Docket No. FWS–HQ–IA–2013–0091; 96300–1671–0000–R4

Elephant Protection Association Comment to the United States Fish and Wildlife Service's Proposed Revision to the African Elephant Rule under section 4(d) of the Endangered Species Act

Executive Summary

The Fish and Wildlife Service (FWS or the "Agency") proposed the subject rule change citing a sharp rise in poaching of African elephants due to an illegal ivory trade that allegedly threatens the species with extinction. Although FWS is well aware that practically all of the illegal ivory taken from Africa is flowing to China and other East Asian countries, the Agency has focused this regulation on creating a near total ban on the domestic ivory trade in the United States. This Proposed Rule Change should be withdrawn because

- The disconnect between the problem and the proposed solution is so great that it renders the Proposed Rule Change arbitrary and capricious under the Administrative Procedure Act
- FWS misconstrued key data in its Proposed Rule Change about the prevalence of illegally imported ivory in the U.S. market and the extent to which it could contribute to African elephant poaching, thereby violating the Federal Data Quality Act
- FWS is taking this action without any meaningful study of or regard for the enormous burdens and financial losses for Americans who own or trade items made with legally imported ivory, especially small businesses, while at the same time the agency acknowledges it is unable to state whether this Proposed Rule Change will save any African elephants, thereby violating the Regulatory Flexibility Act and Executive Orders 12866 & 13563
- The exceptions in the Proposed Rule Change are of no practical use and are therefore illusory due to the extraordinary documentation requirements and burden of proof placed on individuals who own or trade items made with legally imported ivory

- FWS, through this Proposed Rule Change, is inappropriately bootstrapping Director's Order 210 and its revocation of the Endangered Species Act's antique exemption to prohibit import of antique ivory in violation of the Administrative Procedure Act because the Agency failed to provide adequate notice and comment or otherwise follow prescribed procedures to promulgate required regulations to implement the African Elephant Conservation Act
- The Proposed Rule Change would result in unconstitutional taking of legally imported ivory under the 5th Amendment and would not fall within the *Andrus v. Allard* legal doctrine concerning takings due to the lack of any nexus between the purported rationale of the regulation (stopping African elephant poaching) and its proposed action (implementing a domestic ivory ban in the United States)
- The agency failed to consider less burdensome tools for achieving regulatory ends in accordance with SBREFA and Executive Orders 12866 & 13563

Ivory Ban is Arbitrary & Capricious under the Administrative Procedure Act

Poachers are killing large numbers of elephants in Africa. Criminals are smuggling hundreds of tons of illegal ivory to Asia, primarily China. These facts were very well documented at the 65th Meeting of the Convention on International Trade in Endangered Species ("CITES") Standing Committee in July 2014, especially SC65 Doc. 42.1. (Attachment 1). Just as well documented is that the United States is *not* a significant importer of illegally poached African elephant ivory.

SC65 Doc. 42.1 exhaustively reviewed African elephant poaching rates and the movement of illegal ivory since the year 2000. In painstaking detail, the report explained international data collected by

CITES programs Monitoring the Illegal Killing of Elephants ("MIKE"), TRAFFIC and Elephant Trade Information Systems ("ETIS").

The complex data collected about illegal ivory flows based on seizures of illegally trafficked ivory was summarized in three graphical representations beginning on page 31 of the report. Included below, these graphs show where illegal ivory shipments originated and the countries of destination for illegal ivory that were intercepted by law enforcement agencies worldwide. Volumes of ivory seized are represented by thicker lines depicting heavier flows between countries of origin and destination. Any country with at least one seizure of 500 kg or more of ivory was included in a graph. The report explains that "prior to 2009, an average of five and never more than seven large-scale ivory seizures occurred annually, but thereafter an average of 15, and as many as 21 large-scale ivory seizures, have taken place each year over the last five years." Atch 1 at 28. ETIS data indicates that the US accounts for, at most, less than 0.2% of the illegal ivory trade. The report included three graphs, to depict illegal ivory flows over three separate time periods. What these graphs show is that the United States has not had a significant inflow of illegal ivory since 2008.

