal, never under the glare and noise of a circus tent or under the Big Top. I saw no educational message that indicates either Lacey or RBBB understand the conservation issues affecting tigers in today's world. I saw no evidence they even cared.<sup>160</sup>

There is simply nothing about these behaviors that educates the public about wild tigers, lions, or leopards; on the contrary, the tricks that the animals are forced to perform are antithetical to their natural behaviors and instincts.

Further, according to Philip J. Nyhus, a professor of environmental studies and expert in endangered species conservation, policy, and risk assessment, use of tigers for circuses and other similar acts has contributed to "legions of young Americans growing up believing that tigers [are] dangerous wild animals that can and justifiably should be trained through brute strength and punishment."<sup>161</sup> Experts agree that showcasing tigers for profit has lessened the general public's connection to, and knowledge of, wildlife and nature.<sup>162</sup>

This long-standing view was once again confirmed in 2016 in an independent technical report commissioned by the Welsh government, which concluded that

circuses are *not conducive to promoting conservation messages* because: they typically justify their use of animals by asserting that captivity is preferable to the wild, which promotes the idea that humans care for animals better than they do

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<sup>159</sup> *Id.*

<sup>160</sup> Ex. 40, Statement of Dr. Mel Richardson (Nov. 16, 2012).

<sup>161</sup> Ex. 41, Philip J. Nyhus, Ronald Tilson, & Michael Hutchins, *Thirteen Thousand and Counting: How Growing Captive Tiger Populations Threatens Wild Tigers*, in *Tigers of the World: The Science, Politics and Conservation of Panthera Tigris* 223, 233 (Philip J. Nyhus & Ronald Tilson eds., 2nd ed. 2010).

<sup>162</sup> *Id.* at 236.



themselves; they broaden the definition of natural behaviour to any movement an animal can physically complete, which misrepresents how animals actually behave in the wild and disguises the fact that training is required to produce the behaviour; and they minimise the differences between humans and animals, which portrays the idea that animals are willing performers and disguises the underlying human domination.<sup>163</sup>

The researchers ultimately concluded that only with "increasing diversity of interactive forms of education" could "the *overall* contribution of travelling circuses . . . to conservation and/or education" reach the level of "marginal," and even then "any potential benefits *are likely to be outweighed by the negative impressions generated by using wild animals for entertainment.*"<sup>164</sup>

Jessica Bell Rizzolo, a scholar who analyzed circus messaging—particularly that of Ringling Bros.—concluded that circuses "obscure, rather than generate, knowledge of how animals behave in the wild," and promote "anticonservation messages by denigrating the wild" and suggesting that "humans take better care of animals than animals take of themselves."<sup>165</sup> Circuses likewise create "confusion about how animals actually behave in the wild, which is the opposite aim of any true conservation education."<sup>166</sup> Rizzolo has expressed "strong opposition" to the instant Application, writing that "[t]he use of animals in circuses is fundamentally irreconcilable with the promotion of conservation attitudes," because "circuses actively promote anti-conservation messages."<sup>167</sup> True conservation education teaches "a) the unique needs of and threats to wild animals, b) the natural behaviors of wild animals, and c) the value of habitat preservation and wild animal populations."<sup>168</sup> FEI does the opposite, Its claims that circuses are educational are "patently false and misleading."<sup>169</sup>

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<sup>163</sup> See Ex. 42, Jo Dorning et al., *The Welfare of Wild Animals in Travelling Circuses* 10, 25-26 (2016) (emphasis added).

<sup>164</sup> *Id.* (emphasis added); see also Notice of Intent to Propose Rule: Captive-Bred Wildlife Regulation, 57 Fed. Reg. 548-01, 550 (Jan. 7, 1992) (noting that using "captive-bred animals . . . for entertainment" does not "contribute to conservation"); Final Rule: Captive-Bred Wildlife Regulation, 58 Fed. Reg. 68,323, 68,324 (Dec. 27, 1993) (explaining that FWS has "sincere doubts about the relative conservation benefits that are provided to non-native species in the wild from the public exhibition of living wildlife").

<sup>165</sup> Ex. 43, Jessica Bell Rizzolo, *There Is No Wild*, 23 Soc'y & Animals 462, 477-78 (2015).

<sup>166</sup> *Id.* at 478.

<sup>167</sup> Ex. 44, Statement of Jessica Bell Rizzolo 1 (July 20, 2017) (emphasis in original).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

The European Association of Zoos and Aquariums (EAZA) agrees. According to a position statement published this year, EAZA discourages performances that:

- Create a "misleading impression of the natural behaviours of wild animals."
- Use props that fail to "demonstrate or replicate natural behavior."
- Place humans or animals "at risk of physical or psychological harm."
- Require "physical disciplining of an animal," including "to provide protection for a staff member who is in contact with that animal."
- Involve "[d]irect physical contact between humans and animals in a demonstration for the sole purpose of entertainment."
- Feature "animals that display recessive allele characteristics [such as white tigers], animals that are physically unfit to participate or animals displaying aggression or symptoms of mental distress."<sup>170</sup>

For all of these reasons, "it is not possible for a circus to achieve the standards of membership" in EAZA, "so no circus can be accepted as a member, neither can any zoo or aquarium in financial or managerial partnership with a circus."<sup>171</sup>

In this regard, it is significant that, in 1993, the FWS amended its own "captive-bred wildlife" regulations to make clear that "[p]ublic education activities may not be the sole basis to justify issuance" of a captive-bred wildlife permit.<sup>172</sup> The FWS amended the definition of "enhance the propagation or survival" to eliminate "education through exhibition" as the sole justification for granting a captive-bred wildlife registration, because of the agency's concern that "captive-bred animals . . . might be used for purposes that do not contribute to conservation, such as for pets, research that does not benefit the species, *or for entertainment*."<sup>173</sup> In the preamble to the final rule, the agency explained that it has "*sincere doubts about the relative conservation benefits that are provided to non-native species in the wild from the public exhibition of living*

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<sup>170</sup> Ex. 45, EAZA, *Position Statement on Circus Membership of the Association 2* (2017), available at <http://www.eaza.net/assets/Uploads/Position-statements/EAZA-Position-statement-Circus-membership.pdf>.

<sup>171</sup> *Id.* at 3.

<sup>172</sup> 50 C.F.R. § 17.21(g)(3)(i).

<sup>173</sup> Notice of Intent to Propose Rule: Captive-Bred Wildlife Regulation, 57 Fed. Reg. at 548-01 (emphasis added).

wildlife."<sup>174</sup> While the captive-bred wildlife permitting standards are not directly implicated in the instant case, it is fundamentally inconsistent as a matter of policy that FEI would be able to obtain an ESA export permit on educational grounds—especially when no such grounds were provided. Indeed, FWS has made clear that it no longer allows purported conservation education alone to justify *any* ESA permit in order "to ensure applications submitted by exhibitors are meeting the same requirements as other application[s] that are seeking an ESA permit"—i.e., to ensure consistency.<sup>175</sup>

FEI's application to re-export protected species provides *no* details about the actual acts the cats will be forced to perform with Lacey, how those acts "enhance the survival" of the species, or any educational materials for Lacey's future performances whatsoever. There is nothing in the Application—let alone separate supporting documentation such as studies, reports, expert opinions, or even a script of what education Lacey intends to provide during exhibition—to suggest that the commercial exhibition of big cats for entertainment purposes will somehow "enhance the propagation or survival" of the species.

Should FWS change its very clear policy determination regarding the lack of conservation benefits associated with use of endangered animals for public exhibition and entertainment, we request that the agency explain the basis for such a significant change in policy in accordance with established U.S. Supreme Court jurisprudence.<sup>176</sup>

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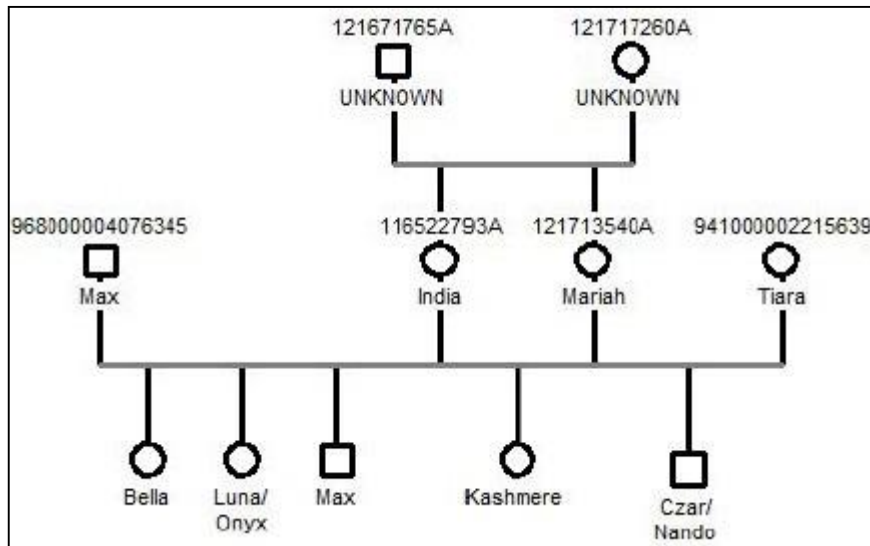
<sup>174</sup> Final Rule: Captive-bred Wildlife Regulation, 58 Fed. Reg. at 68,323 (emphasis added); *see also* Notice of Intent to Propose Rule: Captive-Bred Wildlife Regulation, 58 Fed. Reg. 32,632, 32,635 (June 11, 1993) ("no one has come forward with examples of how exhibition of living wildlife has any specific affirmative effect on survival of non-native species in the wild."); Notice of Intent to Propose Rule: Captive-Bred Wildlife Regulation, 57 Fed. Reg. at 551 ("Even with good material and a good faith effort at delivery by the exhibitor, there may be a limit to the amount of educational content a public which came (and paid) to be entertained will absorb. This is especially true for commercial exhibitors who have a limited amount of time to present their shows, or whose educational message is delivered in social settings where people may not be receptive.").

