

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CENTER FOR BIOLOGICAL DIVERSITY *et al.*,

Plaintiffs,

v.

RYAN ZINKE, *et al.*,

Federal Defendants,

and

SAFARI CLUB INTERNATIONAL, *et al.*,

Defendant-Intervenors.

No. 1:17-cv-02504 (RCL)

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56(a) and Local Civil Procedure Rule 7, Plaintiffs the Center for Biological Diversity, Humane Society International, The Humane Society of the United States, Natural Resources Defense Council, Born Free USA, and Ian Michler hereby move for summary judgment on Claims Three and Six of their Amended Complaint (Doc. No. 20), which assert that Federal Defendants' issuance of enhancement findings authorizing the import of elephant and lion hunting trophies from Zimbabwe failed to comply with the rulemaking procedures required by the Administrative Procedure Act, 5 U.S.C. § 533. The U.S. Court of Appeals for the D.C. Circuit recently concluded that the two previous enhancement findings prohibiting the import of elephant trophies from Zimbabwe were rules requiring notice and comment in *Safari Club Int'l v. Zinke*, 878 F.3d 316 (D.C. Cir. 2017). This Motion for Partial Summary Judgment is supported by the accompanying memorandum of points and authorities, statement of undisputed facts, and declarations. For the reasons stated therein, Plaintiffs respectfully request that this motion be granted.

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**MEMORANDUM IN SUPPORT OF PLAINTIFFS' PARTIAL MOTION FOR
SUMMARY JUDGMENT**

I. INTRODUCTION

This case challenges the U.S. Fish and Wildlife Service's ("FWS" or "Service") 2017 enhancement findings authorizing the import of hunting trophies of imperiled elephants and lions from Zimbabwe under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544. *See* Exhibit A to Declaration of Anna Frostic (Attachment 1) (FWS, Enhancement Finding for African Elephants Taken as Sport-hunted Trophies in Zimbabwe On or After January 21, 2016 and On or Before December 31, 2018 (Nov. 16, 2017)) (hereafter "Elephant Finding"); Exhibit B to Declaration of Anna Frostic (FWS, Enhancement Finding for Lions Taken as Sport-hunted Trophies in Zimbabwe during 2016, 2017 and 2018 (Oct. 11, 2017)) (hereafter "Lion Finding"). As described in Plaintiffs' amended complaint, the Service's findings that elephants and lions in Zimbabwe are sufficiently abundant and well-managed to warrant these threatened species being shot, stuffed, and imported into our country are arbitrary and capricious. However, this Court need not delve into these merits questions to dispose of this case. Instead, the Court need only find that when the Service makes broad pronouncements on the status of a species and its management by a range country that bind the agency's subsequent permitting decisions, the agency must follow the requisite public notice and comment procedure.

Here, the Service wholly failed to follow the rulemaking process. Instead, in finalizing its decision that elephant populations' status, their management, and conditions in Zimbabwe (during a concurrent coup d'état) warranted a 180-degree turn from the agency's previous year's ban on Zimbabwe elephant trophy imports, the agency provided no opportunity for comment and only notice of the agency's final decision. Similarly, in adopting a rule authorizing the import of lion trophies from Zimbabwe, the Service failed to provide any public notice or opportunity to

comment. The D.C. Circuit has explicitly held that such findings authorizing the import of hunting trophies of species threatened with extinction – called “enhancement findings” – are rules, which must be adopted using the public notice and comment process laid out in Section 553 of the Administrative Procedure Act (“APA”), 5 U.S.C. § 553. *Safari Club Int’l v. Zinke*, 878 F.3d 316, 331-34 (D.C. Cir. 2017). Given this decision, the definition of “rule” in the APA (5 U.S.C. § 551(4)), and the criteria FWS uses for making enhancement findings, the challenged enhancement findings here are likewise rules that were adopted without the process necessitated by the APA. Therefore, Plaintiffs respectfully request that this Court grant their partial motion for summary judgment on their notice and comment claims contained in their third and sixth claims for relief in their Amended Complaint (ECF No. 20), set aside and remand the challenged findings to FWS, and impose the conditions in Plaintiffs’ proposed order.

II. BACKGROUND

A. The Endangered Species Act

The Endangered Species Act, 16 U.S.C. §§ 1531-1544, is the most comprehensive legislation for the preservation of threatened and endangered species ever enacted by any nation. In passing the Act, Congress found that different species around the world “have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation” and that “other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction.” 16 U.S.C. § 1531(a)(1)-(2). In the ESA “the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction” *Id.* § 1531(a)(4).