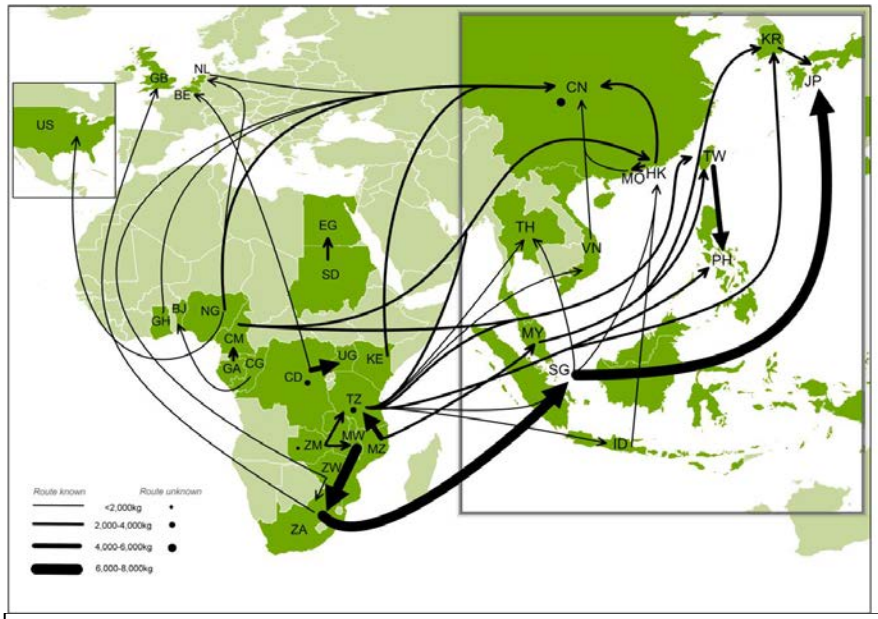

Figure 13. Trade routes for large-scale (>500kg) seizures of ivory, ***2000-2008*** *(ETIS, 03 Nov 2013)*

Figure 13 of the report covered a time period from 2000-2008. During this *nine* year period, the United States is reported to have illegally imported less than 2000 kg of ivory. The map of the U.S. is depicted in the upper left

corner of the graphic. The scale of the countries depicted was altered in part to reflect the significance of those countries to the illegal ivory trade.

Figure 14. Trade routes for large-scale (>500kg) seizures of ivory, ***2009-2011*** *(ETIS, 03 Nov 2013)*

Figure 14 of the report depicts trade from 2009 through 2011. During this *three* year period**, the United States and Europe literally fell off of the map** in terms of the illegal ivory trade. While there were no large scale ivory seizures in western countries, the map shows trade routes consolidating in Asia with most ivory destined for China and Hong Kong.

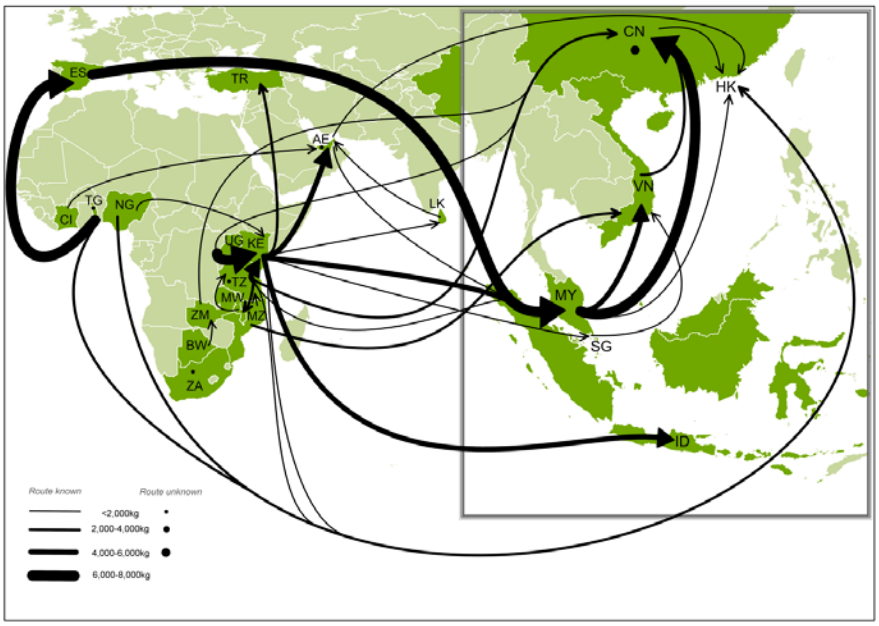

Figure 15. Trade routes for large-scale (>500kg) seizures of ivory, ***2012-2013*** *(ETIS, 03 Nov 2013)*

The third graphic, Figure 15, represents the period from 2012-2013. Again, for this *two* year period, the United States doesn't even show up on the map. Also, the trend of established trade routes continues to show

how the vast quantity of illegal ivory smuggled out of Africa is destined for China, Hong Kong, and other East Asian countries.

FWS is the agency in the United States that is responsible for reporting U.S. seizure data to CITES that was used in this report. As recently as September 2012, FWS concluded that "[s]ince the vast majority of seizures in the United States were small quantities, we do not believe that there is a significant illegal ivory trade into this country." FWS Fact Sheet, "U.S. Efforts to Control Illegal Elephant Ivory Trade and Internal Markets," September 2012 (Attachment 2).[1] International and domestic data confirm that of the tons of elephant tusks smuggled out of Africa from poached elephants, the overwhelming majority of it went to China, and almost none of it to the United States. This situation showed that **the laws against importing illegal ivory *into the United States* were working as intended to protect African elephants**.