<sup>175</sup> Email from Anna Barry, FWS, to Anton & Ferdinand Fercos-Hantig (Feb. 8, 2012, 3:23 PM).

<sup>176</sup> *See, e.g., Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (an agency that changes its policy position must "articulate a satisfactory explanation for its action including a "*rational connection between the facts found and the choices made*" (emphasis added) (citation omitted)).

**C. By Exhibiting "Generic" Tigers, Who Do Not Exist In The Wild, FEI And Lacey Are Not Enhancing Propagation Or Survival Of The Species.**

FEI represents in the Application that all of the tigers are "generic," (*i.e.*, specimens not identified or identifiable as members of a distinct subspecies), except for the tiger Suzy, who is represented to be an Amur (Siberian) tiger (*Panthera tigris altaica*).<sup>177</sup> With the exception of Suzy, the Application shows that virtually all of the tigers are related to one another through one or both of their parents, suggesting extremely low genetic diversity among the Lacey family tigers as illustrated by Table 1.<sup>178</sup>



**Table 1. Relatedness of Lacey Tigers.**

Generic tigers are "no longer Amur or Sumatran or Bengal tigers. They are tiger soup," with little value for conservation.<sup>179</sup> The FWS has made clear that it does

not believe that inter-subspecific crossed or generic tigers provide a conservation benefit for the long-term survival of the species. Generic tigers cannot be used for maintaining genetic viability and distinctness of specific tiger subspecies. Generic

<sup>177</sup> Final Application at 15-16, 33. In all likelihood Suzy is generic as well, given the lack of evidence to substantiate her lineage or to show that she was bred as a part of a managed breeding program.

<sup>178</sup> Parentage information is not included for India II and Prince, though they are full siblings from the same litter. *See* Final Application at 22-32. Comparing the microchip numbers provided for the other tigers reveals that all were sired by a tiger named Max. India (mother of Bella, Luna and Max), and Mariah (mother of Kashmere) were full siblings. *See* Ex. 46, Breeding Certificates of India and Mariah.

<sup>179</sup> Nyhus, Tilson, & Hutchins, *supra* note 161, at 236.

tigers are of unknown genetic origin and are typically not maintained in a manner to ensure that inbreeding or other inappropriate matings of animals do not occur.<sup>180</sup>

When FWS announced the removal of inter-subspecific crossed or generic tigers (*Panthera tigris*) from the list of species that are exempt from registration under the Captive-bred Wildlife (CBW) regulations in 2016, it reiterated the "lack of conservation value of [generic tigers] due to their mixed or unknown genetic composition."<sup>181</sup> Likewise, the Association of Zoos and Aquariums (AZA), which operates the country's only program endeavoring to "[m]aintain sustainable, genetically diverse [captive] tiger populations as a 'genetic insurance policy' for their wild counterparts,"<sup>182</sup> has placed a moratorium on the breeding of generic tigers in order to eventually *reduce* the population of such tigers in the United States to zero.<sup>183</sup> Lacey's generic tigers have all the "undesirable" characteristics that FWS deems harmful to conservation: they are of generic origin, and they are not "maintained in a manner to ensure that inbreeding or other inappropriate matings of animals do not occur." Authorizing the re-export of

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<sup>180</sup> Proposed Rule: U.S. Captive-Bred Inter-Subspecific Crossed or Generic Tigers, 76 Fed. Reg. 52,297, 52,299 (Aug. 22, 2011); *see also* Ex. 47, Email from Mike Carpenter, FWS, to Nick Sculac, Serenity Springs (May 6, 2013, 11:42 AM) ("generic tigers . . . are not suitable for species conservation.").

<sup>181</sup> Final Rule: U.S. Captive-Bred Inter-Subspecific Crossed or Generic Tigers, 81 Fed. Reg. 19,923, 19,924 (Apr. 6, 2016).

<sup>182</sup> Ex. 48, AZA, *Tiger Species Survival Plan*, <http://support.mnzo.org/tigercampaign/tiger-ssp/> (last visited July 9, 2017).

<sup>183</sup> *Id.* The AZA SSP program is "a long term plan involving genetically diverse breeding, habitat preservation, public education, field conservation and supportive research to ensure survival for many threatened and endangered species from around the world. The AZA Tiger SPP scientifically manages the breeding and transfer of Amur, Sumatran, and Malayan tigers (*Panthera tigris altaica*, *P.t. suatrae*, and *P.t. jacksoni*) as part of a cooperative program that serves as a genetic 'insurance policy' for these tigers' wild counterparts. Since 2009, the AZA Tiger SSP has also managed 'generic' tigers in AZA-accredited institutions, with the goal of phasing out these tigers of hybrid ancestry and/or unknown pedigree within the next 20 years, thus providing more space to grow the populations of pure-subspecies tigers whose ancestry can be traced back to the wild-caught founders." Ex. 49, Letter from Steven Olson, Vice President, Federal Relations, AZA, to Timothy Van Norman, Chief, Branch of Permits, Div. of Mgmt. Auth., FWS (Aug. 30, 2011); *accord* AZA, *Tiger Species Survival Plan*, <http://support.mnzo.org/tigercampaign/tiger-ssp/> ("The Generic Tiger SSP differs from the Amur, Malayan, and Sumatran SSPs, in that its goal is to reduce the population of generic tigers in AZA-accredited zoos. This will eventually free space for studbook-registered tigers. A breeding moratorium for generic tigers is now in place .....Target population size: 0.").

these tigers will harm tiger conservation and expand the market for generic tigers by authorizing circuses to profit off of them with the imprimatur of the United States government.

#### **D. Lacey's Big Cat Acts Are Likely To Have A Detrimental Impact On Wild Populations.**

Section 7 of the ESA requires all federal agencies to "insure that any action authorized . . . by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species."<sup>184</sup> And under the ESA's implementing regulations, FWS is required to consider "[t]he probable direct and indirect effect which issuing the permit would have on the wild populations of the wildlife sought to be covered by the permit."<sup>185</sup> The ESA provides that no permit may be issued unless it has been determined that "if granted and exercised" the permit "will not operate to the disadvantage of such endangered species, and . . . will be consistent with the purposes and policy" of the ESA,<sup>186</sup> and that a permit can be issued only if it "is not likely to jeopardize the continued existence of any endangered species."<sup>187</sup> FWS is required to deny the Application if "the authorization requested *potentially* threatens a wildlife . . . population."<sup>188</sup> Because abundant evidence makes clear that authorizing the export of these imperiled big cats for use in circus acts would be detrimental to the survival of the species, would operate to the disadvantage of the species, would be inconsistent with the purposes and policy of the ESA, would jeopardize the continued existence of the species, and will threaten wildlife populations, FWS cannot lawfully issue the permit.<sup>189</sup>

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<sup>184</sup> 16 U.S.C. § 1536(a)(2).

<sup>185</sup> 50 C.F.R. § 17.22 (a)(2)(ii).

<sup>186</sup> 16 U.S.C. § 1539(d).

<sup>187</sup> *Id.* § 1536(a)(2); *see also* 50 C.F.R. § 17.3 (for an activity to qualify as "enhancement" for permitting purposes it must "be shown that such activities would not be detrimental to the survival of wild or captive populations of the affected species.").

<sup>188</sup> 50 C.F.R. § 13.21(b)(4) (emphasis added).

<sup>189</sup> *See* 5 U.S.C. § 706(2)(C) (authorizing a court to set aside permits issued "in excess of statutory jurisdiction, authority, or limitations"). In making these required findings FWS may not rely on any blanket determinations as to impacts generally on all captive bred wildlife, *see, e.g.*, Ex. 50, Memorandum from the Chief, Branch of Consultation and Monitoring, Division of Scientific Authority, FWS, to the Chief, DMA, FWS (Nov. 17, 2003) (broadly claiming that that the taking, transport, shipping, and sale of captive-bred wildlife "may affect, but is not likely to adversely affect the survival of the species"), to ignore the detrimental effects that issuing the particular permit at issue here will have. The ESA "requires case by-case review of exceptions," which includes "mak[ing] certain findings." *Friends of Animals v. Salazar*, 626 F. Supp. 2d 102, 119 (D.D.C. 2009), *appeal dismissed*, 09-5292, 2010 WL 286806 (D.C. Cir. Jan. 4, 2010). Thus,

Not only do animal acts fail to educate the public and fail to enhance the propagation or survival of species, studies have shown that public display and commercial use of endangered species do operate to the *detriment* of wild populations of such species.<sup>190</sup> This research not only undermines any contention that FEI and Lacey's export and foreign exhibition of tigers, lions, and leopards benefits the affected species, but is also yet another reason why the law requires the permit application to be denied.

As the late Dr. Tilson explained:

[M]y colleagues and I have found that forcing tigers to perform in circuses has been detrimental to species conservation efforts because it gives the impression that tigers should be trained through brute strength and physical punishment. It also misleads the public into believing that tigers in the wild can't really be so endangered if circuses are allowed to display them jumping through hula hoops and hopping around on their hind legs. This exploitation of a species that is ostensibly afforded protection from inhumane treatment and commercial exploitation under the Endangered Species Act has actually *lessened* the general public's appreciation for tigers in general and most specifically for wild tiger conservation.<sup>191</sup>

Likewise, the late Dr. Richardson wrote that:

There are no valid scientific studies which show that a child or adult seeing lions, tigers, bears, and elephants surrounded by loud music, clowns, acrobats, and people being shot out of cannons will result in an increase in conservation and caring for the natural environment. There is nothing natural under the Big Top. *Instead, children and adults learn that it is permissible to treat an endangered species such as the tiger . . . as if it were a clown or an acrobat, a mere curiosity, so to speak.*<sup>192</sup>

As these experts point out, the circus undermines its audience's attitude towards conservation and understanding of wild tigers. People who attend the circus see only that tigers live in small cages barely large enough to turn around in, and that they rush into the arena where the trainer with a whip and cane has trained them to walk on their hind legs. They see the tigers eating small morsels of meat pulled from the trainer's pouch. They see no pools or rivers for the tigers to swim in. They never learn that tigers, along with jaguars, are one of the most aquatic of all big cats. They learn that tigers and even lions will lie down together and roll over on cue from the

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the law mandates that the FWS make an "individualized analysis" of each permit application, including specific findings about specific animals in specific contexts. *See id.* at 119-20 ("[T]he text, context, purpose and history of section 10 show a clear Congressional intention that permits must be considered on a case-by-case basis[.]").