Before a species receives any protection under the ESA, it must be listed as either “threatened” or “endangered.” 16 U.S.C. § 1533(a), (c). An endangered species is “in danger of extinction throughout all or a significant portion of its range” *Id.* § 1532(6). A threatened species is “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(20). Congress’ inclusion of two categories for listing species (threatened and endangered) “provide[s] incremental protection to species in varying degrees of danger” *Def. of Wildlife v. Norton*, 258 F.3d 1136, 1143 (9th Cir. 2001) (citations omitted).

The ESA protects endangered species located outside of the United States by prohibiting their importation without a permit. 16 U.S.C. § 1538(a)(1)(A). Indeed, all the prohibitions in Section 9 of the ESA, including the prohibition on “take” (i.e., killing or harming) of species as well as the prohibition on import or export, apply automatically to endangered species. *Id.* § 1538(a)(1). To conduct any otherwise prohibited activity, a non-governmental entity, such as a trophy hunter, must obtain a permit under Section 10 of the ESA and demonstrate that the activity will “enhance the propagation or survival of the affected species” *Id.* § 1539(a)(1)(A).

For threatened species, Section 4(d) of the ESA provides that the Service must issue regulations that are “necessary and advisable” to conserve threatened species and may extend the statutory protections afforded to endangered species to threatened species. 16 U.S.C. § 1533(d); *Sweet Home Chapter of Cmty. for a Great Or. v. Babbitt*, 1 F.3d 1, 7-8 (D.C. Cir. 1993) *rev’d on other grounds*, 515 U.S. 687 (1995) (“According to [FWS’s] interpretation, the two sentences of § 1533(d) represent separate grants of authority”); *see also Safari Club Int’l*, 878 F.3d at 322.

Both African elephants and African lions in Zimbabwe are currently listed as “threatened species.” 50 C.F.R. § 17.11.¹ For each species, FWS adopted a species-specific regulation pursuant to Section 4(d) of the ESA, called a “4(d) rule.” *Id.* § 17.40(e), (r). Both the elephant and lion 4(d) rules apply all the prohibitions and provisions of 50 C.F.R. §§ 17.31 and 17.32 to each species. *Id.* § 17.40(e), (r)(1). The 2016 elephant 4(d) rule allows the import of trophies when certain criteria are met including, and relevant here, that “[a] determination is made that the killing of the trophy animal will enhance the survival of the species and the trophy is accompanied by a threatened species permit issued under § 17.32.” *Id.* § 17.40(e)(6)(i). The lion 4(d) rule also specifies that “[a] threatened species import permit under § 17.32 is required for the importation of all specimens of *Panthera leo melanochaita*,” *id.* § 17.40(r)(2), and before issuing such a permit, FWS must make a determination of whether the killing of the lion will enhance the survival of the species in the wild. 80 Fed. Reg. 80,000, 80,045 (Dec. 23, 2015).²

The legislative history of the ESA clarifies that the issuance of enhancement permits was intended to be extremely limited and that it would only allow an otherwise strictly prohibited activity where necessary to benefit the species in the wild. *See, e.g.*, H.R. Rep. No. 93-412, 93d Cong., 1st Sess. 17 (1973), *reprinted in* A Legislative History of the Endangered Species Act of 1973, at 156, 97th Cong., 2d Sess. (February 1982) (“any such activities to encourage

¹ In listing lions under the ESA, FWS recognized two subspecies and listed one subspecies, *Panthera leo leo*, as endangered and the other subspecies, *Panthera leo melanochaita*, as threatened. 80 Fed. Reg. 80,000, 80,002 (Dec. 23, 2015). The subspecies list as threatened is found in Zimbabwe. *Id.* at 80,004. In March 2016, FWS made a finding that listing African elephants as endangered may be warranted, and the species’ status is currently under review. 81 Fed. Reg. 14,058 (Mar. 16, 2016).