Notwithstanding the success of existing law, FWS has proposed banning the domestic ivory trade by a near total ban on interstate commerce and severely restricting existing exemptions for antiques established by the Endangered Species Act. Without a reasonable basis for this action, this proposed revision to the rule is arbitrary and capricious, an abuse of discretion or otherwise not in accordance with the law under the Administrative Procedure Act ("APA").

FWS Misconstrued Data, Violating the Federal Data Quality Act

Exacerbating the violation of the APA, FWS misconstrued data in its analysis and support of the Proposed Rule, thereby violating the Federal Data Quality Act (also known as the Information Quality Act).

[1] FWS recently removed this Fact Sheet from its website.

Without seizure data to show that the United States was importing illegal ivory, FWS turned to published studies. Key among these studies were those published by Dr. Daniel Stiles. In those studies, Dr. Stiles published results of surveys he conducted in various countries, including the United States. FWS and Nongovernmental Organizations that are pressing for an ivory ban have so misrepresented Dr. Stiles' work that he felt compelled to submit a comment to this Proposed Rule Change to set the record straight. Attachment 3. On Proposed Rule Change p. 45159, FWS cites numbers without context from Dr. Stiles' 2008 report. In Stiles' comment, he points out that the report and table from which these numbers were taken said nothing about whether the items "are legal or illegal." To the contrary, the report found that most of the ivory they saw during their visit in the US probably were legally for sale. Atch 3, at 2-3. He went on to state "Relative to the size of the USA's population and economy, little raw ivory enters the country legally or illegally (based on seizures). From this perspective, *the U.S. ivory market does not appear a significant threat to elephant populations*." *Id.* at 3, emphasis in original.

Dr Stiles states in his comment that, based on his current research, "[t]here is currently no demand for new poached raw ivory in the U.S." *Id*. at 2. He further states that, based on recent research, he has found "that evidence was overwhelming that the increase in elephant poaching beginning in about 2007 was caused by East Asian speculator demand for raw ivory, not by consumer demand for worked ivory." *Id*. He also found that "there is a glut of estate raw tusks [in the United States] that sell for prices about 10-15% of those that can be obtained in China. No informed ivory trafficker would try to smuggle tusks into the U.S." *Id*.

What is most relevant is that FWS has had access to Dr. Stiles' research for years. If they wanted to confirm that ivory Dr. Stiles identified as possible fakes were actually fakes, FWS and the US government have had the means and authority under existing law to test ivory and investigate and prosecute the offenders. Examples of successful prosecutions cited in the Proposed Rule Change prove this to be so.

Unfortunately, FWS did not even contact Dr. Stiles for any of his supporting data to use for investigation or prosecution, so all FWS is left with are misleading statements and false innuendo. While not expressly in the Proposed Rule Change, similar false allegations have been made about links to terrorism and the illegal ivory trade.[2] The failures to accurately present data, objectively present scientific studies and follow up where there was ambiguity are gross violations of the Federal Data Quality Act that should result in withdrawal of this Proposed Rule Change. [3]

FWS Disregard of Costs vs. Benefits Violates Standards Established in the Small Business Regulatory Enforcement Fairness Act, Michigan v. EPA and Executive Orders 12866 & 13563

While the benefits of the Proposed Rule Change range from uncertain to counterproductive, the costs to individuals who own, collect, use or trade legally imported ivory are immediate, certain, and devastating. Indeed, the Agency's goal is a "near total ban on the domestic commercial trade of African ivory" in the United States. FWS Press Release (July 25, 2015) (*Available at* http://www.fws.gov/news/ShowNews.cfm?ID=C5979B33-5056-AF00-5B8634931E12B0C7) *See also* Testimony of Dan Ashe, Director of FWS (Feb. 26, 2014) (noting that "[t]he combined result of these

[2] FWS and NGOs have testified before Congress trying to link the ivory trade with terrorist threats against the United States. Unfortunately, their claims are based on anecdotes, speculation, and manipulation of others' ignorance about the geography and politics of different countries on the African continent. These views have been reflected in others' Comments on the Proposed Rule Change posted prior to the instant Comment. Reliable studies that put the issue in proper perspective include Maguier and Haenlein, "An Illusion of Complicity: Terrorism and the Illegal Ivory Trade in East Africa," Royal United Services Institute (September 2015) (Attachment 8) https://www.rusi.org/publications/occasionalpapers/ref:O56003613E4FFA/, and "The Environmental Crime Crisis: Threats to Sustainable Development from Illegal Exploitation and Trade in Wildlife and Forest Resources," a Rapid Response Assessment by UNEP and INTERPOL (2014).