<sup>190</sup> See Ex. 51, Stephen R. Ross et al., *Specific Image Characteristics Influence Attitudes about Chimpanzee Conservation and Use as Pets*, 6 PLoS ONE 1 (2011).

<sup>191</sup> Statement of Dr. Ronald Tilson 1 (Sept. 30, 2011) (emphasis in original).

<sup>192</sup> Statement of Dr. Mel Richardson 2 (Nov. 16, 2012) (emphasis added).

whip, not that they are solitary hunters. And while they are seeing tigers, they are also seeing clowns and acrobats and numerous other distractions. *They are seeing the unnatural—not the natural.*<sup>193</sup>

Nyhus, et al., warn that people who watch circus-style tiger acts "are actually less—not more—likely to have a meaningful understanding of the real challenges of wild tiger conservation."<sup>194</sup> They explain that the "warped theatrics" of the so-called "American style of feline acts," in which the public sees "snarling animals behind bars, subdued and humbled by macho trainers," has "undoubtedly contributed to legions of young Americans growing up believing that tigers . . . can and justifiably should be tamed through brute strength and punishment."<sup>195</sup> Over time, "the venue and strategies [of the circus] have changed, but the inaccurate messages remain the same."<sup>196</sup> Simply put, using tigers in acts where they are "show-cased for money, and conceit," "raised for the personal gratification of their owners," and even "played with like house cats," contributes to the so-called "petification" of these endangered animals.<sup>197</sup> These stunts actually "detract[] from our understanding and conservation of tigers . . . through the perception that these and other large cats can be bought, sold, hand-raised, and bred on commercial scales."<sup>198</sup>

Likewise, because entertainment is not an acceptable reason to hold imperiled wild animals captive, circuses use conservation discourse in an attempt to "relocate the circus to a more favorable position on this moral spectrum."<sup>199</sup> Yet the messages perpetuated by the circus are *anti-conservationist*. Ringling, for example, has claimed that breeding endangered animals for the circus is doing the species a favor because "there is no wild."<sup>200</sup> (Indeed, at a recent legislative hearing, Alexander Lacey claimed that because "wildlife is in the worst state now than it's ever been on our planet," and habitat conservation efforts are "not really helping," we "should really be applauding people like [Lacey]" that breed tigers for circuses.<sup>201</sup>) These claims lead

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<sup>193</sup> *Id.* at 2-3 (emphasis added).

<sup>194</sup> Nyhus et al., *supra* note 161, at 237-38; *see also* Ex. 51, Philip J. Nyhus & Ron Tilson, *The Conservation Value of Tigers: Separating Science from Fiction* (2010).

<sup>195</sup> Nyhus, Tilson, & Hutchins, *supra* note 161, at 233.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 236.

<sup>198</sup> *Id.* at 235, 233.

<sup>199</sup> Rizzolo, *supra* note 165, at 474.

<sup>200</sup> *Id.* at 472.

<sup>201</sup> N.Y.C. City Council Transcript, *supra* note 64, at 110.



audiences to believe that the wild is "irreversibly lost," and that breeding animals in captivity is preferable to habitat conservation.<sup>202</sup> Audiences therefore feel good about buying a ticket to the circus, but see no need to invest in conservation in the wild.

Similarly, recent studies on the use and inappropriate portrayal of chimpanzees used in entertainment concluded that the practice leads to an incorrect perception by the public that the animals must not be in jeopardy if such uses are permitted, and thus undermines "the scientific, welfare, and conservation goals" of those who seek to protect them.<sup>203</sup> Dr. Stephen Ross, the Coordinator of the AZA's Chimpanzee SSP, and his colleagues note that, "[i]n movies, television shows, and advertisements, chimpanzees are often depicted as caricatures of humans, dressed in clothes and/or photographed in contrived poses"—just as animals in the circus are.<sup>204</sup> As Ross explains, commercial presentations of endangered species "may serve to counteract the efforts of scientific and conservation organizations that have formed strong policy statements condemning the use of [such species] as pets, citing risks to public health and safety, concerns about animals' welfare, and adverse effects on wild populations."<sup>205</sup>

Similarly, Nyhus et al. argue that our exposure to tigers as sources of entertainment has led to "the blurring of our awareness of what tigers are and the serious threats wild tigers face to their continued survival."<sup>206</sup> "People watch the films, they visit the zoos, and by the mesmeric power of these vicarious experiences, they come carelessly to believe that the Bengal tiger . . . is alive and well because they have seen it."<sup>207</sup> They also point out that "the growing number and increasing 'commoditization' of privately owned captive tigers"—such as Lacey's—harms wild tigers by diverting resources—"both human and financial"—from in-situ tiger conservation efforts.<sup>208</sup> Rather than spending scarce resources on addressing the crisis facing the world's *wild*

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<sup>202</sup> Rizzolo, *supra* note 165, at 472-73.

<sup>203</sup> Ex. 53, Ross et al., *Inappropriate Use and Portrayal of Chimpanzees*, 319 *Sci.* 1487 (2008); Ross et al. 2011, *supra* note 190; Ex. 54, Kara Schroepfer et al., *Use of "Entertainment" Chimpanzees in Commercials Distorts Public Perception Regarding their Conservation Status*, 6 *PLoS ONE* (2011); see also Ex. 55, Michael P. Muehlenbein, *Primates on Display: Potential Disease Consequences Beyond Bushmeat*, 162 *Am. J. Phys. Anthropol.* 32, 35 (2016) (misrepresentation in imagery and media of primates make them appear as suitable pets, "and in less need of financial contributions for conservation.").

<sup>204</sup> Ross et al. 2008, *supra* note 203.

<sup>205</sup> *Id.*

<sup>206</sup> Nyhus, Tilson, & Hutchins, *supra* note 161, at 232.

<sup>207</sup> *Id.* at 237 (quoting David Quammen, *Wild Thoughts from Wild Places* (1998)).

<sup>208</sup> *Id.*

tigers, governments, private individuals, and animal protection organizations are forced to put money and energy into regulating and addressing the needs of *captive* tigers who will never be released into the wild.<sup>209</sup>

And Dr. Brian Hare, a Harvard-educated professor of evolutionary anthropology at Duke University has filed comments opposing the instant Application on the basis that using endangered animals for entertainment presents a "major threat[]" to the conservation community because it causes the public to believe that wild animals make good pets and do not need protection in the wild.<sup>210</sup>

Not only does exhibition of exotic animals undermine conservation and misinform the public, circuses are actually detrimental to the development of their main constituency: children. Rather than educating children about species conservation, circuses instead teach children that domination of other living creatures through the threat of physical punishment is acceptable. Dr. Sujatha Ramakrishna, MD, a psychiatrist specializing in child development, has explained:

Animals such as tigers and elephants are not willing participants in circuses. Unlike domesticated animals, they have not been bred to work and live with humans. On occasion, they have suddenly run amok and attacked spectators. Trainers must utilize whips, chains and hooks to control them. Wild animals that stand on their heads and jump through hoops are performing unnatural acts, under the threat of force.

Children who watch these performances learn that it is acceptable to force another living creature to do something that is stressful, and often even painful, as long as it serves the purpose of entertainment.<sup>211</sup>

The expert opinions and studies discussed above are compelling and make evident that circus acts using imperiled big cats not only fail to "educate" patrons about the species, but more dangerously, often lead to the development of apathy or misunderstanding about such species' endangered status, and desensitize spectators to the abuse that these animals suffer for a few fleeting moments of entertainment. As a result, circus acts are detrimental to the survival of the species, operate to the disadvantage of the species, are inconsistent with the purposes and policy of the ESA, jeopardize the continued existence of the species, and threaten wildlife populations.

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<sup>209</sup> *Id.*

<sup>210</sup> Ex. 56, Comment of Dr. Brian Hare (July 21, 2017).

<sup>211</sup> Ex. 57, Sujatha Ramakrishna, MD, *Circus Animal Acts Teach Children Wrong Lesson*, San Jose Mercury News, 9A, Aug. 10, 2010 (2010 WLNR 15948780).

**VII. FWS Cannot Issue the Requested Permit Because FEI Has Failed to Demonstrate a Showing of Responsibility.**

FWS must deny a permit when an applicant "has failed to demonstrate . . . a showing of responsibility" or when the agency determines "through further inquiry or investigation" that the applicant is not "qualified."<sup>212</sup> In making this determination, the agency must consider "[w]hether the expertise, facilities, or other resources available to the applicant appear adequate to successfully accomplish the objectives stated in the application."<sup>213</sup> As such, applications must include "a resume of the experience of those persons who will be caring for the wildlife" as well as a "complete description and address of the institution or other facility where the wildlife sought to be covered by the permit will be used, displayed, or maintained."<sup>214</sup> Likewise, "[a]ny wildlife possessed under a permit must be maintained under humane and healthful conditions."<sup>215</sup> And CITES requires FWS to make a determination that the cats "will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment."<sup>216</sup>

FWS cannot issue the requested permit because FEI and Lacey have failed to make *any* "showing of responsibility." The Application is devoid of information about the transport and where the big cats will actually end up; the permanent facilities are travel cages and are inadequate and inhumane; Lacey's training techniques are inhumane and the Application fails to show that he employs a veterinarian or other professional staff to provide the animals with adequate care; and Circus Charles Knie has a long history of poor animal care.

