

Comments of People for the Ethical Treatment of Animals in Opposition to PRT-065146 and PRT-065149

People for the Ethical Treatment of Animals (“PETA”) submits the following comments urging the U.S. Fish & Wildlife Service (“FWS”) to deny Tarzan Zerbini Circus’s (“TZC”) request to renew traveling exhibition certificates to export/re-export and re-import two endangered Asian elephants: Schell (PRT-065146) and Marie (PRT-065149) (the “Applications”) (Ex. 1). The FWS cannot lawfully approve the permit requests in light of TZC’s persistent violation of the Endangered Species Act (“ESA”) and the FWS regulations, as well as the company’s failure to satisfy the eligibility requirements for such permits and to provide all required information.

Pursuant to 50 C.F.R. § 17.22(e)(2),¹ should the agency decide to issue the permits despite these objections, PETA hereby requests notice of that decision at least ten days prior to the issuance of the permits via e-mail to DelciannaW@petaf.org or telephone to 202-309-4697.

I. Executive Summary

The FWS is barred from lawfully issuing the requested traveling exhibition certificates to TZC for the following reasons:

- TZC has failed to demonstrate that exporting and re-importing the endangered Asian elephants will enhance the propagation or survival of the species. Neither conservation education nor the company’s paltry donation to purported elephant conservation justifies issuance of the requested permits.
- TZC has failed to provide a full statement of its proposed activities or its justification for the requested permits, as the regulations require.
- TZC submitted its application on an incorrect application form, in violation of the regulations.
- The USDA previously assessed TZC a civil penalty for a legal violation, which is related the subject of the requested permits and shows a lack of responsibility.
- TZC has failed to provide abundant required material information.

¹ “If the Service decides to issue a permit contrary to objections received pursuant to paragraph [(e)(1)] of this section, then the Service shall, at least ten days prior to issuance of the permit, make reasonable efforts to contact by telephone or other expedient means, any party who has made a request pursuant to paragraph [(e)(1)] of this section and inform that party of the issuance of the permit.”

- TZC’s facilities and staff are inadequate to enhance the propagation or survival of the species.
- TZC illegally subjects Asian elephants to inhumane and unhealthy conditions.
- TZC violates the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”) Transport Guidelines.
- TZC cannot make the required showing of responsibility because it has repeatedly exposed elephants and the public to the risk of tuberculosis (“TB”), has a long history of noncompliance with the law, and routinely ignores administrative requirements.

Even if issuance of the traveling exhibition certificates were not legally untenable for the reasons outlined above, they exceed the scope of permits that the FWS is authorized to issue. TZC seeks blanket certificates that would allow the company to take endangered species out of the country to go to unspecified locations, at unspecified times, for an unspecified period. Such blanket permits are fundamentally inconsistent with the ESA.

II. The Applications

On November 13, 2013, TZC applied for traveling exhibition certificates to export and re-import two endangered Asian elephants: Schell (PRT-065146) and Marie (PRT-065149).

On January 6, 2014, the FWS contacted TZC to request additional information necessary to make a decision on the Applications. Application at 20 (Email from Anna Barry, Senior Biologist, Division of Management Authority, FWS, to Harriett, TZ Productions (Jan. 6, 2014)). On March 26, 2014, the FWS again contacted TZC, writing that “[s]ince the information” requested on January 6, 2014, “was never received [it] ha[d] no other choice but to abandon the files,” unless TZC furnished the requested information by May 3, 2014. *Id.* at 19 (Letter from Anna Barry, Senior Biologist, Division of Management Authority, FWS, to Connie Watts, TZC (Mar. 26, 2014)). Yet again, on April 9, 2014, the agency wrote to TZC informing the circus that it “still need[ed]” certain information “requested in [the agency’s] January 3rd e-mail.” *Id.* at 1 (Email from Anna Barry, Senior Biologist, Division of Management Authority, FWS, to Harriett & Larry Solheim, TZ Productions (Apr. 9, 2014)).

That same day, April 9, 2014, the FWS received an email from TZC informing the agency that the circus’s “border crossing [was] scheduled for May 6 and 7” and asking it to “do what you can to list” the Applications in the Federal Register “quickly”—with no mention of the missing information. *Id.* at 2 (Email from Larry Solheim, TZ Productions, to Anna Barry, Senior

Biologist, Division of Management Authority, FWS (Apr. 9, 2014)). The FWS responded that “[s]ince the applications ha[d] not yet been published in the Federal Register, it would be extremely difficult to meet those dates” and “highly recommend[ing] that [TZC] have a Plan B for scheduling the re-export of the elephants.” *Id.* (Email from Anna Barry, Senior Biologist, Division of Management Authority, FWS, to Larry Solheim, TZ Productions (Apr. 9, 2014)).

Notice of the Applications was finally published in the Federal Register on April 30, 2014, commencing a comment period ending May 30, 2014. 79 Fed. Reg. 24445, 24447 (Apr. 30, 2014).

On May 29, 2014, counsel for PETA contacted the FWS to confirm that the agency never received the information requested on January 6, 2014, and again on April 9, 2014. Email from Delcianna Winders, Deputy General Counsel, Captive Animal Law Enforcement, PETA Foundation, to Anna Barry, Senior Biologist, Division of Management Authority, FWS, and Brenda Tapia, Data Analyst, Division of Management Authority, FWS (May 29, 2014) (Ex. 2). Just one day before the comments were due, the FWS responded by sending seventeen pages of information, which was purportedly “mistakenly omitted from the information previously furnished for the application.” Email from Anna Barry, Senior Biologist, Division of Management Authority, FWS to Delcianna Winders, Deputy General Counsel, Captive Animal Law Enforcement, PETA Foundation (May 29, 2014) (Ex. 3). This information included missing TB test results for Schell. Additional Application Materials (Ex. 4).

Counsel for PETA sent the FWS a follow-up email to confirm that the agency had not received TB test results for Marie. Email from Delcianna Winders, Deputy General Counsel, Captive Animal Law Enforcement, PETA Foundation, to Anna Barry, Senior Biologist, Division of Management Authority, FWS (May 29, 2014) (Ex. 4a). At 2:48 p.m. on the very day that the comments were due, the FWS sent PETA the missing test results for Marie. Email from Anna Barry, Senior Biologist, Division of Management Authority, FWS, to Delcianna Winders, Deputy General Counsel, Captive Animal Law Enforcement, PETA Foundation, et al. (May 30, 2014) (Ex. 4b). The FWS is required to give PETA additional time to comment on this new information because § 10(c) of the ESA requires the agency to make publicly available all information submitted “as part of any application” and mandates a thirty-day period for comments. 16 U.S.C. § 1539(c).

III. Legal Background

A. ESA Prohibitions and Limited Exceptions

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].” 16 U.S.C. § 1531(c). In relevant part, the ESA prohibits persons from taking endangered species; carrying, transporting, or shipping them in interstate or foreign commerce in the course of a commercial activity; and importing or exporting them. *Id.* § 1538(a) & (f). The ESA defines the term “take” to include “harass, harm, . . . wound, kill, . . . or to attempt to engage in any such conduct.” *Id.* § 1532(19). “Harass” is defined by regulation as “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” 50 C.F.R. § 17.3. As it pertains to captive animals, such as the elephants at issue, the definition of “harass” exempts “generally accepted” animal husbandry practices and breeding procedures. *Id.* “Harm” means “an act which actually kills or injures wildlife.” *Id.* Although the ESA regulations do not define “wound,” the verb means “to cause a wound to or in” or “to inflict a wound.” MERRIAM-WEBSTER ONLINE DICTIONARY (2011) (Definition of “Wound” (Verb)). The noun is defined as “an injury to the body (as from violence, accident, or surgery) that typically involves laceration or breaking of a membrane (as the skin) and usually damage to underlying tissues.” *Id.* (definition of “Wound” (Noun)); see also THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2009) (definition of “Wound” (Noun)) (defining “wound” as “[i]njury to a part or tissue of the body, especially one caused by physical trauma and characterized by tearing, cutting, piercing, or breaking of the tissue”).

Section 10 of the ESA gives the FWS limited authority to issue permits to allow otherwise prohibited activities only “for scientific purposes or to enhance the propagation or survival of the affected species.” 16 U.S.C. § 1539(a)(1)(a) (the “Enhancement Requirement”); accord 50 C.F.R. § 17.22. This section was intended “to limit substantially the number of exemptions that may be granted under the Act, . . . given that these exemptions apply to species which are in danger of extinction.” H.R. Report 93-412, at 156 (1973) (Ex. 5) (emphases added). Such was Congress’s desire to limit exemptions that it prohibited “[v]irtually all dealings with

endangered species , . . . except in extremely narrow circumstances.” Tenn. Valley Auth. v. Hill, 437 U.S. 153, 180 (1978) (emphasis added).

Persons who seek to engage in any of the otherwise prohibited activities must apply for, and obtain, a permit pursuant to § 10. A permit may only be issued if the applicant discloses all “material information required . . . in connection with [its] application.” 50 C.F.R. § 13.21(b)(2). “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.” 16 U.S.C. § 1539(c); see also Gerber v. Norton, 294 F. 3d 173, 180-82 (D.C. Cir. 2002) (holding that the FWS violated § 10(c) of the ESA by failing to make publicly available a map of a mitigation site location submitted as part of a permit application). Moreover, the FWS may only issue a permit after making specific findings that: “(1) such exceptions were 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 set forth in section 2 of this Act.” 16 U.S.C. § 1539(d). In addition, the FWS may only issue a permit if it has determined, based on “the best scientific and commercial data available,” that such issuance “is not likely to jeopardize the continued existence of any endangered species.” Id. § 1536(a)(2).

The ESA regulations emphasize that “[p]ermits are specific.” 50 C.F.R. § 13.42 (emphasis added). The regulation provides:

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.

Id.

B. Traveling Exhibition Certificates

Under current FWS policy, a circus or other traveling animal exhibition may seek a traveling exhibition certificate to export/re-export and re-import endangered species in order to exhibit the animals abroad. Such certificate is generally issued for a three-year period for a single animal. Each animal sought to be exhibited must have his or her own certificate, but the permit allows the permittee to take the animal out of the country for exhibition without seeking further permission at any time during the three-year period. A certificate authorizes a permittee

to “transport the [animal] internationally only for exhibition, not for breeding, propagating, or activities other than exhibition.” 50 C.F.R. § 23.49(e)(2).

To obtain a certificate to export/re-export and re-import species listed as endangered under the ESA, an applicant must meet the criteria both of CITES and the ESA. See Form 3-200-30, at 4 (Ex. 6) (applicant “must be able to show that [its] proposed activity would meet the issuance criteria under ESA”); see also 16 U.S.C. § 1539 (requiring an ESA permit for importing and exporting endangered species).

IV. The FWS Cannot Lawfully Issue the Requested Permits to TZC.

A. TZC’s Proposed Activities Will Not Enhance the Propagation or Survival of Endangered Asian Elephants.

The FWS cannot exempt TZC from § 9’s prohibitions unless the company shows that (re-)exporting and (re-)importing these two Asian elephants will “enhance the propagation or survival of the affected species.” 16 U.S.C. § 1539(a)(1). TZC has the burden of demonstrating that its proposed activities will meet the ESA’s Enhancement Requirement. See 50 C.F.R. § 13.21(b)(3) (providing that the FWS may not issue an ESA permit if “[t]he applicant has failed to demonstrate a valid justification for the permit” (emphasis added)). TZC has not—and cannot—satisfy this fundamental requirement.

Although the Applications are vague on this point, TZC rests its applications for traveling exhibition certificates on its purported educational activities and a \$500 donation to Asian Elephant Support. See, e.g., Application at 16 (Animal Conservation Efforts) (“Our family friendly circus is a perfect environment to educate both adults and children alike. There is no other place where the general public can witness the natural abilities of these magnificent animals and the developed trust with their human partners. TV, videos and books cannot provide the perspective that witnessing circus animals up close and personal can.”); id. (discussing TZC’s contribution to Asian Elephant Support); id. at 51 (Letter from Linda Reifschneider, President, Asian Elephant Support, to Tarzan Zerbini, General Manager, TZ Productions (Feb. 21, 2014)) (thanking TZC for a \$500 donation to Asian Elephant Support). Neither justification is sufficient under the law.

1. TZC’s So-Called “Educational” Activities Do Not Enhance the Propagation or Survival of Endangered Asian Elephants.

i. Issuing TZC the requested permits solely on the basis of its purported educational activities would violate established agency policy.