² Aside from African elephants and lions, the only other threatened species that FWS authorizes trophy imports of are African leopards, argali, and markhor. 50 C.F.R. § 17.40(f), (j), (n). There are only three endangered species hunted for trophies for which the Service has made enhancement findings – black rhinoceros from Namibia and bontebok and cape mountain zebra from South Africa (although Plaintiffs oppose the issuance of such permits as these enhancement findings are not based on the best available science).

propagation or survival may take place in captivity, in a controlled habitat or even in an uncontrolled habitat so long as this is found to provide the most practicable and realistic opportunity to encourage the development of the species concerned”). The legislative history further explains that such activities “might even, in extraordinary circumstances, include the power to cull excess members of a species where the carrying capacity of its environment is in danger of being overwhelmed.” *Id.*

To make required enhancement findings under the ESA for trophy imports, FWS has clarified that it takes a holistic look at a country’s management of that species. First, under its own permitting regulations, FWS considers factors such as: “[t]he probable direct and indirect effect which issuing the permit would have on the wild populations of the wildlife sought to be covered by the permit;” “[w]hether the permit, if issued, would in any way, directly or indirectly, conflict with any known program intended to enhance the survival probabilities of the population from which the wildlife sought to be covered by the permit was or would be removed;” and “[w]hether the purpose for which the permit is required would be likely to reduce the threat of extinction facing the species of wildlife sought to be covered by the permit.” 50 C.F.R. § 17.22(a)(2). These same criteria generally apply to threatened species as well as endangered species. *Id.* § 17.32(a)(2).

A “positive” countrywide enhancement determination means that any African elephant or lion trophy killed in the relevant country during the applicable period presumptively meets the ESA’s enhancement requirement. 82 Fed. Reg. 54,405, 54,405 (Nov. 17, 2017). A “negative” countrywide enhancement determination indefinitely suspends the Service’s issuance of import permits for African elephant or lion trophies killed in the relevant country after the findings’ effective dates. *See* 80 Fed. Reg. 42,524, 42,524 (July 17, 2015). In adopting the current 4(d)

rules for lions and elephants, FWS explained its country-wide approach to making these findings. In adopting the lion 4(d) rule, the agency noted:

[W]hen making a determination of whether an otherwise prohibited activity enhances the propagation or survival of *P. l. melanochaita*, the Service will examine the *overall conservation and management of the subspecies in the country where the specimen originated* and whether that management of the subspecies addresses the threats to the subspecies (i.e., that it is based on sound scientific principles and that the management program is actively addressing the current and longer term threats to the subspecies). In that review, we will evaluate whether the import contributes to the overall conservation of the species by considering whether the biological, social, and economic aspects of a program from which the specimen was obtained provide a net benefit to the subspecies and its ecosystem.

80 Fed. Reg. 80,000, 80,045 (Dec. 23, 2015) (emphasis added). Likewise, in proposing revisions to the African elephant 4(d) rule in 2015, FWS explained that “[t]he standards for making enhancement findings *for each African elephant range country* under the current 4(d) rule are the same as the standards for making findings for import permits for sport-hunted trophies of other species classified as threatened, where such findings are required.” 80 Fed. Reg. at 45,165 (emphasis added).

Moreover, FWS has indicated it will follow the factors established by the scientific experts at the International Union for Conservation of Nature for evaluating the sustainability of trophy hunting, which the agency noted in the preamble to the African lion 4(d) rule include: (a) biological sustainability (ensuring hunting does not contribute to the species’ decline or facilitate poaching or illegal trade); (b) net conservation benefit (including scientifically based quotas and programs to create incentives to reduce pressure on target species); (c) socio-economic-cultural benefit (ensuring benefits are equitable among local residents); (d) adaptive management (planning, monitoring, and reporting to ensure quotas, sex/age restrictions, and hunting programs are based on the best available science); and (e) accountable and effective governance (taking all

necessary steps to eliminate corruption and ensure compliance). 80 Fed. Reg. at 80,045 (quoting IUCN Species Survival Commission (SSC) Guiding Principles on Trophy Hunting as a Tool for Creating Conservation Incentives, Ver. 1.0 2012 (“IUCN SSC”). A year later, FWS reiterated its intent to follow the IUCN guiding principles in adopting a revised African elephant 4(d) rule. *See* 81 Fed. Reg. 36,387, 36,394 (June 6, 2016).

B. The Administrative Procedure Act

The Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706, defines a rule as “the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy” 5 U.S.C. § 551(4). The APA defines adjudication as the “agency process for the formulation of an order” and an order is “the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing.” *Id.* § 551(7), (6).

When an agency issues a rule, Section 553 of the APA specifies the rulemaking procedures including that the agency “must publish a general notice of proposed rulemaking in the Federal Register; give an opportunity for interested persons to participate in the rulemaking through submission of written data, views, or arguments; and issue publication of a concise general statement of the rule’s basis and purpose.” *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 95 (D.C. Cir. 2002); *see also FBME Bank Ltd. v. Lew*, 209 F. Supp. 3d 299, 314 (D.D.C. 2016) (APA notice and comment rulemaking procedures are required for rules unless the statutory scheme requires more formal hearing procedures).