**A. The Application Fails To Provide Necessary Information About The Destination.**

As discussed in Part V, the Application includes virtually no information that would allow FWS to evaluate the adequacy or appropriateness of the facilities and care of the big cats during transport or at their final destination—wherever that may be.

The Application initially listed a Circus Krone address in Munich as the "recipient in the foreign country,"<sup>217</sup> but the building at that address is used as a concert venue most of the year

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<sup>212</sup> 50 C.F.R. § 13.21(b)(3), (5).

<sup>213</sup> *Id.* § 17.22(a)(2)(vi).

<sup>214</sup> *Id.* § 17.22(a)(1)(vi), (v).

<sup>215</sup> *Id.* § 13.41.

<sup>216</sup> CITES, art. IV(5)(B).

<sup>217</sup> Final Application at 7.

and only occupied by the circus for a few months in the winter.<sup>218</sup> In fact, long after FEI submitted the Application, Martin Lacey—Alexander Lacey's brother and Circus Krone's "Director of Predatory Animals"—told a German newspaper that, "The rumors are false; these animals are not coming to us. I wouldn't even have any room for them."<sup>219</sup> Martin further speculated that the "rumors" of Alexander's return were "probably because Alexander has a mailing address in Munich. Maybe he really is coming to Europe with his animals—but not to Circus Krone."<sup>220</sup>

Following the release of this article—and well into the first comment period—FEI sent FWS a new address in Einbeck, Germany, as Lacey's destination.<sup>221</sup> FEI mischaracterizes the destination as Lacey's personal family residence, and fails to include material information: that the Einbeck address is also the address for Circus Charles Knie.<sup>222</sup>

The Application also casts doubt on whether and when Lacey would actually end up in Germany with the cats, as it states that the cats might be flown from Memphis to Cologne OR they might be flown from Miami to Amsterdam.<sup>223</sup> If sent to Amsterdam, the cats will be "accommodated" in some mysterious, unnamed "private winter quarters in the Amsterdam area"

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<sup>218</sup> Ex. 58, Circus Krone, *Krone-Bau*, <http://www.circus-krone.com/de/krone-bau.html> (last visited June 14, 2017) ("Der Kronebau ist im Winter Stammsitz für den reisenden Circus und im Sommer ein Ort für zahlreiche andere Produktionen." ["The Krone building is a winter quarters for the traveling circus and in the summer a place for numerous other productions."]); Ex. 59, München Ticket, *Veranstaltungen* [Events], <https://www.muenchenticket.de/search.jsp?venue=13011&cursor=0> (last visited June 14, 2017) (listing various music performances and other shows performing at the Circus Krone building through November 2017, and between April and June 2018).

<sup>219</sup> Ex. 60, tz, *Circus Krone: Missverständnis um Raubkatzen* (May 31, 2017), <https://www.tz.de/muenchen/stadt/maxvorstadt-ort43329/circus-krone-missverstaendnis-um-raubkatzen-8365334.html> (emphasis added); Ex. 61, Professional Translation of *Circus Krone: Missverständnis um Raubkatzen*.

<sup>220</sup> tz, *Circus Krone: Missverständnis um Raubkatzen* (May 31, 2017), <https://www.tz.de/muenchen/stadt/maxvorstadt-ort43329/circus-krone-missverstaendnis-um-raubkatzen-8365334.html> (emphasis added); Professional Translation of *Circus Krone: Missverständnis um Raubkatzen* (emphasis added).

<sup>221</sup> Final Application at 149.

<sup>222</sup> *Id.*; Zirkus Charles Knie, *Kontakt*, <http://www.zirkus-charles-knie.de/> (last visited July 7, 2017) (listing the address CHARLES KNIE GmbH, Braunschweiger Strasse 2, D-37574, Einbeck).

<sup>223</sup> Final Application at 12.

and then moved to Germany at an unspecified later time.<sup>224</sup> Notably, it's been illegal to exhibit wild animals in circuses in the Netherlands for nearly two years.<sup>225</sup>

FEI's evasive, misleading, and changing answers to the simple question of where Lacey intends to export the cats suggests not only poor planning but also bad faith. Either Lacey has a plan for the cats but he's withholding essential details, or Lacey has no plan at all. Either way, the Application must be denied.

### **B. The Application Fails To Provide Necessary Details Of The Export And Destination Facilities.**

There are no photos or diagrams of the "housing" for the cats at their destination, or the enclosures for the international transport. And while dimensions for the travel crates are given, the Application includes no units of measurement for them. There is no explanation of the "arrangements for watering or otherwise caring for the wildlife during transport."<sup>226</sup> There is no itinerary for the proposed export, no information about the length in transit, and no plans for the subsequent transport and exhibition of the big cats as part of the circus. In essence, if FWS authorizes this export, it will be giving Lacey a personal *carte blanche* to do whatever he wishes, whenever he wishes, wherever he wishes with these endangered animals (which is especially improper because the conditions of a permit issued to FEI may not be enforceable against Lacey).

This is particularly alarming given that one of Lacey's lions, Stella, died just five weeks after he and FEI imported her in 2011, raising questions about the impact of stress of transport on the lion and Lacey's planning and care in advance of international travel.<sup>227</sup> (Stella's death is discussed in more detail in Part VII.D.)

Safe transport of wild animals requires substantial planning and experience, which is why planning is of paramount importance. The International Air Transport Association Live Animals

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<sup>224</sup> *Id.*

<sup>225</sup> See Ex. 62, Four Paws, *Netherlands Bans Wild Animal Circuses*, <http://www.four-paws.org.uk/campaigns/wild-animals/wild-animals-in-entertainment/netherlands-bans-wild-animals-in-circuses/> (last visited July 10, 2017).

<sup>226</sup> FWS Form 3-22-37 at 5.

<sup>227</sup> Final Application at 93.

Regulations (IATA LAR)—which FEI/Lacey must comply with<sup>228</sup>—acknowledge that "[a]nimals instinctively fear the strange environment encountered during transportation."<sup>229</sup> Likewise, the CITES *Guidelines for The Non-Air Transport of Live Wild Animals and Plants* ("Cites Transport Guidelines")—which are based on the IATA LAR and must inform FWS's decision—warn that "[t]he transport of an animal constitutes an unnatural situation for the animal and is most likely to cause it some degree of stress. High levels of stress may increase metabolic rates, hazardous behaviour, chances of injuries and susceptibility to diseases."<sup>230</sup>

This is true for big cats. One study that measured the stress responses of tigers to transport found that respiration rates and stress hormone levels spiked significantly during and even after transport.<sup>231</sup> The researchers concluded that "transport can be an exhausting experience for tigers," "stress from transport even as short as 30 min. can affect a tiger physiologically *for 9 to 12 days*," and posited that the impacts of stress would be even greater in a situation where, as here, the tiger is moved from a familiar environment to an unfamiliar one.<sup>232</sup> Appropriate transportation methods and care in transit can significantly reduce this stress, which is why FEI's lack of disclosure regarding the details of the proposed transport is so problematic as it precludes FWS from evaluating the proposed methods adequately.

Other studies have found that tigers used in circuses spend more time performing abnormal stereotypic behavior such as pacing (which is a sign of compromised welfare) during transport compared with when they are not being transported.<sup>233</sup> For example, one study—whose co-author served as an expert witness on Ringling's behalf in federal litigation, and who has used Ringling tigers in his studies— found that ambient temperatures inside one circus trailer reached

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<sup>228</sup> 50 C.F.R. § 23.56(a)(2) ("For export and re-export of live wildlife and plants, transport conditions must comply with the International Air Transport Association Live Animals Regulations (for animals).").

<sup>229</sup> Ex. 63, IATA Live Animal Regs. § 5.1.

<sup>230</sup> CITES, *Guidelines for The Non-Air Transport of Live Wild Animals and Plants* § 2.1 [hereinafter "CITES Transport Guidelines"].

<sup>231</sup> Ex. 64, Daniel P. Dembiec, et al., *The Effects of Transport Stress on Tiger Physiology and Behavior*, 23 *Zoo Bio*. 335, 344 (2004).

<sup>232</sup> *Id.* at 342, 344 (emphasis added).

<sup>233</sup> Dorning, et al., *supra* note 163, at 140 (citing Ex. 65, C.H. Nevill & T.H. Friend, *The Behavior of Circus Tigers During Transport* 28 *Applied Animal Behav. Sci.* 329 (2003); Ex. 66, C.H. Nevill & T.H. Friend, *A preliminary study on the effects of limited access to an exercise pen on stereotypic pacing in circus tigers*, 201 *Applied Animal Behav. Sci.* 355 (2006)).

a stifling 93°F during hours-long transport, and that tigers spent as much as 35.7 percent of their time engaging in stereotypic pacing behavior.<sup>234</sup> (Another study by these authors also found that ambient temperatures reached 99 °F during summer transport.<sup>235</sup>) The authors acknowledged that circuses keep tigers in small cages to make transport easy and efficient for the circus, where "[l]ife . . . is defined by travel."<sup>236</sup> They further explain the various stressors that big cats used in circuses routinely experience as follows:

Confinement in cages or trailers for an extended period of time is just one aspect of transport. Before transport, many cages and trailers require preparation and loading. Loading often involves work crews shouting to each other trying to coordinate efforts, or loud tractors to load cages into trailers or onto flatbed trucks. Circus tigers sometimes react to the presence of work crews or tractors by growling or swiping with their paws.<sup>237</sup>

A second study by the same authors—which also used cats from Ringling—described pacing as an "extreme manifestation[] of boredom" commonly developed under "conditions of close confinement" in order to "cop[e] with and alleviat[e] stress in an environment to which the animal is not naturally adapted."<sup>238</sup> One tiger in this study spent as much as 17 percent of his or her day pacing while at a performance venue.<sup>239</sup>

Because transport is inherently stressful and dangerous to big cats—even those whose lives have been "defined by travel"—the CITES Transport Guidelines strongly emphasize the importance of planning and state that transport conditions should be designed to "avoid unnecessary fear, injury, damage to health, suffering, cruel treatment, and to ensure the safety of the animal."<sup>240</sup> Hence, "[t]ransporters and organizers of transports have an obligation to plan the transport to ensure that the welfare of the animals is not compromised."<sup>241</sup> Because transport is stressful, and "[f]or reasons of animal welfare, animal transport should be quick, efficient and

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<sup>234</sup> Nevill & Friend 2003, *supra* note 233, at 334.