In light of the failure of TZC’s alternative claim that its donations to conservation justify the issuance of the requested permits, see infra, the company’s purported public-education activities cannot justify the permits’ issuance. It is the clear policy of the FWS that “[p]ublic education activities may not be the sole basis to justify issuance” of an exemption from § 9. 50 C.F.R. § 17.21(g)(3). When the agency amended the captive-bred-wildlife-registration regulations (“CBW regulations”) to codify this policy in 1993, it voiced concern that, in the absence of such limitation, “captive-bred animals . . . might be used for purposes that do not contribute to conservation, such as . . . for entertainment.” Captive-Bred Wildlife Regulation, 57 Fed. Reg. 548-01, 550 (Jan. 7, 1992) (emphasis added). 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 wildlife.” Captive-Bred Wildlife Regulation, 58 Fed. Reg. 68323, 68324 (Dec. 27, 1993) (emphasis added).

Although the CBW regulations alone make this policy explicit, it defies logic that the FWS’s “sincere doubts” about public exhibition’s “relative conservation benefits” only apply when captive-bred animals are being used for entertainment pursuant to a captive-bred wildlife permit, but not pursuant to any other kind of § 10 permit. In fact, the agency advised TZC that “[e]ducation alone can no longer suffice for meeting the requirements under the ESA,” Application at 20 (Email from Anna Barry, Senior Biologist, Division of Management Authority, FWS, to Harriett, TZ Productions (Jan. 6, 2014)) (second emphasis in original), and has also so advised other applicants for traveling exhibition certificates, see, e.g., Fax from Anna Barry, Senior Biologist, Division of Management Authority, FWS, to John F. Cuneo, Jr., Hawthorn Corp. (Mar. 12, 2012) (Ex. 7) (“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.”); E-mail from Anna Barry, Senior Biologist, Division of

Management Authority, FWS, to Anton and Ferdinand Fercos-Hantig (Feb. 8, 2012) (Ex. 8) (noting, in context of exhibitor’s application to export/re-import endangered tigers, that “Conservation Education alone” does not “suffice for meeting the requirements under the Endangered Species Act (ESA), you need to be able to demonstrate how your proposed activities directly relate[] to the survival of this species in the wild,” and explaining that this requirement is “being enforced to ensure applications submitted by exhibitors are meeting the same requirements as other applica[nts] that are seeking an ESA permit”).

The FWS’s policy is consistent with the ESA’s policy of “institutionalized caution.” Tenn. Valley Auth., 437 U.S. at 194. Issuing a § 10 permit based solely on using endangered species to stand on their heads and perform other unnatural acts—on the extremely unlikely chance that patrons come away from the show newly committed to conservation—is the kind of shot-in-the-dark approach to species-preservation that the ESA forbids.

ii. A near consensus in the scientific community supports the FWS’s policy that permits should not be issued solely on the basis of an applicant’s purported public educational activities.

The FWS’s policy that public education activities may not be the sole basis to justify an exemption from § 9 also reflects the near consensus in the scientific community that using endangered species in exhibitions and entertainment has no impact on public attitudes about conservation. As the late Dr. Mel Richardson, a veterinarian with more than four decades of experience working with captive elephants and other animals, noted “[t]here 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.” Statement of Dr. Mel Richardson 2 (Nov. 16, 2012) (Ex. 9) (emphasis added). For example:

- In 2001, the Association of Zoos and Aquariums (“AZA”) set out to measure the impact of zoo visits on visitors’ “conservation-related knowledge, attitude, affect and behavior.” Lynn D. Dierking, Visitor Learning in Zoos and Aquariums: Executive Summary, AZA, at i (2001-2002) (Ex. 10). The study concluded that claims that zoos might have the potential to impact positively guests’ conservation knowledge, affect and behavior, “were not substantiated or validated by actual research.” Id. (emphasis added).

- A survey at Rosamond Gifford Zoo reported in AZA's Communiqué in 2003 by the Zoo's then-president, Dr. Anne Baker, showed that the Zoo's guests were not looking for a serious educational experience. Instead, the public reported overwhelmingly that a visit to the zoo meant quality time with family members and fun. Lisa Kane, Contemporary Zoo Elephant Management: Captive to a 19th Century Mission, in AN ELEPHANT IN THE ROOM: THE SCIENCE AND WELL-BEING OF ELEPHANTS IN CAPTIVITY 87, 94 (Debra L. Forthman et al. eds., 2009) (Ex. 11) (citing Anne Baker, From the President, 3 COMMUNIQUÉ (Dec. 2003)).
- In 2006, a comprehensive study was conducted at five UK zoos aimed at directly measuring the educational impact of a zoo visit. Visitors were asked questions before and after a visit to assess their (1) conservation knowledge; (2) commitment to conservation; and (3) capacity to get involved. No statistically significant changes were measured across the five sites, with the exception of one zoo in which visitors seemed to have a heightened awareness of how they might contribute to conservation. This anomaly was later thought to be an artifact of visitors being in a hurry to enter and therefore being less accurate in their first round of answers than they would have been otherwise, so that it appeared that their knowledge improved after the visit more than it had. Royal Society for the Prevention of Cruelty to Animals, The Welfare State: Measuring Animal Welfare In The UK 2006, at 95-96 (Ex. 12).
- A study conducted at Lincoln Park Zoo's gorilla and chimpanzee exhibits showed that departing guests demonstrated significantly more knowledge about gorillas and chimpanzees than those entering the zoo. However, frequent exhibit visitors were no more knowledgeable than first-time visitors, suggesting that this improvement was short-lived. Sadly, no change in attitudes about gorillas or chimpanzees was found in either first-time zoo guests or frequent visitors. K. E. Lukas & S. R. Ross, Zoo Visitor Knowledge and Attitudes: Gorillas and Chimpanzees, 36 JOURNAL OF ENVIRONMENTAL EDUCATION 33, 33-34, 41, 46-47 (2005) (Ex. 13).
- In terms of affecting zoo guest action, a study at Brookfield Zoo failed to detect a significant effect on visitors' intent to get involved in conservation even after multiple visits to an exhibit called The Swamp. Carol D. Saunders & H. Elizabeth Stuart Perry, Summative Evaluation of the Swamp: a Conservation Exhibit with a Big Idea, XII VISITOR BEHAVIOR 4, 5-6 (1997) (Ex. 14).

- Zoo Atlanta investigated whether its interactive elephant exhibit encouraged active support for elephant conservation. Visitors leaving the zoo were asked to take an already stamped postcard and send it to the White House expressing their views on whether or not the United States should continue its moratorium on the ivory trade. Only 5.9 percent of those who saw the zoo’s elephant show and experienced the interactive elephant display at the zoo mailed the cards. Jeffrey S. Swanagan, Factors Influencing Zoo Visitors' Conservation Attitudes and Behavior, 31 JOURNAL OF ENVIRONMENTAL EDUCATION 26, 26-30 (2000) (Ex. 15).
- Visitors to San Francisco’s UnderWater World Aquarium were asked if they thought that they had learned anything (rather than directly testing their knowledge) and 78% felt they had not. Aline H. Kidd & Robert M. Kidd, Aquarium Visitors' Perceptions and Attitudes toward the Importance of Marine Biodiversity, 81 PSYCHOLOGICAL REPORTS 1083-88 (1997) (Ex. 16).

iii. TZC’s so-called educational activities are inadequate to justify issuance of the requested permits.

Even if the FWS issued § 10 permits for conservation education only—which it does not and cannot—the agency could not issue the requested permits to TZC because TZC has utterly failed to demonstrate that its own so-called educational activities satisfy the Enhancement Requirement. See 50 C.F.R. § 13.21(b)(3) (barring the FWS from issuing an ESA permit to an application that “has failed to demonstrate a valid justification for the permit” (emphasis added)).

The application materials that FWS provided to PETA include almost no information about the content of TZC’s purported educational activities. The relevant materials consist in their entirety of:

- A print-out from TZC’s website, entitled “Animal Conservation Efforts,” which states: “At our events, patrons learn about our animals through announcements, printed materials, and video displays.” Application at 16. There is no further information about the content of these purported “announcements, printed materials, and video displays.” The application materials do not contain the requisite transcripts thereof. Indeed, TZC does not even make clear whether “learn[ing] about [its] animals” means that it provides information about Asian elephants in captivity in the U.S.—which would not qualify as conservation education—or about the conservation challenges of the species in the wild—which might. For instance, TZC’s “Animal Conservation Efforts” page includes

categories like “Responsible Management” and “Domestic Conservation Efforts,” id. at 15, which, as FWS has recognized, have no bearing on the “survival of this species in the wild,” see id. at 20 (Email from Anna Barry, Senior Biologist, Division of Management Authority, FWS, to Harriet, TZ Productions (Jan. 6, 2014)) (advising TZC that it would “need to be able to demonstrate how [its] proposed activities directly relate[] to the survival of this species in the wild” to meet the Enhancement Requirement).

- A document entitled “Animal Conservation” includes the most cursory information about elephants, such as

Elephants have lived everywhere, except Australia and Antarctica, from sea level to heights of more than 12,000 feet, in habitats ranging from deserts to rain forests to glaciers. Forest-dwelling elephants spend most of their lives in the shade. Elephants are at home in deep water and can swim for six hours at a time.

Id. at 33. The document speaks of “elephants,” in general, rather than Asian elephants, Elephas maximus, “the affected species,” 16 U.S.C. § 1539(a)(1)(A), in particular. In fact, Asian elephants have not “lived everywhere, except Australia and Antarctica.” Application at 33. Species of the genus Elephas have only lived in Africa, Europe, and Asia, and Asian elephants themselves have only lived in the wild in Asia. Natural History Museum, Evolution and Systematics (Ex. 17). The Animal Conservation Sheet also includes the blatantly false, unsupported, and irrelevant claim “that elephants live longer traveling in circuses than they do in zoos or in the wild as they have a constant change of scenery that helps stimulate these intelligent animals” and “[t]he exercise that they get from performing and giving elephant rides keeps them physically healthy and improves their longevity.” Application at 34.

Moreover, TZC provides almost none of the information about educational activities, which Form 3-200-30 requires. TZC does not provide “a copy of the actual script or material that will be presented to the audience at each performance, show, or viewing of the specimen(s).” Form 3-200-30, at 4 (Question 6.b.ii) (emphasis in original). It does not explain whether “written material” is made “available free-of-charge.” Id. (Question 6.b.iii). It does not state when the material will be presented. Id. (Question 6.b.iv). It does not discuss “[w]hat

activities,” if any, “will be occurring at the same time the presentation of the message is being provided,” and whether those activities could “diminish the effectiveness of the presentation.” Id. It does not respond to whether “an oral announcement [will] be made regarding the availability of [written] material.” Id. It does not address whether any “posters [will] be placed so that the material will be accessible to the public.” Id. And it does not “explain how the conservation education will be presented to [a] non-English speaking audience,” “[w]hen exhibiting in countries where English is not the primary language,” id., even though TZC is scheduled to perform in French Canada from August 14, 2014, through September 21, 2014, Buy Tickets for the Shrine Circus (Ex. 18).²

Clearly, even if the FWS could issue ESA permits on the basis of public education activities, the agency still could not issue the requested permits to TZC on that basis because the company has utterly failed to demonstrate that its purported educational activities meet the Enhancement Requirement.

2. The FWS Cannot Issue the Requested Permits on the Basis of the Agency’s Illegal Pay-to-Play Policy.

i. The FWS’s Pay-to-Play policy is unlawful.

Again, although the Applications are vague on this point, the materials submitted as part of the Applications suggest that TZC is also seeking to justify the requested permits on the basis of a donation it has made to purported Asian elephant conservation. See, e.g., Application at 16 (Animal Conservation Efforts) (discussing TZC’s contribution to Asian Elephant Support); id. at 51 (Letter from Linda Reifschneider, President, Asian Elephant Support, to Tarzan Zerbini, General Manager, TZ Productions (Feb. 21, 2014)) (thanking TZC for a \$500 donation to Asian Elephant Support).

The FWS’s “Pay-to-Pay” policy allows permit holders to conduct activities prohibited by the ESA for purely commercial purposes that do not themselves enhance the propagation or survival of the species in exchange for de minimis contributions to the conservation of the affected species generally. The agency recently advised TZC that it could meet the Enhancement Requirement by donating money to “in situ conservation work in the species’ range states,” and provided information on how to document the circus’s donation, and examples of donations for this purpose. Id. at 20 (Email from Anna Barry, Senior Biologist, Division of

² The Shrine Circus contracts with TZC. Shrine Circus FAQ (Ex. 19).

Management Authority, FWS, to Harriet, TZ Productions (Jan. 6, 2014)); see also, e.g., Fax from Anna Barry, Senior Biologist, Division of Management Authority, FWS, to John F. Cuneo, Jr., Hawthorn Corp. (Mar. 12, 2012) (Ex. 20) (“To meet the requirements under the ESA you need to be able to demonstrate how your proposed activities directly relate to the survival of this species in the wild. Many of our applicants achieve this goal by donating to a well-established conservation program in the range state.”); Fax from Anna Barry, Senior Biologist, Division of Management Authority, FWS, to John F. Cuneo, Jr., Hawthorn Corp. (Oct. 19, 2011) (Ex. 21) (offering “[c]ontribut[ing] money to an organization that participates in in-situ work in the range state for tigers” as “[a]n [e]xample of an activity applicants participate in to show enhancement”); Fax from Anna Barry, Senior Biologist, Division of Management Authority, FWS, to John F. Cuneo, Jr., Hawthorn Corp. (Oct. 14, 2011) (Ex. 22) (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”).