C. The Service’s Enhancement Findings

In 2014 (and extended indefinitely in 2015), the Service issued a negative enhancement finding for elephant trophies killed in Zimbabwe. *See* 79 Fed. Reg. 44,459 (July 31, 2014); 80

Fed. Reg. 42,524 (July 17, 2015). The Service's negative enhancement finding meant that trophy hunters could not receive permits to import any elephant trophies killed in Zimbabwe after the finding's effective date. *See* 80 Fed. Reg. at 42,524. As part of its negative enhancement determinations, the Service considered the status of elephants in Zimbabwe and the current poaching crisis, Zimbabwe's conservation programs (or lack thereof), and expressed concerns that corruption and a lack of funding prevented Zimbabwe from effectively managing its elephant populations. Although the Service published notice of such decisions in the Federal Register, the Service did not follow the APA's notice and comment requirements before issuing the enhancement findings. *See Safari Club Int'l*, 878 F.3d at 331.

In 2017, the Service reversed course and issued positive enhancement findings for elephant and lion trophies killed in in Zimbabwe. Under the Lion Finding, all lion trophies killed in Zimbabwe "during the 2016, 2017, and 2018 calendar years meet the [ESA's] enhancement criteria." Lion Finding at 1. Similarly, the Elephant Finding states that all applications to import elephant trophies killed between January 21, 2016, and December 31, 2018, would "be considered to have met the [ESA's] enhancement requirement." Elephant Finding at 1. As it did in issuing negative enhancement findings, the Service purported to evaluate Zimbabwe's elephant and lion populations and its conservation programs. Elephant Finding at 10-18; Lion Finding at 8-12. Although many of problems the Service had previously identified with Zimbabwe's wildlife management programs remained the same on the ground, the Service nevertheless concluded that trophy hunting enhanced African elephants' and lions' survival. Elephant Finding at 1; Lion Finding at 1. The Service did not follow the APA's notice and comment requirements in issuing these findings.

Prior to the Service's issuance of the 2017 enhancement findings, hunting groups challenged the 2014 and 2015 negative enhancement findings in this Court. Among other issues, the hunting groups argued that the 2014 and 2015 negative enhancement findings were rules subject to the APA's notice and comment requirements. On December 22, 2017, the D.C. Circuit agreed. *Safari Club Int'l*, 878 F.3d at 336.

III. STANDARD OF REVIEW

The Service's ESA decisions challenged here are reviewed under the APA, which requires courts to hold unlawful and set aside federal agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or that were adopted "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D). Although summary judgment in APA actions is ordinarily granted on the basis of an administrative record filed pursuant to 5 U.S.C. § 706, summary judgment motions may properly be granted before a record is certified on matters, as here, that "are limited to legal issues that do not depend on the administrative record." *California v. U.S. Bureau of Land Mgmt.*, Nos. 17-cv-03804-EDL, 17-cv-3885-EDL, 2017 WL 4416409, *5 (N.D. Cal. Oct 4, 2017); *see also Animal Legal Def. Fund v. U.S. Dep't. of Agric.*, 789 F.3d 1206, 1224 n.13 (11th Cir. 2015) (summary judgment issued without administrative record where "there is no factual dispute"); *People for the Ethical Treatment of Animals v. U.S. Dep't of Agric.*, 194 F. Supp. 3d 404, 409 (E.D.N.C. 2016) ("In APA cases... a court need not wait for an administrative record to be compiled to decide a pure question of law"); Fed. R. Civ. P. 56(b) (stating a party may file for summary judgment "at any time until 30 days after the close of all discovery").

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IV. JURISDICTION

A. The Organizational Plaintiffs Have Standing to Bring this Case

Plaintiffs Center for Biological Diversity, The Humane Society of the United States, Natural Resources Defense Council, and Born Free USA (“Organizational Plaintiffs”)³ are non-profit organizations that bring this suit on behalf of their members. In order to have standing, Organizational Plaintiffs must establish (1) that at least one of its “members would . . . have standing to sue in [her] own right,” (2) that “the interests at stake are germane to the organization’s purpose[s],” and (3) that “neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). Only one plaintiff needs to prove standing when the relief requested and arguments made among the plaintiffs is consistent. *See, e.g., Safari Club International v. Zinke*, Case 1:14-cv-00670-RCL, Doc. Nos. 121 & 124, Minute Order (May 30, 2017) (D.D.C.) (this Court granted intervention as of right in related case to The Humane Society of the United States, Humane Society International, and Center for Biological Diversity); *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996); *see also Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981); *Mass. v. EPA*, 549 U.S. 497, 518 (2007).