<sup>235</sup> Ex. 67, C.H. Nevill, et al., *Survey of Transport Environments of Circus Tigers* (*Panthera tigris*), 35 *J. Zoo & Wildlife Med.* 167, 172 (2004).

<sup>236</sup> Nevill & Friend 2003, *supra* note 233, at 329-30.

<sup>237</sup> *Id.* at 330.

<sup>238</sup> Nevill & Friend 2006, *supra* note 233, at 356.

<sup>239</sup> *Id.* at 358.

<sup>240</sup> CITES Transport Guidelines § 2.3.

<sup>241</sup> *Id.* § 2.2.

strive to avoid as much stress as possible to the animal."<sup>242</sup> Similarly, "[t]he transport of live animals must be well planned, well prepared and effectively executed!"<sup>243</sup>

As discussed in Part VIII.A, FEI and Lacey have provided no transport plan whatsoever for these endangered cats. The cats will either be driven from Tampa to Memphis, then flown to Cologne, and then driven to Einbeck (which would equal at least 15 hours of driving alone, plus 8 hours or more of flying), or they will be driven to Miami, flown to Amsterdam, and then driven to Einbeck at some later date.<sup>244</sup> Without a clear plan to transport the cats—including an itinerary and information on care in transit—FWS has no assurance that the re-export of these endangered animals will be "quick," "efficient," or will "minimize the risk of injury, damage to health or cruel treatment."

### **C. Lacey Intends To Confine Animals in Cramped, Barren, Inhumane Cages.**

The only information in the Application about "the existing facilities where the wildlife will be maintained" pertains to the cramped steel cages (euphemistically called the "primary accommodation") in which the cats will permanently live. FEI describes the cages as "indoor housing," and claims an "exercise arena" will be used at some venues, but provides no dimensions or details on when and how often the cats will be released from the cages.<sup>245</sup> The cats will not be given enrichment items (pools, bones, etc.), except when released into the "exercise arena."<sup>246</sup> The "indoor housing" cages will provide a meager 12 m<sup>2</sup> of floor space for up to two cats.<sup>247</sup> Additional cats are only given 4 m<sup>2</sup> of extra space each, *ergo* four big cats confined together would only have 20 m<sup>2</sup> of living space (or 5 m<sup>2</sup> per cat).<sup>248</sup> According to FEI's own Pay-to-Play payment recipient, adult male tigers' bodies are typically 2 m long (or 3 m long including the tail).<sup>249</sup> Quite literally, Lacey intends to permanently confine these cats in cages

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<sup>242</sup> *Id.* § 2.1.

<sup>243</sup> *Id.*

<sup>244</sup> Final Application at 12.

<sup>245</sup> *Id.* at 5.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> Ex. 68, WCS Russia, *Amur Tiger*, <https://russia.wcs.org/en-us/Wildlife/Amur-Tiger.aspx> (last visited June 13, 2017). Leopards are typically 1.5 m long. Ex. 69, WCS Russia, *Far Eastern Leopard*, <https://russia.wcs.org/en-us/Wildlife/Far-Eastern-Leopard.aspx> (last visited June 13, 2017).



that are barely larger than their own bodies. Given that all three species slated for export are wide-ranging—tigers would normally cover home ranges of hundreds or thousands of square kilometers—this is plainly inhumane and insufficient to maintain the animals' welfare.

Lacey's cage dimensions will provide a mere fraction of the minimum space accepted by the captive wild animal industry. *See* Table 2. The AZA recommends that tiger exhibits measure at least 144 m<sup>2</sup>, with 50 percent more area for each additional animal, and "it is highly recommended" that zoos "exceed the minimum recommendations."<sup>250</sup> Exhibits must include a "[r]elatively large, complex outdoor space"; "[w]ater pools, moats, and/or running streams"; "[n]atural vegetation"; and "[t]rees or other natural substrate objects to allow nail grooming."<sup>251</sup> AZA recommends that lion exhibits be a minimum of 929 m<sup>2</sup> (with up to three animals sharing that space).<sup>252</sup> Likewise, the Global Federation of Animal Sanctuaries (GFAS) requires its members to provide large felids a minimum of 111.5 m<sup>2</sup> of outdoor space per pair of compatible animals, with 50 percent more area for each additional cat.<sup>253</sup> Indoor enclosures for large felids must be at least 22.3 m<sup>2</sup> per cat.<sup>254</sup> And GFAS enclosures must "replicate, in as much as possible, the felids' wild habitat[.] . . . This includes adequate space, both vertical and horizontal, and appropriate space, in terms of diversity and complexity."<sup>255</sup>

	Min. Enclosure Size	Area Per Add'l Cat	Complexity
FEI/Lacey	12 m <sup>2</sup> (1-2 cats)	4 m <sup>2</sup>	<ul style="list-style-type: none"> <li>• Exercise arena and toys may be provided at performance sites.</li> </ul>
AZA	144 m <sup>2</sup> (1 tiger) 929 m <sup>2</sup> (1-3 lions)	50 % more space	<ul style="list-style-type: none"> <li>• Large, complex outdoor space</li> <li>• Water pools, moats, streams</li> <li>• Trees, natural substrate</li> </ul>
GFAS	111.5 m <sup>2</sup> (1-2 cats)	50 % more space	<ul style="list-style-type: none"> <li>• Replicate wild habitat</li> <li>• Diverse and complex</li> <li>• Appropriate vertical, horizontal space</li> </ul>

**Table 2. Comparative Enclosure Requirements.**

<sup>250</sup> Ex. 70, AZA, *Tiger (Panthera tigris) Care Manual* 12 (2016).

<sup>251</sup> *Id.* at 11.

<sup>252</sup> Ex. 71, AZA, *Lion (Panthera leo) Care Manual* 18-19 (2012).

<sup>253</sup> Ex. 72, GFAS, *Standards for Felid Sanctuaries* 4 (2013).

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 3.

Enclosure size alone will not ensure good welfare. Big cats also require a complex environment that is physically and mentally stimulating—this *cannot* be provided in 12 m<sup>2</sup>, which is one reason that "[s]pace limitation is the most important indicator of stereotypic behaviour in wide-ranging carnivores, and wide-ranging species housed in larger enclosures are less stressed, move more, pace less and/or show more naturalistic behaviour."<sup>256</sup>

Jay Pratte, a big-cat behavioral and husbandry expert, observed the "care" and caging of big cats at multiple Ringling Bros. shows in 2016 and found that big cats confined to the circus's cramped, over-crowded, barren cages suffered poor welfare, physical and psychological harm, and ill-health. His findings included the following:

- Big cats were confined on the hot concrete of a parking lot, with no access to fans, shade, pools, or other means of cooling off, while temperatures were in the mid-to-high 80s and the heat index was well over 90 degrees. Most of the tigers—who evolved in temperate climates and would normally seek shade or a pool to cool off—were panting heavily and unwilling to move for the trainers.<sup>257</sup>
- Because "tigers require an immensely complex natural environment," captive facilities must provide them with "pools, toys (that are kept novel by changing them regularly), bones or whole prey items, different substrates to investigate and lie on, etc."<sup>258</sup> Pratte found "simply no evidence of this standard of care by Ringling," and was even told by trainers that "they 'had not had time'" to provide enrichment.<sup>259</sup> He concluded that the animals "are living nearly constantly in a sterile environment."<sup>260</sup>
- Because the cats "experience long periods of inactivity or mindless activity," they were prone to "stereotypic behaviors, inappropriate social interactions, lethargy or apathy, and learned helplessness at being unable to alter their own environments."<sup>261</sup>
- The sterility and limited size of the circus cages created multiple health problems for the cats. Virtually all of the animals were overweight or obese from lack of appropriate exercise,

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<sup>256</sup> Dorning, et al, *supra* note 163, at 44; Ex. 73, Ros Clubb & Georgia Mason, *Captivity effects on wide-ranging carnivores* (Brief Communication), 425 Nature 473 (2003).

<sup>257</sup> Ex. 74, Jay Pratte, *Big-Cat Report: Ringling Bros. Circus (Red Unit)* 3-4 (2016), available at <https://www.peta.org/wp-content/uploads/2021/06/RinglingBigCatReport.pdf>.

<sup>258</sup> *Id.* at 4.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 9.

which can result in health complications such as arthritis, organ failure, heart disease, heat stress, and joint trauma.<sup>262</sup> In fact, Pratte observed cats limping, walking gingerly, struggling to stand up, and panting constantly—all potentially related to a poor environment and obesity.<sup>263</sup> Multiple cats had cracked paw pads, which "is a result of constantly living on concrete or metal floors, which are hosed clean and remain wet for long periods of time. These cracks will also dry out and are extremely painful to the animals when they move—and even when they're at rest."<sup>264</sup>

- Ringling forced cats who are instinctually solitary to share a small, confined space with others, and they could not avoid social conflicts. Lacey is also proposing to do this abroad.<sup>265</sup> Pratte observed multiple confrontations among individual animals as well as scars and wounds all over their bodies, likely caused by these altercations.<sup>266</sup> Pratte explained that the "inability to avoid conflict, or even the presence of other animals (including humans), will result in psychological distress for the animal," and can trigger aggression towards other animals and trainers, displacement behavior, apathy, learned helplessness, and severe capture myopathy.<sup>267</sup>
- Pratte observed multiple big cats engaging in stereotypic pacing and grooming behaviors, describing the animals as "blanked out" and "engaging in stereotypic behaviors to shut out the world, allowing the brain to produce endorphins from a repetitive activity."<sup>268</sup> Stereotypic behavior is a sign of poor welfare and stress. It "should warn us that the animal has probably been in an unchanging and frustrating environment, and that its welfare has probably been unsatisfactory."<sup>269</sup> As discussed in Part VIII.B, "[c]ircus animals," in particular, "spend[] a great amount of time performing stereotypies, especially when shackled or confined in beast wagons."<sup>270</sup>

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<sup>262</sup> *Id.* at 6.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 7.