However, the FWS cannot rely on its Pay-to-Play policy in issuing the requested permits because the 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 [§ 9] . . . to enhance the propagation or survival of the affected species.” 16 U.S.C. § 1539(a)(1)(A). Likewise, the FWS regulations governing enhancement permits provide that “the Director may issue a permit authorizing activity otherwise prohibited by § 17.21 . . . for enhancing the propagation or survival . . . of endangered wildlife.” 50 C.F.R. § 17.22. On the face of these provisions, an applicant only qualifies for an exemption if it demonstrates that activities that would otherwise be prohibited by § 9 of the ESA—e.g., exporting, importing, harming, harassing, or wounding an endangered animal—will likely 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 § 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.” Cong. Research Serv., 97th Cong., Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, and 1980, at 358 (Comm. Print 1982) (Sen. Tunney) (Ex. 23) (emphasis added). He explained that “[t]his is a needed management tool recommended by all wildlife biologists, . . . for example, where a species is destroying its habitat or where the species is diseased.” *Id.* at 396. 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 anybody who will donate money to a conservation organization is also inconsistent with Congress’ goal of substantially limiting the number of exemptions granted under § 10—and allows the exception to swallow the rule. *See* H.R. Rep. No. 93-412, at 156 (1973) (Ex. 24) (safeguards in § 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)). Such was Congress’s desire to limit exemptions that it prohibited “[v]irtually all dealings with endangered species . . . except in extremely narrow circumstances.” *Tenn. Valley Auth.*, 437 U.S. at 180 (emphasis added). Permitting any company willing to pay a negligible fraction of its profits to exploit endangered species stretches § 10’s “extremely narrow” exemption beyond its breaking point.

It also conflicts with the general purposes and policies underlying the ESA. The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Babbitt v. Sweet Water Home Chapter of Cmty. for a Greater Or.*, 515 U.S. 687, 698 (1995). The Act “encompasses a vast range of economic . . . enterprises and endeavors.” *Id.* at 708. “[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.” *Tenn. Valley Auth.*, 437 U.S. at 184; *see, e.g.*, S. Rep. No. 93-307, at 7 (1973) (Ex. 25) (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 15 (1973) (stating that the ESA uses the “broadest possible terms” to define restrictions on takings). Therefore, the Supreme Court has “expansively interpret[ed] ESA [prohibitions] in light of the statute’s ‘broad purpose’ of saving species from extinction.” *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.”). Defendants’ permissive Pay-to-Play policy is utterly inconsistent with the “broad scope [of the ESA’s] prohibitions.” H.R. Rep. No. 94-823, at 7 (1976) (Ex. 26).

This reading of § 10(a)(1)(A) finds further support in the FWS regulations. Pursuant to § 17.21 of the FWS, the Director may only issue a captive-bred wildlife permit to “export or re-import” 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.” 50 C.F.R. § 17.21(g) (emphasis added). It is plainly irrelevant whether the purpose of other activities for which a permit is not required—such as compiling an elephant census or patrolling for poachers in Sumatra, see Application at 51 (Letter from Linda Reifschneider, President, Asian Elephant Support, to Tarzan Zerbini, General Manager, TZ Productions (Feb. 21, 2014))—is to enhance propagation or survival. Furthermore, § 17.22 of the regulations, 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 details of the activities sought to be authorized by the permit. Id. § 17.22(a)(1)(vii) (emphases added). If donating money to a conservation organization can justify issuance of a § 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 importing and exporting endangered Asian elephants. Likewise, in issuing a § 10 permit, § 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.” Id. § 17.22(a)(2)(i) (emphases added). But, again, if making a small donation for conservation “is 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” should 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 § 10 enhancement permit, the NMFS regulations require an applicant to demonstrate that “[t]he proposed activity furthers a bona fide . . . enhancement purpose.” *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) (Ex. 27) (“Permitted activities must . . . enhance the propagation or survival of the listed species.” (emphasis added)). 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.” *Id.* § 216.41(b)(6)(ii) (emphasis added). “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.” *Id.* § 216.41(b)(6)(i); *see also id.* § 216.33(c)(2) (requiring that “the proposed activity” be “for enhancement purposes”). The regulations do not authorize permit holders to import and export endangered wildlife for purposes wholly unconnected to enhancement and survival, so long as they make a small donation to a conservation project. Rather, unlike Defendants’ 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, the 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.” Captive Wildlife Regulation, 44 Fed. Reg. 54002, 54002 (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 54005 (explaining that the rule pertaining to § 10 exemptions for captive-bred wildlife “is intended to facilitate activities for the purpose of enhancing propagation or survival of the affected species” (emphasis added)). 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.” *Id.* (emphasis added); *see also id.* at 54005

(“Only those activities conducted to enhance propagation or survival of the affected species may be authorized by the present rule.” (emphasis added)). Based on its longstanding interpretation, the FWS cannot issue TZC the requested permits unless it shows that the purpose of importing and exporting the Asian elephants—and not of making the noted \$500 donation—is to enhance the survival and propagation of the species.

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 TZC the requested permits.

For these reasons, the FWS cannot rely on its unlawful Pay-to-Play policy in deciding whether to issue the requested ESA permits to TZC

ii. TZC’s paltry contribution to purported conservation cannot justify renewal of the permits.

Even if the Pay-to-Play policy were lawful, issuing the requested traveling exhibition certificates on the basis of TZC’s paltry \$500 donation to an organization that primarily focuses on the issues of captive elephants would be arbitrary and capricious. See 5 U.S.C. § 706(2)(A) (“The reviewing court shall hold unlawful and set aside agency actions, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]”).

It is beyond doubt that the purpose of the requested permits is not to enhance the survival of endangered Asian elephants. This is not the first traveling exhibition certificate that TZC has sought for these elephants. See, e.g., Application at 10 (Certificate No. 11US065146/9) (traveling exhibition certificate issued for Schell from March 23, 2011, to March 22, 2014); id. at 136 (Certificate No. 11US065149/9) (traveling exhibition certificate issued for Marie from March 23, 2011, to March 22, 2014). Yet, besides a completely unsupported claim on TZC’s website that “a portion of the monies from [its] animal ride operations are used to directly fund” “[its] various conservation projects,” Id. at 16 (Animal Conservation Efforts), there is absolutely no evidence that TZC donated any money to conservation efforts before submitting the renewal

applications on November 13, 2013. Nor did it even discuss any such contribution in those applications. It was not until later, after the FWS informed TZC that “[e]ducation alone can no longer suffice for meeting the requirements under the ESA,” id. at 20 (Letter from Anna Barry, Senior Biologist, Division of Management Authority, FWS, to Harriett, TZ Productions (Jan. 6, 2014)), that TZC made a miniscule \$500 donation to Asian Elephant Support, id. at 51 (Letter from Linda Reifschneider, President, Asian Elephant Support, to Tarzan Zerbini, General Manager, TZ Productions (Feb. 21, 2014)), a small non-profit with four board members and no employees, Asian Elephant Support Annual Report (Ex. 28).

Moreover, rather than “directly relat[ing] to the survival of [Asian elephants] in the wild,” Application at 20 (Email from Anna Barry, Senior Biologist, Division of Management Authority, FWS, to Harriet, TZ Productions (Jan. 6, 2014)) (advising TZC that it would “need to be able to demonstrate how [its] proposed activities directly relate[] to the survival of this species in the wild” to meet the Enhancement Requirement), most of Asian Elephant Support’s work focuses on captive elephants. For example, the non-profit states that it supports “[p]rograms that implement regular health checks and treatments for elephants in remote camps”; “[t]raining of calves . . . so they can receive medical care more safely and be better prepared for a future under human care”; ESL classes for mahouts; and “[p]rograms for retired elephants.” Projects We Support (Ex. 29) (emphases added).

TZC had the gall to represent its pitiful \$500 donation to the FWS and the public as a “significant initial contribution” to a “new supporting and participating relationship with the Asian Elephant Support group,” Application at 16 (Animal Conservation Efforts), although the application materials do not elaborate on any subsequent donations to the non-profit—and although \$500 is hardly “significant” for a company that makes a million dollars a year off the animals it exploits, Hoover’s Report for Tarzan Zerbini International (Ex. 30).

It is clear that a single \$500 donation to an organization that primarily focuses on captive-elephant issues will do next to nothing to enhance the survival of endangered Asian elephants. Given this fact and Congress’s intent to “limit substantially the number of exemptions” granted under the ESA, H.R. Report 93-412, at 156 (July 27, 1973), any decision to issue the requested permits to TZC on the basis of this \$500 donation would be so devoid of “reasoned decision-making” that it could not stand. See City of Kansas City v. Dep’t of Hous. & Urban Dev., 923 F.2d 188, 189 (D.C. Cir. 1991) (even “assuming[] arguendo” that the agency had ample statutory

authority, its action was devoid of “reasoned decision-making,” and was therefore arbitrary and capricious).

B. The FWS Cannot Issue TZC the Requested Traveling Exhibition Certificates Because TZC Failed to Submit the Required Application Form.

TZC submitted the Applications on Form 3-200-52, “Reissuance, Renewal, or Amendment of a Permit,” despite the fact that this form instructs applicants to file Form 3-200-30 for “circus/traveling exhibits.” Form 3-200-52, at 2 (Ex. 31). In failing to submit the Applications on Form 3-200-30, TZC failed to comply with both § 23.49(c) of the regulations, which requires that applicants for traveling exhibition certificates “[c]omplete Form 3-200-30 for wildlife,” 50 C.F.R. § 23.49(c), and § 13.11(a), which mandates that “[a]pplications must be submitted . . . as . . . directed by the Service,” *id.* § 13.11(a). The FWS therefore cannot lawfully issue TZC the requested traveling exhibition certificates.³ *See id.* (“The Service may not issue a permit for any activity authorized by this subchapter B unless [applicants] have filed an application . . . as . . . specifically directed by the Service.” (emphasis added)); *id.* § 13.21(b) (providing that the FWS may only issue a permit “[u]pon receipt of a properly executed application”).

C. TZC’s Failure to Provide a “Full Statement of the Reasons Why [It] Is Justified in Obtaining the Permit” Bars the FWS from Issuing the Requested Traveling Exhibition Certificates.

The regulations require applicants for a § 10 permit to provide “[a] full statement of the reasons why the applicant is justified in obtaining a permit including the details of the activities sought to be authorized by the permit.” 50 C.F.R. § 17.22(a)(1)(vii). The Applications completely fail to include the required “full statement.” TZC provides absolutely no information with respect to its proposed activities, nor does it include a statement as to how these proposed activities—which it fails to discuss—will meet the Enhancement Requirement. One can only deduce from documents included in the application materials that TZC rests the Applications on its purported educational activities and a \$500 donation to Asian Elephant Support. *See* § IV.A,

³ Even if the company had submitted the correct form—Form 3-200-52—the FWS would still have had to deny the Applications for “failure[e] to disclose material information required,” 50 C.F.R. § 13.21(b)(2), because TZC failed to respond to question 2.b of Form 3-200-52, which requires applicants to “[p]rovide a summary detailing activities conducted under this permit, as well as a brief statement of why you are seeking reissuance/renewal,” Form 3-200-52, at 2.

supra. This hardly qualifies as the “full statement of [TZC]’s reasons” that the regulations require. 50 C.F.R. § 17.22(a)(1)(vii).

Because TZC has utterly failed to comply with 50 C.F.R. § 17.22(a)(1)(vii), the FWS must deny the Applications.

D. TZC’s Failure to Disclose Material Information Required in Connection with Its Applications Prohibits the FWS from Granting the Requested Traveling Exhibition Certificates.

The FWS cannot issue a permit pursuant to the ESA if “[t]he applicant has failed to disclose material information required . . . in connection with [its] application.” 50 C.F.R. § 13.21(b)(2) (“Upon receipt of a properly executed application for a permit, the Director shall issue the appropriate permit unless . . . [t]he applicant has failed to disclose material information required . . . in connection with his application.” (emphasis added)); see also 50 C.F.R. § 17.22 (stating that the FWS may only issue a § 10 permit “[u]pon receipt of a complete application”).