[3] Although not expressed in the Proposed Rule Change, FWS, the State Department and various NGOs have frequently claimed at meetings of the Advisory Council on Wildlife Trafficking and other for a that a domestic ivory ban in the United States is necessary to set a "moral example" for China in hopes that China will stop smugglers from bringing poached ivory into China. The thought that punishing innocent Americans will inspire China to prosecute criminals is bastardized diplomacy, not a rational basis for a regulation under the Administrative Procedure Act.

administrative actions would be the virtual elimination of all commercial trade (import, export, and interstate and intrastate sale) in elephant ivory and rhino horn.")[4]; Testimony of Dan Ashe, Director of FWS, *International Wildlife Trafficking Threats to Conservation and National Security*, 113th Cong. 17 (Feb. 26, 2014) ("[W]e are using the full extent of our existing legal authority to stop virtually all commercial trade of elephant ivory . . . ."); Testimony of Robert G. Dreher, Associate Director of FWS, *The U.S. Fish and Wildlife Service's Plan to Implement a Ban on the Commercial Trade in Elephant Ivory*, 113th Cong. 7 (June 24, 2014) ("[W]e are using the full extent of our legal authority to implement a near complete ban on commercial trade in elephant ivory.")[5]; Letter from Dan Ashe to Senators Vitter and Gillibrand (Sept. 24, 2014) (noting that FWS "has taken steps towards implementing a near-complete ban on commercial trade in elephant ivory"). Unfortunately, FWS itself has failed to conduct a meaningful assessment of the economic impact of the Proposed Rule Change, and this failure violates the SBREFA, the recent standards the Supreme Court articulated in *Michigan v. EPA,* 576 U.S. _____ (2015), and Executive Orders 12866 & 13563.

FWS first publicly contemplated a domestic ivory ban at the Advisory Council for Wildlife Trafficking in December 2013. In over 18 months that transpired since then, the sum total of FWS's "assessment" was published alongside the Proposed Rule Change in a single document containing the Draft Environmental Assessment and Draft Economic Assessment for the proposed rule (Attachment 4).

The Small Business Regulatory Enforcement Fairness Act (SBREFA) requires proposed rules to "contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities." 5 U.S.C. § 603(c). FWS recognizes that nearly 30,000 small businesses would be

[4] *Available at* http://docs.house.gov/meetings/FA/FA00/20140226/101806/HHRG-113-FA00-Wstate-AsheD-20140226.pdf.

[5] *Available at* http://docs.house.gov/meetings/FA/FA00/20140226/101806/HHRG-113-FA00-Wstate-AsheD-20140226.pdf.

affected by the proposed rule, but then erroneously concludes that SBREFA would not apply because FWS does "not expect these changes to have a substantial impact on small entities." This is flatly inconsistent with FWS's assertions that the proposed rule amounts to a "near total ban." Nor is there adequate examination of the Agency's 30,000 small business impact estimate. Instead of studying the economic harm the Proposed Rule Change would cause owners, collectors and small businesses that trade legally imported ivory, FWS offered two straw-man alternatives along with the proposed rule, asked the public for comment, and quoted disjointed statistics that neither correlate nor support their findings or their certification that SBREFA does not apply.

FWS claims that "[t]he African elephant ivory market within the United States is not large enough to have major data collections or reporting requirements, resulting in limited data" Atch 4 at 51 and "[i]nformation on business profiles to determine the percent of revenues affected by the rule is *currently unavailable."* Proposed Rule Change at 45177, (emphasis added). Lack of *convenient* data, however, does not absolve the Agency from fulfilling its obligation under the law. As described in the IDG study *infra (Attachment 6)*, the so-called ivory market is extremely fractured because it is actually a part of many other markets. Instead of conducting a comprehensive study of these markets as the Agency has a responsibility to perform if no data is readily available, the Agency cited export statistics from 2007-2011 that blended antique with non-antique ivory. Because the declared value of all non-antique exports was 2.2%, the Agency adopted this number as the approximate loss in sales for the domestic ivory trade. Atch 4 at 60.

The Agency's lazy analysis of export and domestic markets is fatally flawed. First, the 2.2% figure for loss of exports completely disregards the practically impossible documentation requirements that FWS proposes to enforce with this rule (*See* discussion about Exceptions *infra*). Given the near impossibility of meeting documentation requirements, total loss for exports will be much closer to 100% than 2.2%

Second, the 2.2% export figure for exports bears no relationship to the domestic trade of legal ivory in the United States. Artisans, repair shops, and dealers of raw ivory that had been legally imported into this country decades ago will all be wiped out (David Warther statement, Attachment 5). All of these businesses depend on the abundant supply of legal raw ivory already in the U.S., and in modern commerce, interstate trade in order to reach a niche but nationwide market.

Although FWS did not conduct any meaningful study of costs of this regulation during the time it had to prepare it, others have. The International Development Group ("IDG"), a syndicated research and consultancy corporation established in 1984, conducted an expedited analysis entitled "The Antique Ivory Market in the United States."[6] Attachment 6. Due to time constraints FWS imposed through the comment period, IDG restricted its research to a narrow group of active collectors of antiques in the United States. Within its research's parameters, IDG estimated the Proposed Rule Change will impose an aggregate loss of $11.9 Billion to 475,000 American households likely to possess antique ivory objects. Atch 6 at 5. IDG acknowledges that total losses (all antiques, legal ivory less than 100 years old, etc.) attributable to the Proposed Rule Change could be much, much larger.