<sup>265</sup> See Final Application at 5.

<sup>266</sup> Pratte, *supra* note 257, at 7.

<sup>267</sup> *Id.* at 8.

<sup>268</sup> *Id.* at 9.

<sup>269</sup> Ex. 75, Georgia Mason, *Stereotypies and Suffering*, 25 *Behav. Processes* 103, 111 (1991).

<sup>270</sup> Ex. 76, G. Iossa, et al., *Are wild animals suited to a travelling circus life?*, 18 *Animal Welfare* 129, 129 (2009).

Pratte's report concluded that the big cats he observed "are suffering from neglect as well as ongoing physical and psychological trauma and are not provided with the proper care and welfare necessary for any felid species."<sup>271</sup>

Pratte's findings are echoed by a comprehensive 2016 report commissioned by the Welsh government as an impartial review of the scientific literature and a survey of animal trainers, circuses, zoos, and scientists (including FEI's Thomas Albert, Alexander Lacey, and Dennis Schmitt). The report concluded that all "Five Freedoms" that animals require for adequate welfare—freedom from hunger and thirst; freedom from discomfort; freedom from pain, injury, and disease; freedom to express normal behavior; and freedom from fear and distress—were compromised by circuses.<sup>272</sup> Instead of "aiming to provide the best possible welfare for captive wild animals," circus facilities merely provide what animals can physically tolerate, which "has a significant negative effect on all aspects of their welfare."<sup>273</sup> The authors concluded:

We could not find any evidence to suggest that the cumulative experience of periods performing, on display, and/or being petted and photographed balanced a lifetime of close confinement, regular disturbance and minimal choice and control. Life for wild animals in travelling circuses and mobile zoos does not appear to constitute either a 'good life' or a 'life worth living'.<sup>274</sup>

Plainly, FEI/Lacey's "primary accommodations" for these endangered animals are "inadequate," fall far short of the minimum industry standard, and do not ensure "humane and healthful conditions."

#### **D. Lacey Has Not Demonstrated Adequate Expertise And His Training Techniques Are Inhumane.**

ESA permit applications must include "a résumé of the experience of those persons who will be caring for the wildlife, and FWS must consider the "expertise" of the applicant in its permitting decision.<sup>275</sup> This information is also important in determining whether the animals will be held under humane and healthful conditions. FEI's Application does not include a résumé for Alexander Lacey, though it claims he is "a respected big cat trainer" who is "very

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<sup>271</sup> Pratte, *supra* note 257, at 14.

<sup>272</sup> Dorning, et al., *supra* note 163, at 47.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> 50 C.F.R. § 17.22(a)(1)(vi), (a)(2)(vi).

knowledgeable about" and "dedicated to" providing "first class husbandry."<sup>276</sup> There are no letters of recommendation or expert endorsements for Lacey included. There is also no evidence that Lacey has had formal education or training in animal welfare, animal science, animal behavior, or conservation—training that would demonstrate his knowledge and ability to provide such "first-class" care. The fact that he has performed in 100 cities is irrelevant, as is the fact that he won a "Silver Clown" award, which rewards showmanship and has nothing to do with animal care.

Lacey's public performances are telling, all the same. They reveal that he uses punishment, coercion, and fear to control big cats in the show ring. Jay Pratte's insights into animal training at Ringling's Red Unit hold true for Lacey's performances as well. Pratte observed that the "primary means" used "to coerce the cats to respond in a desired manner is to yell at them, bang on the cages, and use long goads, prods, or whips to force them to move."<sup>277</sup> The prods were "ubiquitous": "in the trainers' hands, the assistants carry them, and they are left strategically near the cats to remain readily available."<sup>278</sup> Pratte observed the tigers "react in fear, with aggression, and with displaced behavior (redirecting an adverse reaction to another individual)," and also noted that throughout the shows, the cats' body language (hunched shoulders and pinned ears) indicated "stress, fear, and psychological duress."<sup>279</sup> On multiple occasions, tigers were aggressive towards the trainer, indicating that "[t]hese animals do not have a trusting relationship with staff and endure this punitive, adverse environment daily."<sup>280</sup>

Pratte concluded that the tigers

are under constant psychological duress, which results in acute and chronic medical concerns for these animals. Staff members manage the cats using aversive stimuli, fear, and dominance tactics. The cats cannot remove themselves from these situations, nor can they remove the aversive stimuli, which leads to the types of behavioral problems mentioned previously. The cats redirect aggression and fear to the trainers and other animals[.] The cumulative effects of distress will likely shorten these animals' lives and, in severe cases, lead to myopathy, injury, or even death.<sup>281</sup>

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<sup>276</sup> Final Application at 10.

<sup>277</sup> Pratte, *supra* note 257, at 11.

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* at 12.

Dr. Brian Hare, has echoed these concerns, writing that he "strongly oppose[s]" FEI's Application because "[n]o training can reduce the stress that wild animals feel" when forced to perform tricks, which is "exactly what makes them dangerous and unpredictable."<sup>282</sup>

Lacey's act during Ringling's last performance demonstrates all of these problems.<sup>283</sup> Throughout the [performance footage](#), the lions and tigers sit with hunched postures, holding their ears back, and Lacey controls them with a long whip and a stick, which he uses to bang on the metal platforms, and strike and jab the animals. The following instances of aggression towards Lacey are easily observed in the footage:

- The lion Princess growls and swats at Lacey with her ears pinned, and during a trick where she and Mali jump over one another, both continually snarl at Lacey.<sup>284</sup> After the trick is complete, the camera quickly pans away to obscure the view as Princess charges at Lacey, cornering him against the side of the ring.<sup>285</sup> Lacey cues Mali to exit, and she spins in an agitated circle before running away from him and out of the ring.<sup>286</sup>
- The tiger Suzy snarls and swipes at Lacey.<sup>287</sup>
- Lacey pokes the tiger Onyx with a stick and tells her to sit. She growls and swipes at Lacey with ears pinned.<sup>288</sup>
- The tiger Max growls and lunges at Lacey.<sup>289</sup>

#### **E. Lacey Has Made False And Misleading Statements About His Training And Standards of Care.**

Lacey has famously and misleadingly played down the aversive nature of his training methods. In a legislative hearing last fall, he claimed to base his training on "repetition and reward," and admitted that "abuse and mistreatment results in unpredictable and fearful

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<sup>282</sup> Hare, *supra* note 210.

<sup>283</sup> Ringling Bros. and Barnum & Bailey Final Performance (May 21, 2017), [http://www.petapreview.com/4preview/permanent/final\\_performance\\_ringling\\_bros\\_barnum\\_and\\_bailey\\_circus\\_5\\_21\\_17.asp](http://www.petapreview.com/4preview/permanent/final_performance_ringling_bros_barnum_and_bailey_circus_5_21_17.asp). Original footage has been removed from YouTube, but was located on Ringling's YouTube account at this link: <https://youtu.be/aUhXeYkFhf4?t=41m>. PETA is mailing the footage to FWS on a disc.

<sup>284</sup> *Id.* at 01:57.

<sup>285</sup> *Id.* at 2:05.

<sup>286</sup> *Id.* at 2:40.

<sup>287</sup> *Id.* at 3:30.

<sup>288</sup> *Id.* at 8:16.

<sup>289</sup> *Id.* at 13:10

animals"<sup>290</sup>—such as the lions and tigers who took aim at Lacey in the footage above. (Other Ringling trainers echoed this to Pratte as well, who responded that "[t]he cats know only fear, dominance, and punishment."<sup>291</sup>) Lacey described his ever-present whip as a "riding crop" like one carried by any "girl that owns a pony in any riding stable," and said his ever-present goad is a "bamboo stick," the "same thing as your grandma would use to grow tomatoes in the garden."<sup>292</sup> In fact, when directly asked whether he uses whips and goads, Lacey said "I don't use them, no."<sup>293</sup> As the above footage demonstrates, this is a bald-faced lie. FEI's Thomas Albert even quickly moved to correct Lacey at the hearing, admitting that goads *are* used on big cats and explaining that when a big cat doesn't want to move, "you poke them with this stick in the butt and he moves forward."<sup>294</sup> Cats who need "encouragement" with a broom handle or goad to go into the show ring are plainly not willing performers in circuses.<sup>295</sup> Indeed, Marthe Kiley-Worthington, whose work is frequently cited by circuses in an effort to defend their cruel industry, observed circus trainers forcing cats into the show ring by "poking a broom handle into their wagon" and wrote that "resistance to entering the ring" is a reliable measure of whether animals find performances distressing.<sup>296</sup>

Lacey's misrepresentations go beyond his attempts to portray tiger-training to be as benign as gardening. He has also claimed that society "should really be applauding people like [Lacey]" because his big cats are so genetically diverse that his family could go on breeding them for 40 or 50 years.<sup>297</sup> The Application also asserts, without substantiation, that the Lacey family's breeding program "involved careful management of genetics and ensuring strong healthy blood lines[.]"<sup>298</sup> If there a kernel of truth to this assertion, it is certainly not found among the tigers intended for this export. As discussed in Part VI.C above, the Application

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<sup>290</sup> N.Y.C. City Council Transcript, *supra* note 64, at 59.

<sup>291</sup> Pratte, *supra* note 257, at 13.