The application materials that PETA received lack the following required material information:

- “[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,” 50 C.F.R. § 17.22(a)(1)(vii); see § IV.C, supra;
- the “source” and “current location” of the elephants, Form 3-200-30, at 2 (Question 1);
- the “[s]pecific location of where, when, and by whom (name and address) the specimen was removed from the wild, id. at 4 (Question 5.c.a);
- the “[p]urpose of removal,” id. (Question 5.c.b);
- “[d]ocumentation showing that the specimens were legally acquired by the applicant,” id. (Question 5.c.d);
- “a copy of the actual script or material that will be presented to the audience at each performance, show, or viewing of the specimen(s),” Form 3-200-30, at 4 (Question 6.b.ii) (emphasis in original); see § IV.A.1.iii, supra;
- whether “written material” is made “available free-of-charge,” Form 3-200-30, at 4 (Question 6.b.iii); see § IV.A.1.iii, supra;
- when educational material will be presented, Form 3-200-30, at 4 (Question 6.b.iv); see § IV.A.1.iii, supra;

- “[w]hat activities,” if any, “will be occurring at the same time the presentation of the message is being provided,” and whether those activities could “diminish the effectiveness of the presentation,” Form 3-200-30, at 4 (Question 6.b.iv); see § IV.A.1.iii, supra;
- whether “an oral announcement [will] be made regarding the availability of [written] material,” Form 3-200-30, at 4 (Question 6.b.iv); see § IV.A.1.iii, supra;
- whether any “posters [will] be placed so that the material will be accessible to the public,” Form 3-200-30, at 4 (Question 6.b.iv); see § IV.A.1.iii, supra;
- an explanation of “how the conservation education will be presented to [a] non-English speaking audience,” “[w]hen exhibiting in countries where English is not the primary language,” Form 3-200-30, at 4 (Question 6.b.iv); see § IV.A.1.iii, supra;
- “[a] detailed description, including size, construction materials, [and] protection from the elements, . . . [of] the permanent facilities,” Form 3-200-30, at 5 (Question 8.b);
- “[t]he type, size, and construction of any shipping container,” id. (Question 8.c.i);
- “[t]he arrangements for watering or otherwise caring for the wildlife during transport,” id. (Question 8.c.ii).
- a copy of TZC’s Animal Welfare Act (“AWA”) license, id. (Question 10); and
- “[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,” 50 C.F.R. § 17.22(a)(1)(v).

TZC’s failure to provide the above material information disqualifies it from obtaining the requested permit. Furthermore, § 10(c) of the ESA provides that “[i]nformation received by the Secretary as part of any application shall be available to the public as a matter of public record at every stage of the proceeding.” 16 U.S.C. § 1539(c). In Gerber v. Norton, 294 F.3d 173 (D.C. Cir. 2002), the U.S. Court of Appeals for the District of Columbia Circuit held that the FWS had violated § 10 of the ESA by failing to provide the plaintiffs with everything that was part of an ESA permit application. Id. at 180-82. If, at any point in its deliberation process, the FWS obtains any of the omitted material information, the agency must provide the information to the public, as well as an opportunity to review and comment on the information.

E. The FWS Has a Duty to Reject TZC’s Applications Because the Activities for Which It Seeks Permits Will “Operate to the Disadvantage of the Species,” Will Not “Be Consistent with the Purposes and Policy” of the ESA, and Are “Likely to Jeopardize the Continued Existence” of the Species.

The FWS may not issue a permit unless it has 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. 16 U.S.C. § 1539(d). Moreover, the agency may only issue a permit if such issuance “is not likely to jeopardize the continued existence of any endangered species.” *Id.* § 1536(a)(2); *see also* 50 C.F.R. § 17.22(a)(2)(ii) (providing that, in deciding whether to issue a permit, “the Director shall 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”).

Because the activities for which TZC seeks traveling exhibition certificates—export and re-import of endangered Asian elephants in order to exhibit them in circuses—will “operate to the disadvantage of the species,” will not “be consistent with the purposes and policy” of the ESA, and are “likely to jeopardize the existence” of the species, the FWS must deny the Applications.

1. The FWS May Not Rely on a Blanket Determination that the (Re-)Export and (Re-)Import of Captive-Bred Wildlife Is Not Likely to Affect the Survival of the Species.

In considering the Applications, the FWS may not rely on its blanket determination that the export and import of captive-bred wildlife “may affect, but is not likely to adversely affect the survival of the species,” Memorandum from the Chief, Branch of Consultation and Monitoring, Division of Scientific Authority, FWS, to the Chief, Division of Management Authority, FWS (Nov. 17, 2003) (Ex. 32), or any similar blanket determination. 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) (emphasis added), such as whether “if granted and exercised [the exception] will not operate to the disadvantage of such endangered species,” 16 U.S.C. § 1539(d)(2). The regulations further require the FWS to make an individualized determination that “the authorization requested” does not “potentially threaten[] a wildlife or plant population,” 50 C.F.R. § 13.21(b)(4) (emphasis added), as well as 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,” *id.* § 17.22(a)(2)(ii) (emphases added). Thus, the law mandates that the FWS make an “individualized analysis” of each permit application, including specific findings about specific animals in specific contexts. *Friends of Animals*, 626 F. Supp. 2d 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”).

2. Because TZC’s Exhibition of Endangered Asian Elephants in the Circus Is Likely to Jeopardize the Continued Existence of the Species, Has a Detrimental Effect on the Species, and Is Inconsistent with the Purposes of the ESA, the FWS Must Deny the Applications.

i. TZC’s exhibition of endangered Asian elephants in circuses undermines efforts to protect this species.

Recent studies on the use and inappropriate portrayal of chimpanzees in movies and television shows and advertisements 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. Stephen R. Ross et al., Inappropriate Use and Portrayal of Chimpanzees, 319 *SCIENCE* 1487 (Mar. 14, 2008) (Ex. 33); see also Stephen R. Ross et al., Specific Image Characteristics Influence Attitudes about Chimpanzee Conservation and Use as Pets, 6(7) *PLoS ONE* (2011) (Ex. 34); Kara Schroepfer et al., Use of “Entertainment” Chimpanzees in Commercials Distorts Public Perception Regarding their Conservation Status, 6(10) *PLoS ONE* (2011) (Ex. 35). Ross, the Coordinator of the AZA Chimpanzee Species Survival Plan, 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.” Stephen R. Ross et al., Inappropriate Use and Portrayal of Chimpanzees, *supra*.

Comparably, the elephants used by TZC stand on small platforms, form pyramids, and perform other unnatural tricks. See, e.g., Gallery Photo (Ex. 36) (showing elephants standing on small platforms); 2014 Show Photo (Ex. 37) (showing elephants on one knee and raising their forelegs in unison); Bill Jackson, Under the Big Top, *CAMBRIDGE TIMES*, June 21, 2012 (Ex. 38) (showing an elephant sitting upright on a small platform). The exhibition of elephants in the circus is inescapably analogous to the use of chimpanzees in movies and television and

undoubtedly misleads the public into believing that all is well with elephant populations in the wild. The late Dr. Mel Richardson noted that

[t]here 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 [elephant] . . . as if it were a clown or an acrobat, a mere curiosity, so to speak.

Statement of Dr. Mel Richardson 2 (Nov. 16, 2012) (emphasis added).

Likewise, the late Dr. Ronald Tilson, Conservation Director at the Minnesota Zoo Foundation from 1987-2011 and the Coordinator of the AZA Tiger Species Survival Plan from 1987-2011, explained of exhibiting tigers in circuses:

[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.

Statement of Dr. Ronald Tilson 1 (Sept. 30, 2011) (Ex. 39) (emphasis in original). The analogy to the exhibition of elephants in TZC's performances is obvious.

Furthermore, the sight of multiple endangered Asian elephants in a single circus performance can give audiences "the false impression that [these] species [are] safe, so that destruction of habitat and wild populations can proceed." Noel F.R. Snyder et al., Limitations of Captive Breeding in Endangered Species Recovery, 10 CONSERVATION BIOLOGY 338, 344 (1996) (Ex. 40); cf. Philip J. Nyhus et al., Thirteen Thousand and Counting: How the Growing Captive Tiger Populations Threaten Wild Tigers, in TIGERS OF THE WORLD 223, 235 (2d ed. 2010) (Ex. 41) ("[I]f we can raise tigers in captivity for profit like chickens so that there are thousands or even tens of thousands of tigers in cages, why should we worry about the loss of a few thousand in the forests of Russia or India or Indonesia?").

ii. The Applications must be denied because issuance would facilitate “takes” of the species.

TZC seeks the requested permits in order to transport endangered Asian elephants abroad, to use them in circus performances. As discussed in §§ IV.F.1 and IV.G, *infra*, in connection with its circus shows TZC routinely exposes Asian elephants to unsanitary and hazardous conditions. These activities violate § 9’s take prohibition insofar as they harm, harass, and wound these animals. See 16 U.S.C. § 1532(19) (defining “take”); § III.A, *supra* (discussing the “take” prohibition). Because these takes are inextricably intertwined with the circus exhibits for which TZC seeks permission to (re-)export and (re-)import Marie and Schell, issuance of the requested permits would facilitate these takes. Facilitating an unlawful take is, of course, inconsistent with “the purposes and policies” of the ESA and “operate[s] to the disadvantage of the species” and thus must be denied. Indeed, as the FWS has made clear, even where an “incidental take is anticipated to occur as a result of the proposed action, an ‘is likely to adversely affect’ determination should be made.” FWS & NMFS, Endangered Species Consultation Handbook xv (Mar. 1998) (Ex. 42) (emphasis added). It follows *a fortiori* that where, as here, the evidence makes clear that intentional takes are likely to occur as a result of TZC’s proposed actions, an “is likely to adversely affect” determination should absolutely be made.

In short, the FWS cannot rely on its blanket determination that importing and exporting captive-bred animals will not adversely affect wild populations of this species and ignore the detrimental impact that exhibitions like TZC’s can have on Asian elephants in the wild. The evidence indicates that the activities for which TZC seeks the permits are likely to adversely affect wild elephants.

F. The Applications Should Be Denied Because TZC’s Facilities and Staff Are Inadequate.

In considering an application, § 17.22 of the regulations requires the FWS to consider “[w]hether the expertise, facilities, or other resources available to the applicant appear adequate to successfully accomplish the objectives stated in the application.” 50 C.F.R. § 17.22(a)(2)(vi). TZC lacks the facilities and adequate staff necessary to enhance species propagation or survival.

1. The Applications Should Be Denied Because TZC Lacks Adequate Facilities.

i. TZC's Facilities Are Inadequate.

The U.S. Department of Agriculture ("USDA") has cited TZC for numerous violations of the AWA connected to its hazardous facilities, including:

- On December 12, 2012, the USDA cited TZC for an inadequate perimeter fence. USDA Inspection Reports at 1 (Ex. 43). An adequate perimeter fence is critical to protect the animals from wild animals and unauthorized persons, and to protect the public from potentially dangerous animals, like elephants. Id. TZC was earlier cited on August 16, 2004, for both inadequate fencing and an absent perimeter fence. Id. at 9-11.
- On February 20, 2008, USDA inspectors observed that "[t]here [was] excessive rust and corroded metal located along the base of the east wall in the elephant barn. Two adult elephants [we]re tethered in this area every night and ha[d] direct access to the area referenced above. In addition, there [we]re rusty nails sticking through the metal wall into the barn in the same area." Id. at 7.
- On August 16, 2004, the USDA cited TZC for placing the elephants at risk of electrocution. According to the inspectors, "[t]here [was] a water leak from the well that ha[d] allowed water to pool around the transport trailer. There [was] also an electrical supply in this area." Id. at 9. The inspectors ordered TZC to repair this hazard "immediately for the safety of the elephants as they ha[d] access to this area." Id.
- During that same inspection, the USDA cited TZC for failing to have any "provision for sanitary disposal of waste for the facility." Id. at 10. According to the August 16, 2004, inspection report, "[t]he waste for the facility was allowed to flow out onto the ground. The waste [was] washed out through a hole (drain) in the concrete floor. This waste c[ould] flow down into the pond that the animals ha[d] direct access to. There was an excessive growth of weeds around the waste drainage area. The weeds were in excess of 2 feet tall. On the east side of the property there [was] a dump area that ha[d] solid waste piled app[roximately] 4 ft tall and 8 feet wide, pallets, plastic barrels and an overgrowth of weeds. The animals were allowed access to this waste area also." Id.
- Again, on August 16, 2004, TZC was cited because "[t]here [was] an excessive growth of weeds and an accumulation of waste materials, concrete blocks (broken concrete), wooden

pallets, plastic barrels and a metal dumpster that the elephants had access to,” which “could [have] easily cause[d] injury to the elephants.” Id. at 11.