The latter two elements of associational standing are easily met in this case. Protecting wildlife, including African elephants and lions in Zimbabwe, from population decline is germane to Organizational Plaintiffs’ missions. *See* Trujillo Decl. ¶¶ 7-8 (Attachment 2); Cummings Decl. ¶¶ 4-13 (Attachment 3); Delsink Decl. ¶¶ 3-5 (Attachment 4); Travers Decl. ¶¶ 6-8 (Attachment 5). Moreover, Organizational Plaintiffs’ members need not participate in this litigation because

³ Humane Society International has an organizational interest in protecting elephants and lions in Zimbabwe and the decision to allow the import of trophies from Zimbabwe harms these organizational interests. Delsink Decl. ¶¶ 6-18 (Attachment 4).

none of the claims asserted or the relief sought requires individualized proof. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 344 (1977).

Additionally, Organizational Plaintiffs' members have standing to bring this action in their own right because (1) they suffered an injury in fact that is both "concrete and particularized"; and "actual or imminent"; (2) their injury "is fairly traceable" to Defendants' conduct; and (3) "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth*, 528 U.S. at 180-181 (quoting *Lujan v. Defs. of Wildlife*, 503 U.S. 555, 560-61 (1992)).

Defendants' failure to follow the APA's notice and comment requirements for the 2017 enhancement findings is a procedural injury that harms the concrete interests of Organizational Plaintiffs' members ("Members"). The enjoyment of wild animals is a "classic aesthetic interest[], which ha[s] always enjoyed protection under standing analysis." *Humane Soc'y of the U.S. v. Hodel*, 840 F.2d 45, 52 (D.C. Cir. 1988). Organizational Plaintiffs' members have recreational, aesthetic, scientific, and professional interests in viewing African lions and elephants in Zimbabwe and trans-boundary parks. For example, some Members enjoy photographing and viewing African elephants and lions and have concrete plans to visit Zimbabwe this year. *See* Hartl Decl. ¶¶ 6-10 (Attachment 6); Delsink Decl. ¶¶ 12-17 (Attachment 4). Other Members visit Zimbabwe and trans-boundary parks to view African elephants and lions through their work – including filming wildlife documentaries and relocating animals to protected habitat – and intend to do so in the future. *See* Carpenter Decl. ¶¶ 4-6 (Attachment 7); Travers Decl. ¶¶ 3, 11 (Attachment 5).

The 2017 Elephant and Lion Findings harm these recreational, aesthetic, scientific, and professional interests by allowing American hunters to import elephant and lion trophies, thereby

increasing the incentive to hunt and kill the animals. *See* Elephant Finding at 15 (letter from Zimbabwe explaining that “historically 54% of the hunting market in Zimbabwe is made up of US hunters”); Lion Finding at 16 (“U.S. hunters have played a significant role in the industry in Zimbabwe, previously making up 51% of all hunting in Zimbabwe and 72% of lion hunts within the country”); 81 Fed. Reg. at 36,395-96 (FWS noting changes to elephant trophy system were needed because “overall conservation status of African elephants has deteriorated”); 80 Fed. Reg. at 80,015 (FWS explaining “[d]ocumented declines in lion populations of Africa are a result, in part, of mismanaged trophy hunting”). Organizational Plaintiffs’ members thus face an imminent loss of an opportunity to view African elephants and lions because of the 2017 enhancement findings. *See Humane Soc’y*, 840 F.2d at 52; *see also Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 n.4 (1986) (concluding whale watchers would “be adversely affected by continued whale harvesting”).

A favorable ruling by this Court would also redress the injuries of Organizational Plaintiffs’ members. When, as here, a plaintiff alleges the deprivation of a procedural right – here the APA’s notice and comment requirements – the redressability prong is relaxed: the plaintiff need not “prove that if he had received the procedure the substantive result would have been altered.” *Sugar Cane Growers Co-op. of Fla*, 289 F.3d at 94-95. It is enough that the agency “could reach a different conclusion.” *Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 185 (D.C. Cir. 2017). The Service could reach a different conclusion if it followed the APA’s notice and comment requirements and considered the best available science on the impacts of trophy hunting elephants and lions in Zimbabwe. Organizational Plaintiffs have thus established that their members have standing to sue in their own right.