<sup>292</sup> N.Y.C. City Council Transcript, *supra* note 64, at 85-86.

<sup>293</sup> *Id.* at 102.

<sup>294</sup> *Id.* at 129-30, 105.

<sup>295</sup> Dorning, et al., *supra* note 163, at 92.

<sup>296</sup> Marthe Kiley-Worthington, *Animals in Circuses and Zoos: Chirons World?* 44 (1990).

<sup>297</sup> N.Y.C. City Council Transcript, *supra* note 64, at 110; Ringling Bros. and Barnum & Bailey Final Performance (May 21, 2017),

[http://www.petapreview.com/4preview/permanent/final\\_performance\\_ringling\\_bros\\_barnum\\_and\\_bailey\\_circus\\_5\\_21\\_17.asp](http://www.petapreview.com/4preview/permanent/final_performance_ringling_bros_barnum_and_bailey_circus_5_21_17.asp).

<sup>298</sup> Final Application at 9.

shows that Bella, Onyx, and Max are full siblings (parents are Max x India); Czar (Max x Tiara) and Kashmere (Max x Mariah) share a father; and according to prior Ringling permit applications Mariah and India are full siblings (so Kashmere is half-brother *and* cousin to Bella, Onyx, and Max). Derry and Martin are full siblings as well.

Lacey has also falsely claimed that "[a]ll of our animals live to be at least 25 years old,"<sup>299</sup> yet the cats who've died in Lacey & FEI's care in the last five years ranged from age 16 to 21 years old.<sup>300</sup>

#### **F. Lacey Does Not Have Adequate Staff.**

The Application is also devoid of information about other staff responsible for the care of the cats. In fact, it mentions only one other person who would care for them, and only a single sentence describes his experience: Narcis Cretcu "has been assisting Mr. Lacey since August 2007 in the daily husbandry and care of big cats, including their feeding, watering and exercise requirements."<sup>301</sup> As with Lacey, there is no résumé, no evidence of education or formal training, and no letter of recommendation for Cretcu. Notably, Cretcu is *not* listed as an approved handler of the animals in FEI's most recent Florida captive wildlife permit application, which was submitted while this Application was pending in June.<sup>302</sup> The only approved handlers in Florida other than Lacey are Ringling employee Alexander Vargas, and Susan Lacey (Alexander's mother).<sup>303</sup> Neither of these handlers is mentioned in this Application.

Also notably absent from the Application is evidence that a veterinarian will be available to assist the export and to care for the cats when they arrive in Germany or the Netherlands. This is of course critically important, given the long duration of the anticipated travel and the acute stress it will cause. As mentioned in Part VII.B, the FWS must be concerned given that one of Lacey's lions, Stella, died just five weeks after he and FEI imported her in 2011.<sup>304</sup> The Application states that Stella was euthanized because of "cirrhosis and fibrosis" and "quality of

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<sup>299</sup> N.Y.C. City Council Transcript, *supra* note 64, at 67.

<sup>300</sup> Final Application at 93, Statement of Dr. Dennis Schmitt, FEI (Mar. 2017).

<sup>301</sup> *Id.* at 10.

<sup>302</sup> Ex. 77, Fla. Captive Wildlife ESA/ESB Renewal Application, Ringling Bros. Blue Unit (June 6, 2017).

<sup>303</sup> *Id.* at 9.

<sup>304</sup> Final Application at 93, Statement of Dr. Dennis Schmitt, FEI (Mar. 2017).



life issues."<sup>305</sup> Liver failure typically follows chronic disease, and often has clinical signs such as increased thirst and urination, yellowing of the mucous membranes, lethargy, vomiting, diarrhea, and weight loss. Either Lacey and his vet in Europe (if he had one) were unaware of Stella's condition at the time of the import—which is hard to imagine, and calls into question the adequacy of care—or they knew about it and decided to subject her to the stress of travel anyway, which likely hastened her death.

Because FEI has failed to demonstrate that Lacey and his staff have experience that is "adequate to successfully accomplish the objectives stated in the application"—namely exporting endangered big cats in order to enhance the propagation or survival of the species—the permit must be denied.

### **G. FEI Has A Long History Of Animal Welfare Violations.**

Although Lacey—not FEI—is the proper applicant and will ultimately be responsible for the care and transport of the cats, Facility File 013257, which FEI uses to bolster the Application, is replete with evidence that FEI does not hold animals under "humane and healthful conditions."<sup>306</sup>

A letter from the USDA's Staff Veterinarian to the FWS regarding Ringling, for example, warns that "It is dangerous to transport big cats in enclosures (train cars) when the temperature exceeds 100 degrees Fahrenheit," and "[t]hese endangered animals should be transported in either temperature controlled cars if it can be assured that the power is not cut even when the train is not moving, or they should be transported in climate controlled [sic] trucks that offer the same assurances."<sup>307</sup>

This warning was perhaps prompted by the death of a young lion named Clyde, who baked to death in a Ringling boxcar traveling through the desert.<sup>308</sup> According to a whistleblower, circus employees who had knowledge of how Clyde died were instructed not to speak to USDA inspectors who were investigating the death, and before USDA officials arrived

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<sup>305</sup> *Id.*

<sup>306</sup> *Id.* § 13.41.

<sup>307</sup> Final Application at 178, Letter from Barbara Kohn, Staff Veterinarian, USDA, to Anna Barry, FWS (July 13, 2011).

<sup>308</sup> Ex. 78, Marc Kaufman, *USDA Investigates Death of Circus Lion*, Washington Post (Aug. 8, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A48042-2004Aug7.html>.

to investigate the death, Ringling quickly had misters installed in the boxcar holding the lions.<sup>309</sup> Despite Clyde's death and the USDA's admonition, there is no evidence in the Application that Lacey will take necessary precautions to ensure that the endangered cats are protected from extreme temperatures during transport.

Other big-cat related Animal Welfare Act (AWA) citations in Facility File 013257 include:

- A citation for confining tigers in a filthy transport enclosure.<sup>310</sup>
- A finding that an FEI transport trailer for big cats was improperly ventilated, resulting "loud noises" as well as "excessively high temperatures during routine transport" that "pushed temperatures to a point of immediate danger to the animals."<sup>311</sup>
- A separate inspection finding that vents blew shut during transport, causing the temperature to rise so "excessive[ly]" that a tiger tore a cage door off its track and broke his or her teeth in an effort to escape.<sup>312</sup>

Facility File 013257 also includes a disingenuous claim that FEI's representatives frequently toss around: that "Ringling Bros. has never been found in violation of the AWA for abuse, neglect, or mistreatment of its animals. In fact, in all aspects of animal care and safety, Ringling Bros. meets all federal animal welfare standards."<sup>313</sup> FEI has plainly carried the torch of its circus's namesake, P.T. Barnum, who "perpetrated a series of clever deceptions on a public he looked upon as fools," and who famously proclaimed "there's a sucker born each minute."<sup>314</sup>

In truth, FEI has been cited dozens of times for failing to meet the minimum standards promulgated under the federal AWA and has bought its way out of findings of wrongdoing by reaching settlements with the USDA (just as it is trying to buy its way around the ESA using Pay-to-Play).<sup>315</sup> In 2011, FEI was ordered to pay \$270,000—the largest civil penalty ever assessed against an exhibitor under the AWA—to settle dozens of violations dating from June

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<sup>309</sup> Ex. 79, Affidavit of Frank E. Hagan (Aug. 24, 2004).

<sup>310</sup> Final Application at 196.

<sup>311</sup> *Id.* at 204-05.

<sup>312</sup> *Id.* at 207.

<sup>313</sup> *Id.* at 252.

<sup>314</sup> William Johnson, *The Rose-Tinted Menagerie* 61 (1990).

<sup>315</sup> See Ex. 80, Factsheet: Ringling Bros. and Barnum & Bailey Circus (2016), <https://www.peta.org/wp-content/uploads/2021/06/RinglingFactsheet.pdf>.

2007 to August 2011.<sup>316</sup> Ringling was also ordered to provide all employees who handle animals with AWA compliance training and to hire a staff member dedicated to AWA compliance.<sup>317</sup> In an earlier settlement, FEI also agreed to implement an employee-education program and to donate \$20,000 to animal charities to settle a USDA administrative lawsuit stemming from the death of a 3-year-old elephant calf.<sup>318</sup> The calf, Kenny, died overnight after being forced to go on stage in three shows even though workers and a veterinarian noted that he had bloody diarrhea, had not been drinking, was in pain, and was colicky.<sup>319</sup> The USDA also issued the circus an official warning after its big-cat trainer shot and killed a Bengal tiger named Arnie using 12-gauge shotgun while he was locked in a cage after he attacked the trainer's brother.<sup>320</sup> These civil penalties evidence a lack of responsibility.<sup>321</sup>

#### **H. Circus Charles Knie Has A History of Animal Welfare Problems.**

The Application fails to disclose that Lacey intends to use his cats in performances with Circus Charles Knie, as demonstrated by the fact that the address given as Lacey's destination is Knie's address, as well as by German ticket sales websites that were prematurely advertising Lacey's act as a part of the show.<sup>322</sup> Lacey has also previously performed with Circus Charles Knie.<sup>323</sup> This information—including a "complete description," photographs, and diagrams of the "facility where the wildlife sought to be covered by the permit will be used, displayed, or maintained"—is required by law to be included in the Application.<sup>324</sup> It's also material to FWS's issuance decision, because the agency must consider "[w]hether the expertise, facilities, or other

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<sup>316</sup> Ex. 81, Agreement between FEI and USDA (Nov. 23, 2011).

<sup>317</sup> *Id.*

<sup>318</sup> Ex. 82, Consent Decision, *In re: Feld Entm't, Inc.*, FL 98026 (July 15, 1998).

<sup>319</sup> See Ex. 83, Affidavit of Gary D. West (Feb. 5, 1998); Affidavit of Ringling Employee (Feb. 6, 1998).