- On November 23, 1999, the USDA cited TZC for failing to provide an elephant with a sufficiently “spacious pen or enclosure where she c[ould] move about freely, unchained.” Id. at 12.
- On December 8, 1994, USDA inspectors observed that “[s]everal repairs to [the transport] trailer [needed to] be made before next use.” Id. at 18. The circus was cited again on November 18, 1998, because the “expanded metal [v]entilation holes” in the transport trailer “had [a] broken opening and ha[d] sharp points on 2 vents” and the “[w]ood side walls had broken spots that need[ed] to be replaced or repaired.” Id. at 16. Then again, on May 4, 1999, USDA inspectors cited TZC because “[t]he trailer used to transport the 3 Elephants ha[d] broken splintered wood on the sides of the trailer near the ventilation holes”; “[t]he top of the trailer ha[d] loose plywood and insulation [was] missing in one section of the top”; and “[t]he left rear floor of the trailer ha[d] a small hole where the metal ha[d] rusted through the floor and a rusted piece of metal that [was] loose on one corner that could cause injury to an Elephants Feet.” Id. at 15. And, on November 3, 1999, TZC was cited for a fourth time because a trailer being used to transport the elephants had “broken splintered wood on the side walls near the vent holes”; “[t]he floor where the metal and the wood me[et] has rusted thru spots”; “[t]he floor sag[ged] in several spots on the trailer”; and “[t]he front part of the right fender well ha[d] come loose and ha[d] sharp edges and needs to be repaired.” Id. at 13.
- TZC was cited on September 15, 1993, for allowing portable pens and trailers used for tigers to fall into disrepair. Id. at 24.

Furthermore, according to news reports, TZC was forced in 2000 to buy bigger overnight cages for its animals in order to meet the minimum size requirements established by Nova Scotia provincial laws. Brendan Elliott, Bear Ban Barred Circus: Provincial Rules Made Big Top Fold Tents Last Month, HALIFAX NEWS, July 23, 2000 (Ex. 44). As early as 1990, the Society for the Prevention of Cruelty for Animals in Victoria, British Columbia, inspected TZC and found that the animals “were kept entirely in cages too small to allow the least bit of movement.” Judith Lavoie, It Could Be a Jungle out There for Tarzan’s Circus Acts: SPCA Sends Animal Reports

to Other Tour Stops, TIMES-COLONIST, Sept. 18, 1990, at D10 (Ex. 45); Dirk Meissner, SPCA Executive Raps Circus for Treatment of Animals, TIMES-COLONIST, Sept. 15, 1990 (Ex. 46).

ii. The Facilities at the Two Tails Ranch, Where TZC Has Often Housed the Elephants It Owns and Uses, Are Also Inadequate.

The circus has also been cited multiple times for inadequate facilities at the Two Tails Ranch, which is owned by Tarzan Zerbini's daughter, Patricia, and where TZC has often housed animals it owns and uses.⁴ For example:

- The USDA cited TZC for failure to maintain an adequate perimeter fence at the ranch on February 16, 2011, and March 13, 2009. USDA Inspection Reports 4-6. Furthermore, Two Tails Ranch itself was also cited for an inadequate perimeter fence on November 14, 2005. Id. at 8.
- On February 16, 2011, USDA inspectors observed “[h]oles in the barrier between where Luke, [a] TB positive bull elephant, was housed at night and where 2 female elephants were housed. These holes [could have] allow[ed] contaminated air to enter the other side of the barn and present[ed] a danger to the health of the other elephants.” Id. at 4.

In addition, on March 6, 2012, a visitor participated in a tour of the Two Tails Ranch, which has often been used to house elephants owned and used by TZC. See n. 4, supra. Video from the tour shows Patricia Zerbini, Tarzan Zerbini's daughter and a member of TZC's staff, see Application at 32 (Re: Elephant Trainers/Handlers Qualifications), explaining that all four of the elephants then at the ranch were housed separately. Video “2012-03-06_V16_Two Tails

⁴ On February 16, 2011, July 7, 2010, and March 13, 2009, the USDA conducted official inspections of TZC at Two Tails Ranch, which it referred to as “Site 002”: “daughter's winter quarters.” USDA Inspection Reports at 4-5; July 7, 2010, USDA Inspection Report (Ex. 47). The agency also noted that, in December 2007, Marie and Schell, the two elephants for whom permits are currently sought, went to the ranch “following their tour with the Tarzan Zerbini Circus,” returned to the road with the circus in January 2008, were back at the ranch by February 21, 2008, again returned to the circus tour on February 24, 2008, and went back to the ranch on April 16-17, 2008. USDA, Zerbini Elephants TB Classification (Ex. 48); see also, e.g., Email from [Redacted] to Animal Care West, USDA (Apr. 15, 2013) (Ex. 49) (showing that the elephant Roxy performed with TZC from April 19 to April 21, 2013, and then returned to Two Tails Ranch on April 21, 2013); id. at 12 (stating that the elephants “Roxy and Bunny were housed until Spring of '99 at the Williston, FL site”). In addition, Tarzan Zerbini and Patricia Zerbini frequently transfer ownership back and forth between each other. For example, Marie, one of the elephants for whom a permit is sought, appears to have been transferred from TZC to the ranch and then back to TZC in 2010. Marie at Tarzan Zerbini Circus (Ex. 50). To give another example, Roxy was owned by TZC from 1990 to 2008, North American Regional Studbook 176 (2010) (Ex. 51), but stayed intermittently at the Two Tails Ranch during that time, see, e.g., USDA Inspection Reports at 12 (noting that Roxy was being housed at the ranch). She was then transferred from TZC to the ranch in 2008, North American Regional Studbook 176 (2010), but was still performing with the circus in 2013, Email from [Redacted] to Animal Care West, USDA (Apr. 15, 2013).

Ranch_Patricia explaining why the elephants must be supervised when together.”⁵ “The formation of long-term relationships is the very essence of elephant society” Joyce H. Poole and Cynthia J. Moss, Elephant Sociality and Complexity: The Scientific Evidence, in ELEPHANTS AND ETHICS: TOWARD A MORALITY OF COEXISTENCE 69, 87 (Christen Wemmer & Catherine A. Christen eds., 2008) (Ex. 52). According to John Lehnhardt, then Animal Operations Director for Disney’s Animal Program, “[t]he most critical . . . aspect of elephant husbandry is the social structure and needs of elephants.” John Lehnhardt, Husbandry, in BIOLOGY, MEDICINE, AND SURGERY OF ELEPHANTS 45, 49 (Murray E. Fowler & Susan K. Mikota eds., 2006) (Ex. 53) (emphasis added). Indeed, the elephant-holding community recognizes that the “affinity for gregariousness—being with other elephants—is a basic elephant ‘need.’” Phyllis C. Lee & Cynthia J. Moss, Welfare and Well-Being of Captive Elephants: Perspectives from Wild Elephant Life Histories, in AN ELEPHANT IN THE ROOM: THE SCIENCE AND WELL-BEING OF ELEPHANTS IN CAPTIVITY 22, 31 (Debra L. Forthman et al. eds., 2009) (Ex. 54) (emphasis added).⁶

The visitor also reported inadequate enrichment features in all of the elephants’ enclosures. “Stress, frustration and depression-like states can be caused by environmental conditions—physical or social—that differ significantly from those that the animal has evolved to cope with in the wild” Ros Clubb & Georgia Mason, A Review of the Welfare of Zoo Elephants in Europe 6 (2002) (Ex. 59); see also J. Veasey, Concepts in the Care and Welfare of Captive Elephants, 40 INTERNATIONAL ZOO YEARBOOK 63, 72 (2006) (Ex. 60) (“suffering” may result when “the environment does not match [elephants’] ‘evolutionary expectancy’”). Thus, according to the Association of Zoos and Aquariums’ (“AZA”) Taxon Advisory Group and Species Survival Plan, “[r]esponsible elephant management provides a high-quality enrichment program”—“with the opportunity to display species appropriate behaviors such as digging, dust

⁵ The videos cited throughout were mailed via overnight mail as a single exhibit on May 29, 2014, to Brenda Tapia, Data Analyst, Division of Management Authority, FWS.

⁶ See also, e.g., Elephant TAG/SSP Key Messages (Ex. 55) (“Elephants require an environment that provides for social interaction with other elephants.”); BIAZA Guidelines at 42 (Ex. 56) (“Elephants are one of the most social mammals and this should be borne in mind when managing them in captivity.”); Dep’t of Env’t Affairs & Tourism, National Norms and Standards for the Management of Elephants in South Africa § 3(a) (1998) (Ex. 57) (“[E]lephants are intelligent, have strong family bonds and operate within highly socialised groups and [thus that] unnecessary disruption of these groups by human intervention should be minimised.”); see generally Joyce Poole & Petter Granli, Mind and Movement: Meeting the Interests of Elephants, in AN ELEPHANT IN THE ROOM: THE SCIENCE AND WELL-BEING OF ELEPHANTS IN CAPTIVITY 2, 14 (Debra L. Forthman et al. eds., 2009) (Ex. 58) (the interests of elephants in captivity “can only be met within environments that[] [e]nable the development of normal social relationships”).

bathing, swimming, foraging, playing, and scent exploration, among others”—“as part of daily elephant care.” AZA SSP/TAG, Elephant Enrichment (Ex. 61). For example, the AZA mandates that “[o]utdoor habitats . . . provide sufficient . . . environmental capacity to both allow for and stimulate natural behavioral activities and social interactions,” AZA Standards for Elephant Management and Care § 1.4.1.2 (2011) (Ex. 62); see also id. § 1.4.1.3 (“The facility and program [must] provide[] a complex physical and social environment which stimulates natural behaviors.”), including providing “[f]urnishings to accommodate an array of locomotive and foraging behaviors as well as resting and sleeping,” id. § 1.4.3. It “encourage[s]” “the use of both wet and dry wallows.” Id.

However, in Luke’s enclosure, the visitor observed a single car tire, some rocks, and a tree branch. Video “2012-03-06_Two Tails Ranch_V03_Luke in his enclosure.” In another mostly barren enclosure, there was only a single large ball and car tire. Video “2012-03-06_Two Tails Ranch_V01_Elephant swaying” – “V02_Elephant swaying.” The visitor did not see any enrichment items at all in Roxy’s enclosure, which only had sand covering the ground. Video “2012-03-06_V19_Two Tails Ranch_Roxy the elephant”; cf. AZA Standards for Elephant Management and Care § 1.4.5.1 (2011) (“Enclosures must be made up of a variety of substrates,” because “[p]roviding a variety of substrates will promote behaviors, such as foraging, wallowing, bathing, digging, and resting.”). The scarcity of enrichment items and the barrenness of the enclosures at the Two Tails Ranch are inadequate to provide Asian elephants the environment that they require. See Beth Posta et al., The Effects of Housing on Zoo Elephant Behavior: A Quantitative Case Study of Diurnal and Seasonal Variation, 26 INTERNATIONAL JOURNAL OF COMPARATIVE PSYCHOLOGY 37, 38 (2013) (Ex. 63) (“[R]ecogniz[ing] the importance of encouraging species-typical behaviors,” zoo managers have widely moved from the “barren, sterile environments” of the past to “more realistic and enriching exhibits that resemble natural environments.”); J. Veasey, Concepts in the Care and Welfare of Captive Elephants, 40 INTERNATIONAL ZOO YEARBOOK 63, 68 (2006) (“small, barren environments” are correlated with reduced animal welfare).

2. The Applications Should Be Denied Because TZC’s Staff Is Inadequate.

TZC’s staff is also inadequate to care for endangered Asian elephants—possibly due to a lack of training, discipline, and/or proper procedures by the circus. On April 7, 2014, the USDA

fined Patricia Zerbini for “fail[ing] to secure the perimeter fence so that an unauthorized person could not go through it and have contact with the animals in the facility.” USDA, Citation and Notification of Penalty, Reference No. FL140004-AC (Apr. 7, 2014) (Ex. 64). This resulted in “[t]he elephant ‘Rajah’ severely injur[ing] an unauthorized person by grabbing the person with his trunk through the openings of his enclosure and pulling the person against the enclosure bars.” *Id.* In fact, the victim of this attack was hospitalized and unable to speak for nearly two months after the August 26, 2013, mauling. Monivette Cordeiro, Williston Elephant Ranch Owner Fined After Attack, OCALA STAR BANNER, May 20, 2014 (Ex. 65).

Incredibly, this was the sixth confirmed serious elephant attack associated with the Zerbinis—resulting in at least two deaths.⁷ See The Mizpah Shrine Circus’s Visit to Fort Wayne Has Ended Tragically, WPTA, Jan. 31, 2005 (Ex. 67) (reporting that a worker died after receiving blunt force trauma to the chest); Chris Hamilton, Shrine Circus Worker Suffers Injury, DULUTH NEWS-TRIBUNE, Apr. 29, 1999 (Ex. 68) (reporting that an intoxicated employee was hospitalized in serious condition after being attacked by a runaway elephant); Brock Ketcham & David Hayman, Circus Elephant Hurts Groom, CALGARY HERALD, Apr. 14, 1997, at A1 (Ex. 69) (reporting that a handler required hospitalization after being slapped by a spooked elephant); John McGauley, Elephant Steps on, Injures Man, FORT WAYNE NEWS SENTINEL, Feb. 6, 1995, at 9A (Ex. 70) (reporting that an employee was hospitalized in critical condition after being stepped on by an elephant); Clarence Hartwell, Tarzan in Michigan, CIRCUS REPORT, Apr. 25, 1994, at 10 (Ex. 71) (reporting that three children were injured during elephant rides); Nine Persons Hurt when Elephants Collide, WASHINGTON TIMES, July 17, 1992 (Ex. 72) (reporting that nine people were hurt, including one person who was hospitalized, when elephants collided with a barricade). Most of these were attacks on employees, including:

- On January 31, 2005, an elephant trainer with TZC was trampled to death by one of the elephants as they were being loaded into a trailer following performances at the Mizpah Shrine circus in Fort Wayne, Indiana. The Mizpah Shrine Circus’s Visit to Fort Wayne Has Ended Tragically, *supra*.