IDG included in its report's Appendix a report from Lark Mason, an internationally recognized antiques expert. Mr. Mason estimated 400,000,000 or more objects in the United States made of or with ivory would be adversely impacted by the Proposed Rule Change. *Id.* at 36. He estimated 5% of these objects enter into commerce each year, for a total of 20,000,000 objects consolidated into 1.5-2.5 million transactions each year. *Id.* Mason further estimated the overall value of ivory or other endangered species containing objects sold in New York State alone is likely in excess of $500,000,000

[6] This study was initiated after FWS published its Draft Economic Analysis along with the Proposed Rule Change on July 29, 2015, and had to be complete by FWS's deadline for comments, September 28, 2015. Various groups had requested a 30 day extension from FWS to prepare more detailed responses, but FWS did not grant those requests.

each year. *Id.* at 28. Overall, Mason estimates as many as 20-30 million people in the United States will be affected with losses in the tens of billions. *Id. at 37.*

Given these estimated losses, what is FWS's expected benefit to elephant conservation? In its Draft Environmental Assessment, FWS states **"[i]t is not possible to predict how many African elephants will be saved by revising the ESA 4(d) rule for the African elephant**. We have an obligation, however, to do what we can to minimize the role of the U.S. market in the global market for African elephant ivory, including by prohibiting commercial import and significantly restricting commercial export and sale of ivory within the United States." Atch 4 at 46. This is an admission that FWS cannot state with confidence that the Proposed Rule Change will save a single African elephant, but they *feel* an obligation to go ahead and ban ivory anyway.

Such outrageous disregard for the cost of regulations when compared to expected benefits is completely inconsistent with the Supreme Court's recent holding in *Michigan v. EPA*, 576 U.S. ___ (2015) (Remanding coal regulations to EPA for agency's failure to adequately consider costs when promulgating the regulations). In Section II of the Court's opinion, it stated:

> Federal administrative agencies are required to engage in "reasoned decisionmaking." *Allentown Mack Sales & Service, Inc.* v. *NLRB*, 522 U. S. 359, 374 (1998) (internal quotation marks omitted). "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." *Ibid.* It follows that agency action is lawful only if it rests "on a consideration of the relevant factors." *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43 (1983) (internal quotation marks omitted).

Like the EPA in *Michigan*, FWS gave no consideration to the costs that its regulation would impose on innocent Americans.

Similarly, FWS violated Executive Orders 12866 & 13563 in that ignoring costs necessarily means the agency failed to "use the best, most innovative and least burdensome tools for achieving regulatory ends." Violations of these Executive Orders are also more fully discussed *infra.*

Considering the enormous losses innocent Americans will suffer versus the purely speculative value to African elephants the Proposed Rule Change will impose, the Proposed Rule Change violates SBREFA, *Michigan v. EPA* and Executive Orders 12866 & 13563.

Proposed Exceptions Have No Practical Use and are Illusory Due To Impossible Documentation Requirements

FWS tries to compensate for their failure to do a meaningful economic study by proposing limited exceptions to their domestic ivory ban. Each of these exceptions is restricted by onerous broad, nonspecific documentation requirements that have never before been enforced, which means the documents sellers are required to produce never existed. Moreover, because FWS fails to specify which documents will fully satisfy the Agency, sellers lack the clear guidance they need to comply with the Proposed Rule Change required by the APA.

For example, to qualify for theproposed *de minimis* 200 gram exception, a seller would need to prove:

1. If the item is in the U.S., that the item was imported prior to January 18, 1990 or under a CITES pre-Convention certificate with no limitation on its commercial use;

2. If the item is outside the U.S., that the time was removed from the wild prior to February 26, 1976.

This exception is further narrowed to (1) items not made wholly or primarily of ivory, (2) items manufactured before the effective date of the final rule, and (3) items in which the ivory is a fixed component of a larger manufactured item and is not the primary source of the value of the item. While all of these criteria are arbitrary and without any scientific basis, the final criterion is void for vagueness in that there is no practical way to determine or document whether the value of an item that has been inlaid with ivory owes more than 50% of its value to the uniqueness and craftsmanship of the ivory work. The criteria would relate to documentation that would have been necessary to generate at the time of manufacture or import, or it would involve obtaining expensive expert opinions and third party research. These requirements are exceptionally burdensome given there was no incentive or need to generate or keep documentation in the past when trading ivory was perfectly legal. Regardless, FWS hoists this burden on Americans who own items that incorporate legally imported ivory, stripping them of all value. The same is true for the Proposed Rule Change's "Antiques exception."[7] Even if this documentation could be obtained, the cumulative effects of the various criteria create a maze of requirements few if any legal ivory owners could successfully navigate.