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B. The Individual Plaintiff also Has Standing to Bring this Case

Mr. Michler also has standing to bring this suit. As a safari operator, specialist wilderness guide, environmental photojournalist, ecotourism consultant for national governments, and field researcher for documentary filmmakers, Mr. Michler regularly guides safaris to Zimbabwe to view elephants and lions. Michler Decl. ¶¶ 4, 8 (Attachment 8). The presence of American trophy hunters in Zimbabwe harms the African elephants and lions Mr. Michler enjoys viewing and makes a living showing to others in his personal and professional capacities. *Id.* ¶¶ 9-10. Like Organizational Plaintiffs' members, Mr. Michler has suffered an injury to his recreational, aesthetic, scientific, and professional interests that is traceable to the Defendants and would be redressed by a favorable decision by this Court. *Id.* ¶ 10-11. Thus, Mr. Michler has standing to bring this case.

V. ARGUMENT

Under the APA, a rule is “the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.” 5 U.S.C. § 551(4). An adjudication is an “agency process for the formulation of an order.” *Id.* § 551(7). “As a general matter, agencies employ rulemaking procedures to resolve broad policy questions affecting many parties and turning on issues of ‘legislative fact.’ Adjudicatory hearing procedures are used in individual cases where the outcome is dependent on the resolution of particular ‘adjudicative facts.’” *Indep. Bankers Ass’n of Ga. v. Bd. of Governors of Fed. Reserve Sys.*, 516 F.2d 1206, 1215 (D.C. Cir. 1975); *Neustar, Inc. v. FCC*, 857 F.3d 886, 894 (D.C. Cir. 2017) (“Rulemaking scenarios generally involve broad applications of more general principles rather than case-specific individual determinations”).

In December 2017, the D.C. Circuit held that in making negative 2014 and 2015 enhancement findings for elephant trophies from Zimbabwe “the Service erred in adopting the findings without first following the notice-and-comment rule-making requirements of the APA” explaining these findings “fit [the] definition[] of [a] ‘rule’” *Safari Club Int’l*, 878 F.3d at 321. The findings had binding and prospective effect controlling the agency’s resolution of numerous permitting decisions over the months and years that followed each finding. *Id.* The 2017 Elephant Finding and the 2017 Lion Finding challenged here have these exact same characteristics; therefore, these enhancement findings required public process before they were issued. Requiring that FWS employ notice and comment rulemaking in issuing enhancement findings for trophy imports is essential to: ensure that evaluations of range country management plans are based on the best available scientific and economic data; apprise the interested public; and to ensure the ESA’s precautionary principle is properly applied to these imperiled species.

A. FWS Failed to Undertake the Required Notice and Comment Process for Its 2017 Zimbabwe Elephant and Lion Findings

The elephant and lion enhancement findings challenged here are rules within the meaning of the APA. “An agency may not escape [notice and comment requirements] by labeling its rule an adjudication.” *Safari Club Int’l*, 878 F.3d at 332. At the end of the day “‘rules is rules,’ no matter their gloss.” *Nat’l Ass’n of Home Builders v. Army Corps of Eng’rs*, 417 F.3d 1272, 1284-85 (D.C. Cir. 2005) (internal citations omitted). In concluding that 2014 and 2015 enhancement findings banning the importation of elephant trophy imports from Zimbabwe were rules, the D.C. Circuit highlighted two considerations: “First, most legislative rules are generally applicable. *Safari Club Int’l*, 878 F.3d at 332. “Second, rules generally have only ‘future effect’ while adjudications immediately bind parties by retroactively applying law to their past actions.” *Id.* at

333. These considerations illustrate that enhancement findings for trophy imports, including the Elephant Finding and Lion Finding at issue here, are rules.

First, enhancement findings that evaluate the status of a species in a range country along with that country's management plan and regime to determine whether trophy hunting may enhance a species' population have general applicability because they "appl[y] to all potential imports of [hunting trophies from a particular country], not to any individual parties." *Safari Club Int'l*, 878 F.3d at 333; *see also* Elephant Finding at 1 ("the Service is able to make a determination that the killing of the trophy animal in Zimbabwe, on or after January 21, 2016 and on or before December 31, 2018, will enhance the survival of the African elephant. Applications to import trophies hunted during this time period will be considered to have met the enhancement requirement unless we issue a new finding based on available information."); Lion Finding at 1 ("the Service has determined that permits for the importation of sport-hunted trophies of wild lions (*Panthera leo melanochaita*) . . . taken in Zimbabwe during the 2016, 2017, and 2018 calendar years meet the enhancement criteria under the Service's regulations at 50 CFR 17.32. Therefore, applications received for import of such specimens will be considered to have met this requirement.").