⁷ In addition, on March 17, 1997, a bear traveling with TZC bit off the tip of a two-year-old child’s finger in Grand Rapids, Michigan. The child had to undergo surgery to repair her finger. About thirteen fifth-graders who were also visiting the circus that day told a reporter that they touched the bears after employees encouraged them to do so. Theresa D. McClellan, Kids: They Told Us It Was Okay to Pet Bears Through the Cage, THE GRAND RAPIDS PRESS, Mar. 17, 1997 (Ex.66).

- On April 24, 1999, a twenty-seven-year-old TZC worker, who had been drinking, was hospitalized in serious condition after he was attacked by an elephant who had broken free of her shackles in Duluth, Minnesota, where the circus was performing. Another elephant trainer admitted that the elephants had been beaten badly by drunken trainers and were wary of people with alcohol on their breath. Hamilton, supra.
- On April 13, 1997, a spooked TZC elephant slapped a handler with her trunk and bit him on the head and back, causing injuries serious enough to require hospitalization. Ketcham & Hayman, supra.
- On February 6, 1995, a TZC employee was critically injured when an elephant stepped on him and crushed his pelvis in Fort Wayne, Indiana. McGauley, supra.

The USDA also cited Patricia Zerbini for endangering the public on May 24, 2011, for allowing visitors to stand two feet from an elephant, Luke, who had tested positive for TB and had not completed an approved treatment protocol. USDA Inspection Reports at 3. Allowing the public and other elephants to have contact with a TB-positive elephant is extremely dangerous. TB is “one of the most serious diseases affecting captive elephants today,” striking at least twelve-percent of Asian elephants in the United States. Susan K. Mikota, Stress, Disease and Tuberculosis in Elephants, in AN ELEPHANT IN THE ROOM: THE SCIENCE AND WELL-BEING OF ELEPHANTS IN CAPTIVITY 74, 74, 80 (Debra L. Forthman et al. eds., 2009) (Ex. 73). Indeed, in 2008, Jan, an elephant on tour with TZC, died of TB at the Two Tails Ranch. USDA, Zerbini Elephants TB Classification. Marie and Schell, for whom the traveling exhibition certificates are currently sought, were on tour with Jan at the time and were placed under quarantine at the ranch by the State of Florida. Id.

Elephants carry the human form of TB, which is highly transmissible from elephants to humans and to other elephants, even without direct contact. As explained in a 2009 Centers for Disease Control and Prevention (“CDC”) report, direct contact with a TB-positive elephant is not necessary for transmission of the disease to humans. Rendi Murphree, et al., Elephant-to-Human Transmission of Tuberculosis, 2009, EMERGING INFECTIOUS DISEASES (Mar. 2001) (Ex. 74). TB carried by an elephant was linked to an outbreak among nine humans in Tennessee, some of whom had no direct contact with the elephant. Id.

Ms. Zerbini has also demonstrated a critical lack of knowledge of Asian elephants. On the March 6, 2012, tour, the visitor observed some of the elephants swaying back and forth

constantly. Video “2012-03-06_Two Tails Ranch_V01_Elephant swaying”_“V02_Elephant swaying”; Video “2012-03-06_Two Tails Ranch_V03_Luke in his enclosure.” Swaying is a stereotypic behavior, Andrzej Elznaowski & Agnieszka Sergiel, Stereotypic Behavior of a Female Asiatic Elephant (Elephas Maximus) in a Zoo, 9 JOURNAL OF APPLIED ANIMAL WELFARE SCIENCE 223, 223 (2006) (Ex. 75): a “repetitive, unvarying behavior[] with no obvious goal or function,” Ros Clubb & Georgia Mason, A Review of the Welfare of Zoo Animals in Europe 222 (2002). Stereotypic behaviors are evidence of harassment as it is defined by the ESA regulations. They are never seen in the wild, Trial Tr. 111:15-111:16, ASPCA v. Feld Entmt., Inc., Civ. No. 03-2006 (D.D.C.), Feb. 4, 2009, p.m. (testimony of Dr. Joyce Poole) (Ex. 76); see also id. at 53:22-53:24 (“Never, in all the years I’ve seen elephants, 10,000, 20,000 elephants, I’ve never observed this behavior [in the wild].”), and displace normal behaviors.⁸ Moreover, they “tend to develop in animals that are frustrated or thwarted from performing highly motivated behaviours, such as feeding and foraging. . . . [Stereotypies] are thus signs that animals are motivated to perform natural behaviours that cannot be performed naturally” in their environment.” Ros Clubb & Georgia Mason, A Review of the Welfare of Zoo Animals in Europe 223 (2002) (emphasis added); accord Trial Tr. 39:7-39:21, ASPCA v. Feld Entmt., Inc., Civ. No. 03-2006 (D.D.C.), Feb. 11, 2009, a.m. (testimony of Dr. Ros Clubb, Senior Scientific Officer at the Royal Society for the Prevention of Cruelty to Animals’ Wildlife Department) (Ex. 78) (testifying that stereotypies develop “when animals are frustrated and they can’t perform behaviors that they really[,] really want to perform. . . . [S]o it’s associated with deprivation of performing natural behaviors in particular.”); Juan Liu et al., Stereotypic Behavior and Fecal Cortisol Level in Captive Giant Pandas in Relation to Environmental Enrichment, 25 ZOO BIOLOGY 446 (2006) (Ex. 79) (“Captive mammals may exhibit stereotypic behavior” because they “are deprived of the benefits of . . . naturalistic habitats to express their species-typical behaviors.”). The AWA regulations note, for example, that “[i]nadequate space may be indicated by evidence of . . . abnormal behavior patterns.” 9 C.F.R. § 3.128. However, when asked why the elephants were swaying, Patricia Zerbini claimed that elephants need to

⁸ For example, Kurt & Garai (2001) studied orphaned calves in captivity, who lived mainly on ropes, and spent more than fifty percent of their time in stereotypic weaving. They found that “[m]anipulation of objects, pulling on chains, resting in recumbent position and social behaviour were reduced. Obviously stereotypies had changed the pattern of daily activities and displaced exploratory and appetitive behaviour to a certain degree.” F. Kurt & M. Garai, Stereotypies in Captive Asian Elephants: A Symptom of Social Isolation, Abstracts of the International Elephant and Rhino Research Symposium, Vienna, Austria, 57, 59 (2001) (Ex. 77).

“constantly shift the weight” to keep pressure off their internal organs, which is why “you constantly see elephants shifting, rocking, or bobbing”—a totally baseless assertion.

Ms. Zerbini also demonstrated appalling ignorance of Asian elephants when she told tour guests that abused elephants “don’t remember what happened yesterday, don’t care about what’s gonna happen tomorrow or even this afternoon,” that they don’t hold grudges, that they and only care about food, water and safety. Video “2012-03-06_V07_Two Tails Ranch_Patricia talking about abused elephants.” This is manifestly false as anyone with basic knowledge of elephants should be aware. In fact, elephants “excel” in “long-term, extensive spatial-temporal and social memory.” Benjamin L. Hart et al., Large Brains and Cognition: Where Do Elephants Fit In?, 32 NEUROSCIENCE & BIOBEHAVIORAL REVIEWS 86, 86 (2008) (Ex. 80); accord James Ritchie, Fact or Fiction?: Elephants Never Forget, SCIENTIFIC AMERICAN, Jan. 12, 2009 (Ex. 81); Richard W. Byrne et al., Elephant Cognition in Primate Perspective, 4 COMPARATIVE COGNITION & BEHAVIOR REVIEWS 65 (2009) (Ex. 82). For example, elephants are known to mourn the death of a companion for many years. Isabel Gay A. Bradshaw, Not by Bread Alone: Symbolic Loss, Trauma, and Recovery in Elephant Communities, 12 SOCIETY & ANIMALS 143, 147-48 (2004) (Ex. 83). Science demonstrates that elephants often experience detrimental lifelong psychological effects from traumatic experiences, such as experiencing violence or witnessing death. Charles Siebert, An Elephant Crackup?, THE N.Y. TIMES MAGAZINE, Oct. 8, 2006 (Ex. 84).

Therefore, because TZC lacks adequate facilities and staff to enhance the propagation or survival of endangered Asian elephants, the FWS should deny the Applications.

G. The FWS Cannot Issue the Requested Permits Because TZC Illegally Subjects Asian Elephants to Inhumane and Unhealthy Conditions.

The FWS cannot issue TZC the requested traveling exhibition certificates because TZC routinely illegally subjects elephants to inhumane and unhealthy conditions. 50 C.F.R. § 13.21(b)(3) requires that applicants “demonstrate . . . a showing of responsibility” before they may be issued a permit. Id. Demonstrating a “showing of responsibility” means demonstrating that TZC could meet the requirements of the traveling exhibition certificates. See OSG Prods. Tankers LLC v. United States, 82 Fed. Cl. 570, 575 (Fed. Cl. 2008) (in making a responsibility determination in the context of government contracts, the “contracting officer must satisfy herself that that plaintiff can meet the requirements of the contract”). However, the company

cannot show that it would meet the requirements of the requested ESA permits because it cannot, inter alia, show that it will comply with 50 C.F.R. § 13.41, which mandates that “[a]ny live wildlife possessed under a permit must be maintained under humane and healthful conditions.” 50 C.F.R. § 13.41; see also id. § 13.2 (“The regulations contained in this part provide uniform, rules, conditions, and procedures for the . . . issuance, denial, suspension, revocation, and general administration of all permits issued pursuant to this subchapter B.”); id. § 17.22(a)(e) (“[p]ermit conditions” include “any applicable general permit conditions set forth in part 13”); id. § 23.56(a)(1) (“You must comply with the provisions of part 13 of this subchapter as conditions of the [CITES] document . . .”).

1. The USDA Has Cited TZC Numerous Times for Maintaining Elephants and Other Animals Under Inhumane and Unhealthful Conditions.

In addition to citing TZC numerous times for its inhumane and hazardous facilities—including failing to provide an elephant with sufficient space, exposing elephants to the risk of electrocution, and allowing elephants access to areas where waste was piled feet high, discussed above in § IV.F.1, the USDA has also repeatedly cited TZC for neglecting elephants’ and other animals’ health and welfare. For example:

- On May 24, 2011, the USDA cited the Two Tails Ranch, which has been frequently used to house elephants owned and used by TZC, see n. 4, supra, because an elephant had tested positive for TB in 2008, and “the licensee [was still] not complying with any of the acceptable options outlined in the TB Guidelines,” nor had “an acceptable alternative plan . . . been submitted to the Eastern Regional Office.” USDA Inspection Reports at 3.
- TZC was cited on August 16, 2004, for providing an unhealthy diet of “hay, loaves of bread and the grasses/weeds in the pasture” to the elephants. Id. at 11.
- On May 4, 1999, the USDA cited TZC for failing to provide veterinary care to an Asian elephant with a “swollen left foot.” Id. at 15. Foot problems are “the leading cause of euthanasia in captive elephants in the United States.” Gary West, Occurrence and Treatment of Nail/Foot Abscesses, Nail Cracks, and Sole Abscesses in Captive Elephants, in THE ELEPHANT’S FOOT: PREVENTION AND CARE OF FOOT CONDITIONS IN CAPTIVE ASIAN AND AFRICAN ELEPHANTS 93, 93 (Blair Csuti et al. eds, 2001) (Ex. 85); accord Murray E. Fowler, An Overview of Foot Conditions in Asian and African Elephants, in THE ELEPHANT’S FOOT:

PREVENTION AND CARE OF FOOT CONDITIONS IN CAPTIVE ASIAN AND AFRICAN ELEPHANTS 3, 5 (Blair Csuti, et al. eds, 2001) (Ex. 86).

- Also on May 4, 1999, TZC was cited for failing to provide elephants with “a tent or shade from the [s]un.” USDA Inspection Reports at 15.
- USDA inspectors cited TZC on November 5, 1994, for failing to have a program of veterinary care and medical records. Id. at 21-22.
- On September 15, 1993, the USDA cited TZC for failing to provide veterinary care to a horse with a swollen ankle. Id. at 24.

On December 3, 2001, the USDA issued TZC a \$2,250 civil penalty for failure to provide veterinary care to an elephant with a swollen foot, failure to provide elephants with shade, and failure to include elephants in the program of veterinary care, among other AWA violations. USDA, Settlement Agreement, Case No. MO00012-AC (Dec. 3, 2001) (Ex. 87).