FWS Inappropriately Bootstraps Director's Order 210 Without Providing Notice and Comment for that Order

In the Proposed Rule Change, the Draft Environmental Assessment and the Draft Economic Assessment, FWS presumes the enforcement measures from Director's Order 210 carry the weight of the law. FWS states that it was appropriate for the Director to override the longstanding exemption in

[7] A full discussion on the burdens placed on owners of antiques is being presented in a comment from the Ivory Antiques Preservation Society as is incorporated here by reference.

agency regulations and the Endangered Species Act for importing antiques made with ivory through DO 210 because the African Elephant Conservation Act ("AfECA") has no exemption for antiques in its ban on ivory imports.

The truth is that FWS never implemented AfECA through proper rulemaking and regulation in accordance with the Administrative Procedure Act. The agency did not provide the requisite notice and comment period for implementing the law or for making a dramatic change in enforcement of the Endangered Species Act. Indeed, the agency admits it does not have authority to disregard the ESA exemption for antiques. Instead it argues that because AfECA was passed after the ESA that the ESA's exemption for antiques was superseded.

Even if FWS were correct in its analysis of the AfECA, and we believe it is not,[8] that does not excuse it from properly implementing the law according to the Administrative Procedure Act. The agency has

[8] The later enactment of the AfECA should be read harmoniously with the ESA exemption. *Watt v. Alaska*, 451 U.S. 259, 267 (1981) ("We must read the statutes to give effect to each if we can do so while preserving their sense and purpose."). This is particularly the case given that there is no legislative history indicating that the AfECA was contemplated to ban imports of ESA antiques. *See generally* H.R. Conf. Rep. 100-928 (1988); H.R. Rep. No. 100-827 (1988); S. Rep. No. 100-240 (1987).

To the extent that the AfECA could be read as being contemplated to ban imports of ESA antiques, that is because the AfECA was designed to impose a selective moratorium on a limited number of countries that did not comply with CITES. *See* H.R. Rep. No. 100-827 (1988) (noting that the AfECA declined to impose a "total ban" but rather would impose a "selective moratorium" which would "ensure that intermediate as well as producer nations would comply with CITES").

Indeed, a separate law that Congress did not pass, the African Elephant Poaching Act (H.R. 4849 (1988)) would have imposed such a total ban. Congress never intended that FWS find that every single country in the world failed to meet the AfECA's requirements as it did in 1989 – by definition, that would not be a "selective moratorium." This is evidenced by the fact that the AfECA included a provision that FWS was to conduct an assessment by 1991 as to whether the "importation of illegally harvest ivory has . . . been substantially stopped" and, if not, FWS was to recommend to Congress what further actions should be taken, "including the establishment of a complete moratorium on the importation of elephant ivory into the United States." 16 U.S.C. § 4243 (2000). FWS's mis-interpretation of the AfECA did not previously have a practical impact because FWS had interpreted the AfECA to incorporate the ESA's exemptions, an interpretation consistent with Congressional intent. Now that FWS has interpreted the AfECA to not incorporate the ESA's antique exemptions, however, this erroneous imposition of a total ban under the AfECA has practical importance.

Likewise, if Congress had intended AfECA to swallow the ESA antiques exemption, it would have said so. *See Whitman v. Am. Trucking Assocs*., 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms of ancillary provisions¬—it does not, one might say, hide elephants in mouseholes."). This draconian reinterpretation of the ESA antiques exemption circumvents

had 26 years to promulgate regulations for the AfECA since it was passed in 1989. FWS first publicly discussed a domestic ivory ban during an Advisory Council on Wildlife Trafficking meeting in December 2013, and the Director issued his order in February 2014. The Director quickly amended the order in May 2014, realizing the absurdity of enforcing the requirement to prove antiques had been imported through designated ports even for antiques imported to the United States before approved ports had been designated, but that action does not save the rest of DO 210's overbearing enforcement requirements. FWS's failure to properly implement the AfECA is not grounds for the agency to disregard the Administrative Procedure Act through diktat from the Agency's director in the form of DO 210.

DO 210 clearly establishes binding agency rules for enforcement of the African Elephant Conservation Act and the Endangered Species Act. Section 2(a) provides that FWS employees "*must* strictly implement and enforce all criteria under the ESA antique exemption." Section 2(b) provides that FWS employees "*must* strictly implement and enforce" the AfECA moratorium, and establishes five specific exemptions to that moratorium. Appendix 1, item 1 specifically addresses "[h]ow will the Service enforce the antique exception to the prohibitions of the ESA" and much of the rest of the Appendix sets forth FWS's position on the exception.