Moreover, enhancement findings for trophy imports have general applicability by definition because the regulatory criteria the Service must apply in making these enhancement findings "involve broad applications of more general principles." *Neustar, Inc.*, 857 F.3d at 893. FWS' permitting regulations dictate that in making enhancement findings, FWS considers: the impact of hunting "on the wild populations of the wildlife sought to be covered by the permit;" any "conflict with any known program intended to enhance the survival probabilities of the population;" and whether hunting is "likely to reduce the threat of extinction facing the species

of wildlife sought to be covered by the permit.” 50 C.F.R. §§ 17.22(a)(2), 17.32(a)(2). These are considerations that go beyond any one permit application as they address the status of the species on the ground and the broader management of that species. This is especially true given that the application forms for trophy imports (Forms #3-200-19, #3-200-20) allow trophy hunters to apply for import permits before they kill a particular animal, which demonstrates that the Service’s enhancement analysis is focused on a comprehensive view of how any recreational offtake impacts an entire country’s population of the species at issue.

Indeed, the Service’s recent articulations of *how* it makes enhancement findings for trophy imports further illustrates that they have general applicability. In establishing the recent 4(d) rules for African lions and elephants, FWS clarified its commitment to making its findings in consideration of *each range country’s management* of a species. *See* 80 Fed. Reg. at 80,045 (“the Service will examine the overall conservation and management of the subspecies *in the country* where the specimen originated” (emphasis added)); 80 Fed. Reg. at 45,165 (“[t]he standards for making enhancement findings *for each African elephant range country* under the [2014] 4(d) rule are the same as the standards for making findings for import permits for sport-hunted trophies of other species” (emphasis added)); *see also* 50 C.F.R. § 17.40(n)(2) (in making an enhancement finding for the import of markhor trophies, the Service evaluates whether the population is part of “an established conservation program” and whether “regulatory authorities have the capacity to obtain sound data on populations...[and] the legal and practical capacity to provide for the long-term survival of populations”); 79 Fed. Reg. 60,365, 60,369 (Oct. 7, 2014) (committing that the Service will “review all conservation programs to determine whether they meet the enhancement criteria set forth in the [markhor] 4(d) rule”). In other words, the Service’s enhancement determinations for threatened species trophy imports apply to countries generally.

The agency has further stated its intent to now consider the IUCN SSC guidelines when it makes enhancement findings for trophy imports, including: the “[b]iological sustainability” of hunting the species in a country; whether there is a “net conservation benefit” and “socio-economic-cultural benefit” of hunting in that country; the country’s “adaptive management” or its “planning, monitoring, and reporting;” and whether the country has “accountable and effective governance.” 81 Fed. Reg. at 36,394 (indicating the IUCN SSC factors will be considered in making enhancement findings for elephants); 80 Fed. Reg. at 80,045 (same for lions). And the agency has in fact at least purported to use the guidelines. Elephant Finding at 4; Lion Finding at 3. The factors the agency must and does consider in making enhancement findings are, by their nature, generally applicable. Such findings focus, as they must, on the overall threats to the species, its status in a particular country, and the regime under which the animal will be taken, rather than on an individualized analysis for any particular permit application.

Moreover, despite enhancement findings being characterized as a part of the permitting process by the Service, as *National Association of Home Builders v. U.S. Army Corps of Engineers* illustrates, even when an agency calls its action “permitting,” it nevertheless still may qualify as a rule under the APA. 417 F.3d at 1285. This is the situation where the agency “bases enforcement actions on the policies or interpretations formulated in the document” or “if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document” *Id.* (citing *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000)). The Service’s enhancement findings for elephant and lion trophy imports are not part of the permitting process, but instead guide the permitting

process by making broad pronouncements regarding the status of the species in a particular range country as well as conditions on the ground.

Second, the 2017 enhancement findings have future effect. As with the 2014 and 2015 enhancement findings, the 2017 enhancement findings are “meant to bind hunters in future permitting . . . regardless of when they actually harvested their elephant trophy.” *Safari Club Int’l*, 878 F.3d at 333. While here the Elephant Finding and Lion Finding are backdated – to 2016 – they nonetheless establish binding standards the agency follows going forward (indeed, applications for import permits can be submitted long after the animal is killed). *See id.* at 333-34 (explaining that the 2014 and 2015 findings were not retroactive even though they were backdated). As such, the findings are pronouncements of how FWS will address all the trophy import permit applications it receives. Thus, such enhancement findings are by their nature forward-looking.