And, again, as far back as 1990, the Society for the Prevention of Cruelty to Animals in Victoria, British Columbia, inspected TZC and found that the majority of horses had lacerations, abrasions, and scars from old injuries; there was no food or water available for the tigers; monkeys and dogs were kept in cages at all times except for performances; and no water was provided for the monkeys and dogs. The inspector’s report concluded that “[t]his circus, . . . where it was impossible to find anyone to accept basic responsibility for the care of the animals, was a prime example of everything that should not be allowed to occur in a circus.” Judith Lavoie, It Could Be a Jungle out There for Tarzan’s Circus Acts: SPCA Sends Animal Reports to Other Tour Stops, TIMES-COLONIST, Sept. 18, 1990, at D10; Dirk Meissner, SPCA Executive Raps Circus for Treatment of Animals, TIMES-COLONIST, Sept. 15, 1990.

2. Evidence Suggests that TZC Physically and Psychologically Abuses Elephants.

There is also evidence that TZC treats the elephants inhumanely by physically and psychologically abusing them. After a TZC worker who had been drinking was attacked by an elephant in 1999, another elephant trainer admitted that the elephants had been beaten badly by drunken trainers and were wary of people with alcohol on their breath. Chris Hamilton, Shrine Circus Worker Suffers Injury, DULUTH NEWS-TRIBUNE, Apr. 29, 1999.

During the March 6, 2012, of the Two Tails Ranch, the visitor observed Patricia Zerbini using a bullhook on an elephant, Luke, to force him to hold a car tire, stand on some rocks in his

enclosure, pick up a log, and paint. Video “2012-03-06_V13_Two Tails Ranch_Patricia using bull hook on Luke”; Video “2012-03-06_V14_Two Tails Ranch_Luke painting.” It is impossible for elephants to engage in their natural behaviors when they are hit, jabbed, poked, hooked, and stabbed any time their behavior diverges from their routine. Such use of bullhooks is stressful because “it deprives the elephants [of] free choice, being able to make their own decisions. It complicates their life, their behaviors, and their physical wellness.” Trial Tr. 93:20-94:3, ASPCA v. Feld Entmt., Inc., Civ. No. 03-2006 (D.D.C.), Feb. 23, 2009, a.m. (testimony of Carol Buckley, founder of Elephant Aid International and co-founder of The Elephant Sanctuary) (Ex. 88). Indeed, many studies indicate that “the greatest stressor in the lives of captive animals [may be] their perceived or actual inability to control most aspects of their surroundings.” Kathleen N. Morgan & Chris T. Tromborg, Sources of Stress in Captivity, 102 APPLIED ANIMAL BEHAVIOUR SCIENCE 262, 286 (2007) (Ex. 89); see id. at 264 (“Perhaps the greatest stressor in populations of captive animals are those over which the animal has no control and from which they cannot escape.”); G. Iossa et al., Are Wild Animals Suited to a Travelling Circus Life?, 18 ANIMAL WELFARE 129, 135 (2009) (Ex. 90) (“It has been suggested that the greatest stressor of captivity is the inability of captive animals to control the captive environment, ie the inability of confined individuals to escape or otherwise avoid the stressor.” (internal citation omitted)); J. Veasey, Concepts in the Care and Welfare of Captive Elephants, 40 INTERNATIONAL ZOO YEARBOOK 63, 74 (2006) (stating that “[a]nimals denied choice and control over their surroundings” during training “are likely to suffer a reduction in welfare”).

Moreover, even when it does not break skin, the use of these sharp instruments to hook, jab, or “bop” an elephant causes physical discomfort and pain. The very function of the bullhook is to cause “some kind of discomfort or pain in order for the elephant to move away from that feeling.” Trial Tr. 94:18-95:20, ASPCA v. Feld Entmt., Inc., Civ. No. 03-2006 (D.D.C.), Feb. 18, 2009, p.m. (testimony of Colleen Kinzley, Director of Animal Care, Conservation, and Research at the Oakland Zoo) (Ex. 91). “The only reason an elephant reacts to the bull hook is because of [its] history. If they ha[ve] never been hurt by the bull hook, they are not going to react negatively to it at all. But, because there is a history of . . . the pain that they’ve experienced—that’s why the hook is effective.” Trial Tr. 59:17-62:15, ASPCA v. Feld Entmt., Inc., Civ. No. 03-2006 (D.D.C.), Feb. 23, 2009, p.m. (testimony of Carol Buckley) (Ex. 92)

(emphasis added).⁹ Elephants possess pain receptors close to the skin's surface, and handlers are trained to use the bullhook "on some of the most sensitive parts of the body such as the trunk, inside of the elbows, backs of the legs and behind the ears." Ros Clubb & Georgia Mason, *A Review of the Welfare of Zoo Elephants in Europe* 122 (2002).¹⁰

Moreover, "[a]versive handling, such as hitting and goad use, is known to cause various welfare problems in a range" of other species. *Id.* at 123. "The effects are thought to be the result of chronic stress," as "supported by observations of enhanced levels of plasma cortisol (a hormone associated with stress) following aversive handling, and also in the presence of people who have handled them aversively." *Id.* (internal citations omitted). "[E]ven mildly aversive stimuli can have long-term effects if they are sustained, frequent and/or unpredictable, which is true of the frequent taps and prods with [a bullhook] handlers use[] to 'cue' elephants. *Id.*

Therefore, the FWS cannot issue TZC the requested traveling exhibition certificates because the company cannot show that it would meet the requirements of the requested ESA permits because it cannot show that it will comply with the regulations' mandate that "[a]ny live wildlife possessed under a permit must be maintained under humane and healthful conditions." 50 C.F.R. § 13.41.

H. The FWS Must Deny the Applications Because TZC's Transport Conditions Do Not Comply with CITES' Transport Guidelines or the AWA.

The FWS is also prohibited from issuing the requested traveling exhibition certificates because TZC cannot make the required "showing of responsibility" that its transport conditions will comply with CITES' transport guidelines, *see* 50 C.F.R. § 23.56(a)(2) ("For export and re-export of live wildlife and plants, transport conditions must comply with CITES' Guidelines for transport and preparation for shipment of live wild animals and plants" (emphasis omitted)),

⁹ *Accord* Trial Tr. 37:13-37:23, *ASPCA v. Feld Entmt., Inc.*, Civ. No. 03-2006 (D.D.C.), Feb. 18, 2009, a.m. (testimony of Gail Laule, animal behavioral consultant) (Ex. 93) ("To an elephant who . . . has never experienced a bullhook, it's simply a neutral object, so if I'm going to use it as a tool to manage an elephant in a free contact system, I have to establish that tool and make it very clear to the elephant what this tool represents and what it does, and so what I have to do is teach that animal it means pain and discomfort"); Ros Clubb & Georgia Mason, *A Review of the Welfare of Zoo Elephants in Europe* 122 (2002) (stating that "[t]here is no question that [elephants] find" even a "softer blow" with a bullhook "aversive, as this underlies the very effectiveness of physical punishment").

¹⁰ *See also* Trial Tr. 37:5-37:8, *ASPCA v. Feld Entmt., Inc.*, Civ. No. 03-2006 (D.D.C.), Feb. 18, 2009, p.m. (testimony of Colleen Kinzley) ("all the cue points, the top of the shoulders, the top of the head, behind the leg, all of those points where the elephant would be moving away from that pressure or pain of the bullhook"); Trial Tr. 89:8-89:14, *ASPCA v. Feld Entmt., Inc.*, Civ. No. 03-2006 (D.D.C.), Feb. 18, 2009, a.m. (testimony of Gail Laule) (explaining to the court that the locations used to cue the elephants are the most sensitive locations on their bodies).

or the AWA, see Form 3-200-30, at 5 (“transport conditions must comply with . . . the Animal Welfare Act”); see also 50 C.F.R. § 13.48 (“Any person holding a permit under subchapter B and any person acting under authority of such permit must comply . . . with all applicable laws and regulations governing the permitted activity.”).

Section § IV.F.1, supra, details TZC’s long history of violating Guideline 2.3 of CITES’ transport guidelines, which mandates that “means of transport, containers and their fittings should be designed, constructed, maintained, and operated so as to . . . avoid unnecessary . . . injury, damage to health, suffering, [and] cruel treatment . . . and to ensure the safety of the animal.” CITES, Guidelines for the Non-Air Transport of Live Wild Animals and Plants § 2.3 (2013) (Ex. 94).

As §§ IV.F.1 and IV.G, supra, and n.10, infra, further detail, the company’s transport conditions violate the AWA regulations, including the following provisions:

- Section 2.131 of the AWA regulations mandates that “[h]andling of all animals shall be done as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort.” 9 C.F.R. § 2.131(b)(1).
- Section 3.137 mandates that the interior of enclosures used to transport animals “shall be free from any protrusions that could be injurious to the live animals contained therein.” Id. § 3.137(a)(2).
- Section 3.137 further states: “Primary enclosures used to transport live animals shall be large enough to ensure that each animal contained therein has sufficient space to turn about freely and to make normal postural adjustments.” Id. § 3.137(c).

Because TZC cannot make the required “showing of responsibility” that its transport conditions will comply with CITES’ transport guidelines or the AWA, the agency is barred from issuing the company the requested traveling exhibition certificates.

Moreover, as § IV.D notes, supra, the Applications fail to provide required material information regarding TZC’s transport conditions, including “[t]he type, size, and construction of any shipping container,” Form 3-200-30 (Question 8.c.i), and “[t]he arrangements for watering or otherwise caring for the wildlife during transport,” id. (Question 8.c.ii). The FWS is also prohibited from issuing TZC the requested traveling exhibition certificates because TZC cannot demonstrate responsibility without providing this information.

I. The Applications Must Be Denied Because TZC Cannot Make the Required Showing of Responsibility.

As previously discussed, 50 C.F.R. § 13.21(b)(3) requires that applicants “demonstrate . . . a showing of responsibility” before they may be issued a permit. *Id.* Demonstrating a “showing of responsibility” means demonstrating that TZC could meet the requirements of the traveling exhibition certificates. *See OSG Prods. Tankers LLC v. United States*, 82 Fed. Cl. 570, 575 (Fed. Cl. 2008) (in making a responsibility determination in the context of government contracts, the “contracting officer must satisfy herself that that plaintiff can meet the requirements of the contract”). TZC cannot make the required showing of responsibility because it has routinely knowingly exposed elephants and the public to TB, has a long history of violating the law, and has repeatedly ignored administrative requirements.

On May 24, 2011, the USDA cited the Two Tails Ranch, which has often housed elephants owned and used by TZC, *see* n. 4, *supra*, for allowing visitors to stand two feet from an elephant, Luke, who had tested positive for TB and had not completed an approved treatment protocol. USDA Inspection Reports at 3. The agency also cited the ranch for failing to “comply[] with any of the acceptable options outlined in the TB Guidelines” for treating the elephant, or submitting “an acceptable alternative plan . . . to the Eastern Regional Office.” *Id.* TZC itself was cited on February 16, 2011, because there were “[h]oles in the barrier between where Luke, [a] TB positive bull elephant, was housed at night and where 2 female elephants were housed. These holes [could have] allow[ed] contaminated air to enter the other side of the barn and present[ed] a danger to the health of the other elephants.” *Id.* at 4. On July 14, 2005, the USDA assessed TZC a civil penalty for attempting to import TB samples obtained from elephants touring in Canada into the United States from Canada without required permits. USDA, Settlement Agreement, Case No. MO05094-VS (Jan. 9, 2006) (Ex. 95). And three elephants traveling with TZC were quarantined in Ontario and removed from Canada on July 13, 2002, after the USDA alerted Canadian authorities that the elephants had been in prolonged contact with a TB-positive elephant. Chris Thompson, *Elephants with TB Deported*, WINDSOR STAR, Aug. 2, 2002 (Ex. 96). The elephants had been performing for Shrine circuses and giving rides to children. *Id.*¹¹

¹¹ Even if the FWS does grant the requested traveling exhibition certificates, it should require Marie and Schell, the elephants for whom the permits are sought, to undergo serological testing. In 2008, Jan, an elephant on tour with

TZC's long history of legal non-compliance further demonstrates that it cannot make the required showing of responsibility. When TZC shipped the TB samples without the required permits in 2005, it did so in flagrant disregard of the USDA repeatedly "alert[ing] both the circus officials and the Canadian veterinarian who collected and submitted the TB samples that a permit was required for the samples to be imported into the U.S." Memo to [Redacted], USDA, from [Redacted], USDA (Oct. 4, 2005) (Ex. 102). According to the USDA staff member in contact with TZC, "I told them on more than one occasion that they were not supposed to do that. . . . This seems to be a case where everyone involved has ignored all of our instructions and efforts to help." Email from [Redacted] to Ray M. Flynn, APHIS, USDA (Aug. 15, 2005) (Ex. 103). The USDA also noted that it "sound[ed] like [TZC had] sent samples in the past without a permit." Id. At the time, the agency also questioned whether TZC had lied about having a veterinarian collect the samples in Canada because the veterinarian, who the company identified, practiced in Florida. Id.