DO 210 thus is a legislative rule because (1) it substantively alters the scope of both the AfECA exemptions and the ESA antiques exemption, and (2) it purports to bind FWS and leaves enforcement officials with no discretion. *See Ass'n of Flight Attendants-CWA v. Huerta*, 785 F.3d 710, 716-17 (D.C. Cir. 2015) ("Agency actions that impose legally binding obligations or prohibitions on regulated parties or set[] forth legally binding requirements for a private party to obtain a permit or license are legislative

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Congress's clearly expressed intent and exceeds FWS's statutory authority. See *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014) ("When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' *Brown & Williamson*, 529 U.S., at 159, we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.' *Id*. at 160; *see also MCI Telecomm. Corp. v. Am. Tel. & Tel. Co*., 512 U.S. 218, 231 (1994); *Industrial Union Dept., AFL–CIO v. Am. Petroleum Inst*., 448 U.S. 607, 645–646 (1980) (plurality opinion).").

rules. . . . Agency action that creates new rights or imposes new obligations on regulated parties or narrowly limits administrative discretion constitutes a legislative rule. The language employed by the agency may play an important role in this analysis: a document that reads like an edict is likely to be binding, while one riddled with caveats is not." (citations omitted, alteration in original)); *Cmty. Nutrition Inst. v. FDA*, 818 F.2d 943, 946 (D.C. Cir. 1987) (per curiam) (noting that in assessing whether a document is a legislative rule, "courts are to give far greater weight to the language actually used by the agency; we have, for example, found decisive the choice between the words 'will' and 'may'" and noting that a key criterion is "whether a purported policy statement genuinely leaves the agency and its decisionmakers free to exercise discretion"); *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1014 (9th Cir. 1987) ("In contrast, to the extent that the directive narrowly limits administrative discretion or establishes a binding norm that so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criterion, it effectively replaces agency discretion with a new binding rule of substantive law." (quotation marks and emphasis omitted)). The Agency's failure to properly promulgate rules in DO 210 are not cured by the Proposed Rule Change wherein the Proposed Rule Change merely takes DO 210 for granted as established law.

Proposed Rule Change Results in Unconstitutional Takings Outside of Andrus v. Allard

FWS appears to have tailored their rule to fit within *Andrus v. Allard*, 444 U.S. 51 (1979). In order to avoid being declared an unconstitutional taking under the 5th Amendment, FWS left ivory owners with a right of possession, limited rights of exhibition, and the ability to transfer property to heirs. However, they severely restrict any right to commercial use of ivory with the express purpose of imposing a near total ban on the domestic ivory trade in the United States.

FWS's attempt to avoid an unconstitutional taking fails, however, because their unreasonable restrictions placed on legal ivory in America are not reasonably calculated to achieve the goal of reducing elephant poaching in Africa or reducing the demand for illegal ivory which is for all practical purposes in China and East Asia. *Andrus* acknowledged that "[t]he Takings Clause . . . preserves governmental power to regulate, subject only to the dictates of justice and fairness." *Andrus* at 65. Upholding the deprivation of commercial use of eagle feathers, the court acknowledged the burden placed on people who owned artifacts that predated implementing law, stating "*within limits*, [emphasis added] that is a burden borne to secure the advantage of living and doing business in a civilized community." *Andrus* at 67.

In this case, FWS fails to fit within even the broad standards articulated in *Andrus*. As discussed above, FWS admitted in its Draft Environmental Assessment that **"[i]t is not possible to predict how many African elephants will be saved by revising the ESA 4(d) rule for the African elephant**. We have an obligation, however, to do what we can to minimize the role of the U.S. market in the global market for African elephant ivory, including by prohibiting commercial import and significantly restricting commercial export and sale of ivory within the United States." Shockingly, FWS admits that it cannot state with any confidence that a single African elephant will be saved by implementing this rule. Even so, they stubbornly press on with their domestic ivory ban to "minimize the role of the U.S. in the global market for African elephant ivory" notwithstanding the fact that the U.S. role in that market is already not significant. (Atch 4 at 46) This arbitrary and capricious regulatory behavior violates "the dictates of justice and fairness" that would allow the government to seize property without just compensation. It violates the Constitutional limits within which a government could force innocent citizens to individually bear the costs of regulations. Without anything more than a hope that a single elephant might be saved, this regulation falls outside of *Andrus's* protection and would require FWS to compensate those it injures.

FWS Failed to Consider Less Burdensome Tools for Achieving Regulatory Ends In Accordance With Executive Orders 12866 and 13563

As stated in the Proposed Rule Change, Executive Orders 12866 and 13563 call for "improvements in the Nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends." PRC at 45175. The Proposed Rule Change fails each of these tests.

- It fails to "promote predictability" by failing to state clear, specific and achievable criteria for what the agency would accept for documentation for ivory that fits within the Proposed Rule Change's exceptions
- It fails to "reduce uncertainty" by relieving the government of proving an ivory item's illegality and shifting the burden to the public for proving that ivory is legal without providing the public with adequate notice of what will satisfy that burden of proof
- It utterly fails "to use the best, most innovative and least burdensome tools for achieving regulatory ends" in that it never even addresses obvious alternatives to reducing African elephant poaching and smuggling illegal ivory to China other than banning legally imported ivory in the United States.