<sup>320</sup> Ex. 84, Ringling Circus Warned Over Killing of Tiger, Reuters (Mar. 27, 1998).

<sup>321</sup> See 50 C.F.R. § 13.21(b)(1); FWS, Director's Order No. 212 (Dec. 9, 2015), *available at* <https://www.fws.gov/policy/do212.html> (FWS employees shall "[c]onsider all relevant facts or information available, including relevant violations of a Federal or State law or regulation related to or governing the activity for which they are applying, consistent with 50 CFR 13.21(b) and 13.21(d), in making a determination whether to issue permits, certificates, or licenses issued under 50 CFR part 13.").

<sup>322</sup> These advertisements have since been taken down.

<sup>323</sup> Final Application at 10.

<sup>324</sup> 50 C.F.R. § 17.22(a)(1)(v). (vi).

resources available to the applicant appear adequate to successfully accomplish the objectives stated in the application."<sup>325</sup>

There is little doubt that the tigers, lions, and leopard will *not* be "maintained under humane and healthful conditions"<sup>326</sup> at Circus Charles Knie. This company—which exhibits roughly 100 animals—has a particularly grueling travel schedule—in one year, it performed 347 shows over 218 days in 43 locations<sup>327</sup>—meaning animals are subjected to transport multiple times a week and forced to spend long hours in transport trailers.

In fact, in June 2015, the Darmstadt District Court fined Circus Charles Knie's elephant exhibitor, Riccardo Errani, for violating Germany's Animal Welfare Act. The order related to the circus's standard practice of leaving elephants on cramped transport trucks for up to 18 hours at a time during the company's frequent travel. The District Court agreed with Darmstadt's veterinary authority's finding that the elephants suffered considerably because they were not being let out of the trucks immediately upon arrival at the new venue.<sup>328</sup> [Eyewitness footage](#) recorded in the town of Kleve in 2014 confirms the suffering of the animals on these shows, including an elephant used by Charles Knie bobbing her head stereotypically while chained inside a cramped trailer. Similarly, [footage](#) recorded in Hamm that same year shows three elephants used by Charles Knie confined on pavement and swaying back and forth in distress.

Multiple animals have also escaped from Charles Knie. In 2012, a kangaroo was injured when he or she escaped from the circus and hopped through the streets of Lüneburg.<sup>329</sup> Another kangaroo, Norbert, escaped while the circus was in Zeven and hopped through the city center before he was cornered and captured.<sup>330</sup>

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<sup>325</sup> *Id.* § 17.22(a)(2)(vi).

<sup>326</sup> *Id.* § 13.41.

<sup>327</sup> Ex. 85, Diccon Bewes, *Roll up! It's circus time in Switzerland!* (June 5, 2011), <http://www.dicconbewes.com/2011/06/05/roll-up-its-circus-time-in-switzerland/>.

<sup>328</sup> See Ex. 86, Amtsgericht in Darmstadt [Darmstadt Dist. Ct.] Oct 23, 2015, 233 OWi 8200 Js 40305/13 (Ger.).

<sup>329</sup> Ex. 87, *Zirkus-Känguru auf Stadttour in Lüneburg*, BILD.de (June 6, 2012), <http://www.bild.de/regional/hannover/zirkuskaenguru-auf-stadttour-in-lueneburg-24522364.bild.html>.

<sup>330</sup> Ex. 88, *Riesenkänguru «Norbert» hüpf durch Zeven*, BILD.de (Mar. 29, 2012), <http://www.bild.de/regional/hannover/riesenkaenguru-norbert-huepft-durch-zeven-23398252.bild.html>.

**VIII. FWS Cannot Issue The Requested Permit Because FEI Has Not Applied For It In Good Faith, Failed To Disclose Material Information, And Has Made False Statements.**

FWS may only issue a permit after making specific findings that the permit was "applied for in good faith."<sup>331</sup> The agency shall not issue such permit if the applicant has "failed to disclose material information required, or has made false statements as to any material fact, in connection with his application."<sup>332</sup> As discussed throughout these comments, FEI has either failed to disclose material information or made false statements in connection with the Application. Such statements and informational gaps include:

- Claiming that the cats are being held at the Florida State Fairgrounds, despite denials by the Fairgrounds that the animals are there.
- Listing Circus Krone as a destination when the circus has publicly stated that it has no intention of bringing on Lacey.
- Failing to disclose that Lacey's new destination is Circus Charles Knie, and instead characterizing the destination as Lacey's family home.
- Failing to disclose whether the export will go to the Netherlands or Germany.
- Failing to demonstrate that the importing country will issue an import permit.
- Claiming to have provided "lengthy and convincing evidence" substantiating that circuses are educational when no such evidence exists.
- Claiming that FEI has never violated the law when in fact it has been cited many times and agreed to pay multiple civil penalties.

Although Lacey is not the applicant—and therefore has not certified that the Application contains "complete and accurate" information and that he understands that he is subject to felony criminal liability for any false statement made in the application—FWS must also consider the various misrepresentation that he has made in the past about his training methods and his cats as well, as they are germane to the Application.

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<sup>331</sup> 16 U.S.C. § 1539(d).

<sup>332</sup> 50 C.F.R. § 13.21(b)(2).

## **IX. FWS Must Consider The Environmental Impact Of The Export.**

Under the National Environmental Policy Act (NEPA), federal agencies must prepare an Environmental Impact Statement (EIS) to consider the consequences of "major federal actions significantly affecting the quality of the human environment."<sup>333</sup> Where an agency is not sure whether a federal action will have a significant impact, it must prepare an Environmental Assessment (EA) and "involve environmental agencies, applicants, and the public" in preparing the assessment.<sup>334</sup> The U.S. Department of the Interior (DOI) has determined that ESA and CITES permitting decisions are categorically excluded from the EIS and EA requirements of NEPA because they "do not individually or cumulatively have a significant effect on the human environment."<sup>335</sup>

Even so, agencies must "provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect and require additional analysis and action."<sup>336</sup> DOI's regulations provide for a dozen such extraordinary circumstances that require the agency to prepare an EIS (or EA) for an otherwise categorically excluded action.<sup>337</sup> The proposed federal action here—authorizing the export endangered animals to a foreign circus for use in commercial entertainment and exhibition—involves extraordinary circumstances, including the following:

- The action has "highly controversial environmental effects" and involves "unresolved conflicts concerning alternative uses of available resources."<sup>338</sup> At the time of this writing, more than 113,000 people have commented on this Application, plainly indicating that the proposed export and continued commercial exploitation of imperiled species is "highly controversial." The fact that 24 members of Congress and multiple experts have also opposed the Application further suggests that it is "highly controversial." And as discussed at length in these comments, the rationale behind FWS's unlawful Pay-to-Play policy is not only

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<sup>333</sup> 42 U.S.C. § 4332(C).

<sup>334</sup> 40 C.F.R. § 1501.4(b).

<sup>335</sup> Dep't of the Interior Dep't Manual, Part 516, Ch. 8.5(C)(1).

<sup>336</sup> 43 C.F.R. § 46.205(c).

<sup>337</sup> *Id.* § 46.215.

<sup>338</sup> *Id.* § 46.215(c).

highly controversial and arbitrary, the policy itself is invalid because it directly conflicts with the plain statutory language that contains the express Enhancement Requirement.<sup>339</sup>

- The action establishes "a precedent for future action or represent[s] a decision in principle about future actions with potentially significant environmental effects" and has "a direct relationship to other actions with individually insignificant but cumulatively significant environmental effects."<sup>340</sup> Precedent for issuing ESA permits that contravene the letter and spirit of the ESA exists already and is so insidious that FWS actually *instructs* circuses to make Pay-to-Play donations in exchange for ESA permits. If FWS issues yet another permit to allow a commercial entertainment company to export endangered animals for circus exhibition, its decision will further ingrain an "informal" policy that provides a roadmap *around* the fundamental protections of the ESA.
- The action violates a federal law "imposed for the protection of the environment."<sup>341</sup> As discussed at length above, issuance of a permit based on the Pay-to-Play policy is unlawful.

Because these extraordinary circumstances exist, the FWS must consider the environmental impacts of its decision to approve or deny this permit under NEPA.

## **X. Conclusion and Request for Notice of Issuance**

For all of the reasons detailed above, PETA, ALDF, and ARFF respectfully request that FWS deny FEI's Application for the requested permit to re-export 15 big cats for use in the circus.<sup>342</sup> Should the agency decide to issue the permits despite these objections, we hereby

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<sup>339</sup> *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (holding regulations or agency standards that are directly contrary to the statutory text are invalid and unenforceable).

<sup>340</sup> 43 C.F.R. § 46.215(e), (f).

<sup>341</sup> *Id.* § 46.215(i).

<sup>342</sup> Even if FWS ignores the limitations and decides to allow an improper export, it may not issue a blanket 5-year permit. *See* 50 C.F.R. § 13.42 ("The authorizations on the face of a permit that set 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; describe *certain circumscribed transactions*; or otherwise allow a *specifically limited* matter, are to be strictly interpreted and will not be interpreted to permit similar or related matters outside the scope of strict construction." (emphases added)) Indeed, in the case of an export by a permit applicant who will not be touring and re-entering the U.S., FWS has previously advised applicants that the agency "can only consider issuing a single use CITES/ESA Export permit that is valid for 6 months." Ex. 89, Email from Anna Barry, FWS, to Joan Galvin, Kelley, Drye & Warren (Aug. 3, 2015, 2:11 PM). As the applicant in this case, FEI,

request notice of that decision, pursuant to 50 C.F.R. § 17.22(e)(2), at least ten days prior to the issuance of the permits via e-mail to [RMathews@petaf.org](mailto:RMathews@petaf.org) and [aeliseuson@aldf.org](mailto:aeliseuson@aldf.org) or telephone to 202-680-8276.

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will neither be touring, nor re-entering the U.S. with the cats, it is improper for any permit to be issued for more than 6 months.