TZC, died of TB at the Two Tails Ranch. USDA, Zerbini Elephants TB Classification. Marie and Schell were on tour with Jan at the time and were placed under quarantine at the ranch by the State of Florida. Id. In 2005, Marie and Schell were also on a more frequent testing schedule for TB, mandated by the USDA, because they had been exposed to a TB-positive elephant. Aff. of Veterinary Medical Officer, USDA (Sept. 27, 2005) (Ex. 97). Although trunk washes were performed to test Marie and Schell for TB, id.; USDA, Zerbini Elephants TB Classification, this is insufficient. Elephants have been shown to shed TB intermittently, and because of this and the trunk wash culture's inconsistency and low sensitivity accuracy, experts have opined that trunk wash culture results provide little information as to whether the elephant is infected or not. E.g., Konstantin Lyashchenko et al., Field Application of Serodiagnostics to Identify Elephants with Tuberculosis Prior to Case Confirmation by Culture, 19 CLINICAL & VACCINE IMMUNOLOGY 1269 (2012) (Ex. 98); see also, e.g., Lyndsey Linke, et al., Evaluation of DNA Extraction Techniques for Detecting Mycobacterium Tuberculosis Complex Organisms in Asian Elephant Trunk Wash Samples, 49 JOURNAL OF CLINICAL MICROBIOLOGY 618 (2011) (Ex. 99) (TB may be transmitted prior to detection in a trunk wash); Konstantin Lyashchenko et al., TB in Elephants: Antibody Responses to Defined Antigens of M. Tuberculosis, Potential for Early Diagnosis and Monitoring of Treatment, 13 CLINICAL & VACCINE IMMUNOLOGY 722 (2006) (Ex. 100) (detection with a trunk wash is likely only in the late stages of the disease). In fact, Jan trunk washed negative for TB in December 2007, before testing TB-positive upon necropsy just three months later. USDA, Zerbini Elephants TB Classification. Therefore, the FWS should require Marie and Schell to undergo serological testing, which can diagnose TB up to eight years earlier than trunk wash tests. Lyashchenko et al., TB in Elephants, supra; Susan Mikota, DVM, A Brief History of TB in Elephants, presented at the Elephant TB Seminar in Kansas City, MO (Apr. 5-6, 2011) (Ex. 101); Lyashchenko et al., Field Application of Serodiagnostics, supra.

Requiring the elephants to undergo serological testing is particularly important because "[i]t is widely accepted that stress influences both susceptibility to TB and its severity once infection is established," Susan K. Mikota, Stress, Disease and Tuberculosis in Elephants, in AN ELEPHANT IN THE ROOM: THE SCIENCE AND WELL-BEING OF ELEPHANTS IN CAPTIVITY 74, 80 (Debra L. Forthman et al. eds., 2009), and transport is a recognized stressor. See, e.g., Trial Tr. 66:07-66:14, ASPCA v. Feld Entmt., Inc., Civ. No. 03-2006 (D.D.C.), Feb. 11, 2009, a.m. (testimony of Dr. Ros Clubb) ("[t]ransport and confinement is known to be quite stressful for a whole range of animals and is associated with stereotypic behavior," and when animals are transported or otherwise confined "for particularly long periods of time, it prevents expression of natural behaviors"); G. Iossa et al., Are Wild Animals Suited to a Travelling Circus Life?, 18 ANIMAL WELFARE 129, 129 (2009) ("Circus animals travel frequently and the associated forced movement, human handling, noise, trailer movement and confinement are important stressors."); id. at 133 ("confinement constitute[s] [a] source[] of stress to captive animals").

This was the third time that the USDA had assessed TZC a civil penalty for violating the AWA. IES, Report of Investigation, Case No. MO05094-VS, at 2 (Oct. 4, 2005) (Ex. 104). Moreover, as §§ IV.F.1 and IV.G detail, the agency has cited TZC and Two Tails Ranch, which has often been used to house elephants owned and used by TZC, see n. 4, supra, for AWA violations dozens of times.

TZC's longstanding failure to comply with administrative requirements also calls into serious question the company's ability and willingness to comply with the requirements of the requested traveling exhibition certificates. On March 26, 2014, for example, the FWS was forced to write to the circus informing it that since it had not furnished additional information requested almost four months earlier, on January 6, 2014, the agency would have to abandon the files unless it received information before May 3, 2014. Application at 19 (Letter from Anna Barry to Connie Watts, Tarzan Zerbini Circus (Mar. 26, 2014)). As late as April 9, 2014, the FWS was still requesting some of this information. Id. at 1 (Email from Anna Barry, Senior Biologist, Division of Management Authority, FWS, to Harriett & Larry Solheim, TZ Productions (Apr. 9, 2014)). The available evidence suggests that the agency still has not received all of the requested information.

Similarly, in 2002, TZC failed to pay a civil penalty assessed it by the USDA for more than five months, until the agency was forced to threaten that it would "take formal action" if the debt was not paid. Letter from Alan R. Christian, Director, Investigative and Enforcement Services, APHIS, USDA, to Tarzan Zerbini Circus (Apr. 29, 2002) (Ex. 105). The USDA noted that TZC had told the agency in February that the company would make payment in March, but, in fact, TZC did not pay the penalty until May 8. Id.

One of the conditions of the requested permits is that the permittee "maintain complete and accurate records," which must be "available for inspection." 50 C.F.R. § 13.46; see also id. § 13.47 (providing that permit holders must allow inspectors to "copy any permits, books, or records required to be kept" at "any reasonable hour"). But TZC has routinely failed to maintain or make available required records. See USDA Inspection Reports at 9 (acquisition-and-disposition records); id. at 12 (medical records and the written program of veterinary care were unavailable); id. at 18 (written program of veterinary care); id. at 21-22 (acquisition-and-disposition records and written program of veterinary care).

Because TZC has routinely and knowingly exposed elephants and the public to TB, has a long history of violating the law, and has repeatedly ignored administrative requirements, the company cannot make the required showing of responsibility, and the FWS must deny the Applications.

J. The FWS Should Not Grant the Requested Permits Because TZC Has Been Assessed a Civil Penalty Related to Importing and Exporting Endangered Species.

The FWS should also deny the Applications because TZC “has been assessed a civil penalty . . . relating to the activity for which the application is filed,” which “evidences a lack of responsibility.” 50 C.F.R. § 13.21(b)(1).

On July 14, 2005, the USDA assessed TZC a civil penalty for attempting to import TB samples obtained from elephants touring in Canada into the United States from Canada without required USDA permits. USDA, Settlement Agreement, Case No. MO05094-VS (Jan. 9, 2006) (Ex. X). This civil penalty clearly “relat[es] to the activity for which the [A]pplication[s] [were] filed”: importing and exporting endangered elephants used in the circus. It also plainly “evidences a lack of responsibility.” TZC flagrantly violated the law. The company shipped the samples without the required permits, despite the USDA repeatedly “alert[ing] both the circus officials and the Canadian veterinarian who collected and submitted the TB samples that a permit was required for the samples to be imported into the U.S.” Memo to [Redacted], USDA, from [Redacted], USDA (Oct. 4, 2005). According to the USDA staff member in contact with TZC, “I told them on more than one occasion that they were not supposed to do that. . . . This seems to be a case where everyone involved has ignored all of our instructions and efforts to help.” Email from [Redacted] to Ray M. Flynn, APHIS, USDA (Aug. 15, 2005).

Correspondingly, PETA has found no evidence that TZC obtained the ESA and CITES permits required to legally ship the TB samples from Canada. See Form 3-200-37 (Ex. 106) (application form for ESA permits to export or import biological samples and other parts and products); 50 C.F.R. § 23.13 (prohibiting the import and export of any specimen of a species listed in CITES Appendix I, II, or III); id. § 23.92 (requiring “[a]ll living or dead wildlife and plants in Appendix I, II, and III and all their readily recognizable parts, products, and derivatives” to “meet the requirements of CITES and this part”).

Thus, the Applications should be denied.

K. Should the FWS Decide to Issue the Permits Despite the Points Raised Here, It Cannot Issue Multi-Year Permits to TZC, and It Must Specifically Tailor the Permits.

TZC seeks blanket traveling exhibition certificates that would allow the company to take endangered species out of the country to go to unspecified locations, at unspecified times, for an unspecified period. The FWS routinely issues traveling exhibition certificates for a period of three years, without any attention to the specifics of the act(s) for which the permit is sought, allowing precisely what TZC seeks here—incredibly broad permission to take endangered species out of the country to go to unspecified locations, at unspecified times, for an unspecified period, at any time, and as many times as it wants during a three year period. It is fundamentally inconsistent with the ESA for the FWS to issue such broad permission.

Section 13.42 of the ESA regulations emphasizes that “[p]ermits are specific.” *Id.* (emphasis added). The regulation provides:

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.

Id. (emphases added). In promulgating this rule, the FWS explained:

Such specific conditions are needed to allow the Service to tailor individual permit authorizations to the applicant’s particular qualifications, and to ensure the continued conservation of the affected species. Without the ability to refine permit conditions, all permittees would have identical permit authorizations, no matter what experience, facilities, or other qualifications, they possess, and without regard for the unique conservation needs of the affected species.

Revisions to General Permit Procedures, 70 Fed. Reg. 18311, 18314 (Apr. 11, 2005) (emphasis added). And yet, by issuing blanket Travel Exhibition certificates, the agency is allowing all permittees to use endangered species for the same period of time, without regard to their “experience, facilities, or other qualifications”; “for the unique conservation needs of the affected species”; for the “times [or] dates” of the activity; or for the “location of the activity.” *Id.* Such blanket certificates are wholly inconsistent with “[t]he concept that permits are specifically issued for a particular activity.” *Id.* (emphasis added) (“The concept that permits are specifically

issued for a particular activity is not a new idea, and the new language [§ 13.42] only clarifies the current section.”).

Furthermore, the ESA authorizes the FWS to “permit, under such terms and conditions as [it] shall prescribe—any act otherwise prohibited by section 9 . . . to enhance the propagation or survival of the affected species.” Id. § 1539(a)(1)(A) (emphasis added). This plain language contemplates that § 10 permits will be granted only for a single, identifiable act of taking, exporting, re-importing, delivering, receiving, carrying, transporting, shipping, or selling endangered animals—not for any vague, unspecified series of activities with endangered wildlife. But issuing permits for vague, unspecified series of activities is precisely what the FWS allows when it issues traveling exhibition certificates without regard to the specific activity the permittee proposes, the specific species the permittee seeks to export, the specific country or countries the permittee seeks to visit, or the specific time period the permittee plans to spend outside of the country.

Issuing blanket exemptions without specific conditions is also inconsistent with the ESA’s policy of drawing exceptions to the take prohibitions as narrowly as possible. See, e.g., H.R. Report 93-412, at 156 (July 27, 1973) (safeguards in § 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)). If an applicant has applied to transport endangered Asian elephants out of the country to perform summer tour dates in 2014, the FWS should so limit the certificates. Likewise, it is improper for the FWS to issue an applicant certificates to take Asian elephants to Tokyo, Sao Paolo, and, when the applicant is only seeking permission to take the Asian elephants abroad for scheduled tour dates in Canada. To do so flies in the face of the ESA’s policy of “institutionalized caution.” Tenn. Valley Auth., 437 U.S. at 180. Congress desired to prohibit “[v]irtually all dealings with endangered species, including possession [and] transportation, . . . except in extremely narrow circumstances.” Id. (emphasis added). Tailoring traveling exhibition certificates to specific activities (e.g., transporting a specific animal to a specific country on a specific date or dates) ensures that permittees are exempted from the take prohibitions only to the extent necessary to enhance the propagation and survival of the affected species.

Furthermore, the issuance of blanket permits without specific information about how they might be used denies the public of information to which it is entitled. As previously discussed,

applicants are required to submit all “material information required . . . in connection with [its] application.” 50 C.F.R. § 13.21(b)(2). Where, when, and for how long and applicant intends to bring endangered animals is certainly material—it goes to the very heart of the activity for which the permit is sought. The public, moreover, has a right to all application materials, 16 U.S.C. § 1539(c), and is deprived of information about where, when, and for how long animals will specifically be used when FWS issues blanket permits.

For these reasons, even if the FWS were to decide to issue permits to TZC despite the various factors making such issuance unlawful, to avoid further running afoul of the ESA the agency must tailor the permits to the specific activity for which TZC seeks them and not issue blanket three-year permits.

V. Conclusion

For all of the reasons detailed above, PETA urges the FWS to deny TZC’s applications for the requested traveling exhibition certificates to (re-)export and (re-)import two endangered Asian elephants. Should the agency decide to issue the permits despite these objections, PETA hereby requests 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 DelciannaW@petaf.org or telephone to 202-309-4697.