The Proposed Rule Change's misrepresentations and omissions of abundant and reliable data about the Asian market for illegal ivory falsely created a myopic view of the U.S. ivory market which made it easy for FWS to ignore obvious alternatives to a domestic ivory ban that would be much more effective at saving elephants without depriving innocent Americans of property rights. Among the alternatives to an ivory ban that FWS failed to evaluate or expressly consider in the Proposed Rule Change:

1. Increasing support for conservation and local community programs in Africa that incentivize communities that live with elephants to identify and fight poachers;
2. Increasing support for local African law enforcement to prevent, capture and prosecute poachers;
3. Enforcing Pelly Amendment sanctions against China, other Asian and African countries for illegally importing poached ivory in violation of international law;
4. Bolstering embassy support in African range nations as well as nations that illegally import mass quantities of poached ivory to increase diplomatic pressure on affected countries; and
5. Rewarding African countries with strong and effective elephant conservation programs by allowing an international trade of ivory from those countries whose proceeds could be used to reinforce their conservation programs, provide economic incentives to rural communities to conserve elephants (e.g. CAMPFIRE program), and which could act as models for other range countries to emulate.

Indeed, the final of the alternatives was the original goal of the CITES treaty, and most of these alternatives find support in Congress in the form of the African Elephant Conservation and Legal Ivory Protection Act of 2015.

The alternatives directed at supporting African conservation and enforcement programs have already demonstrably reduced poaching. As with prior CITES reports, the most recent report from MIKE, *Update on Elephant Poaching Trends in Africa to 31 December 2014*[9] (Attachment 7), shows that elephant poaching peaked in 2011 and has been on the decline since. It also shows that poaching rates are below healthy natural replacement rates for elephants in Eastern and Southern Africa – areas where elephants are most numerous and effective conservation programs are in place. The poaching decline

[9] Report can be found at https://cites.org/sites/default/files/i/news/2015/WWD-PR-Annex_MIKE_trend_update_2014_new.pdf

took place well before the first time a domestic ivory ban was even discussed in December 2013. Moreover, these alternatives would likely cost significantly less than the cost to the Agency of implementing and enforcing the rule against Americans who possess decades-old legally imported pre-ban ivory. Regardless, it is the Agency's responsibility under the law to consider these alternatives and evaluate them against the actions in the Proposed Rule Change.

Conclusion

Elephant poaching is a serious problem, and it is proper for the United States to be concerned about it. Dealing with the problem, though, requires a sober look at the causes, and the root causes are in Africa and Asia. The Proposed Rule Change has no rational relationship to elephant poaching and illegal ivory smuggling. A domestic ivory ban in the United States is presented as a politically correct solution to a difficult diplomatic conservation problem, and it unlawfully punishes innocent Americans while diverting attention and resources from actual poachers and smugglers half a world away. Compounding the problem, the Proposed Rule Change threatens to destroy antiques and other culturally significant items by undermining their markets and rendering them worthless. Under this rule, neither valuable ivory objects nor elephants will be preserved for future generations, so this Proposed Rule Change should be withdrawn.

Respectfully Submitted,

Robert A. Mitchell, Jr.

Elephant Protection Association

Index of Attachments

1 *Elephant Conservation, Illegal Killing and Ivory Trade*, Convention on International Trade in Endangered Species of Wild Fauna and Flora, 65th Meeting of the Standing Committee, Geneva, Switzerland, Document 42.1. (7-11 July 2014).

2 U.S. Fish and Wildlife Service Fact Sheet, *U.S. Efforts to Control Illegal Elephant Ivory Trade and Internal Markets,* September 2012. (Previously found at http://www.fws.gov/international)

3. Daniel Stiles, Ph.D., Comment for Docket FWS-HQ-IA-2013-0091-0415 submitted 24 August 2015.

4. U.S. Fish and Wildlife Service, *DRAFT Environmental Assessment: Revisions to the African elephant rule under section 4(d) of the Endangered Species Act (50 CFR 17.40(e))*, Document ID FWS-HQ-IA-2013-0091-0002 (29 July 2015).

5. David Warther, Comment Submitted in Two Parts, 27 September 2015 (Document ID not available at time of this submission).

6. Anton Bruehl, *The Antique Ivory Market in the United States*, International Development Group, Comment Submitted 28 September 2015 (Document ID not available at time of this submission).

7. Monitoring the Illegal Killing of Elephants ("MIKE"), *Update on Elephant Poaching Trends in Africa to 31 December 2014*, https://cites.org/sites/default/files/i/news/2015/WWD-PR-Annex_MIKE_trend_update_2014_new.pdf (undated).

8. Maguier and Haenlein, "An Illusion of Complicity: Terrorism and the Illegal Ivory Trade in East Africa," Royal United Services Institute (September 2015). https://www.rusi.org/publications/occasionalpapers/ref:O56003613E4FFA/