The fact that the Service’s enhancement findings for trophy imports constrain the agency’s permitting decisions – at least with respect to the enhancement factor – further demonstrates they are prospective and not retroactive. Once an enhancement finding is made, whether positive or negative, that finding is the agency’s pronouncement on the status and management of the species in a certain country and leads to the issuance (assuming all other criteria are met) or denial of ESA trophy import permits for that species. Thus, an enhancement finding binds FWS in its permitting process and thus operates as a rule. *See, e.g., Thomas v. New York*, 802 F.2d 1443, 1446-47 (D.C. Cir. 1986) (“Clearly, an agency [endangerment] statement that bound subsequent EPA Administrators to issue SIP revision notices would be a statement of ‘future effect designed to implement . . . law or policy,’ and thus a rule” (quoting 5 U.S.C § 553(b)(A))). These pronouncements on various biological, political, social, and economic factors

in enhancement findings stand in contrast to the factors considered during an adjudication, which “are likely to be specific to individuals or entities” *Neustar, Inc.*, 857 F.3d at 896 (“We reiterate that adjudications by nature are likely to be specific to individuals or entities, while rules tend to be matters of more general application” (internal citation omitted)). Because the 2017 findings have general applicability and future effect, they are legislative rules and cannot become effective without notice and comment.

B. FWS Failed to Follow the Requisite Notice and Comment Procedures and this Failure was Not Harmless

In making the 2017 lion and elephant enhancement findings, FWS did not follow the required public process. *See Sugar Cane Growers Coop. of Fla.*, 289 F.3d at 95 (describing the process of notice and comment rulemaking); *Thomas*, 802 F.2d at 1447 (“if [the agency action] forced the [agency] to take direct and substantial regulatory actions – [that act] could not be promulgated without notice-and-comment procedures”). Indeed, the Lion Finding was made entirely behind closed doors and to this day the final decision has not even been posted on FWS’ website let alone in the Federal Register. The Elephant Finding was noticed in the Federal Register, but only *after* it was finalized, *see* 82 Fed. Reg. 54,405 (Nov. 17, 2017). Thus, the public was never afforded the opportunity to review the Service’s rationales for its draft findings and offer information pertinent to shaping those final findings. As the Court of Appeals explained in *Safari Club International v. Zinke*, because the “notice never invited comment from the public” and “merely stated” the agency’s finding, it failed to comply with Section 553 of the APA. 878 F.3d at 335. Thus, the relevant rules before this Court simply never underwent the required process.

This failure is not harmless error. As the Court of Appeals also explained in *Safari Club International v. Zinke*, “an utter failure to comply with notice and comment cannot be considered

harmless if there is any uncertainty at all as to the effect of that failure.” 878 F.3d at 335 (quoting *Sugar Cane Growers Coop. of Fla.*, 289 F.3d at 96). Here uncertainty abounds. FWS completely reversed its 2014 and 2015 decisions prohibiting Zimbabwe elephant imports, and similarly contradicted findings it made in establishing enhancement requirements for lion trophy imports, without airing its rationale for issuing “new” findings to the public before they were adopted. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) (agency must disclose in detail the thinking and data that has formed its rule). This failure meant Plaintiffs were denied a meaningful opportunity to present evidence and raise objections to try to convince FWS to continue to prohibit the import of elephants and lions from Zimbabwe. *See, e.g., CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1082-83 (D.C. Cir. 2009) (lack of notice was prejudicial where plaintiffs missed opportunity to persuade the agency not to adopt the “rule in the first place” and would have “made additional objections and presented significantly more (and different) evidence”); *AFL-CIO v. Chao*, 496 F. Supp. 2d 76, 89-90 (D.D.C. 2007) (“actual prejudice” is not required).

Moreover, the findings at issue pertain to highly imperiled species, which are both protected under our ESA and are species the American public cares about tremendously. The Supreme Court has indicated such threatened species are to be given the benefit of the doubt. *TVA v. Hill*, 437 U.S. 153, 194 (1978) (ESA establishes a policy of “institutionalized caution” and ESA-listed species must be afforded “the highest of priorities”). Decisions that dictate for years at a time whether imperiled species may be killed for recreational enjoyment of an elite few and sent overseas for home décor, should be subject to public notice and input before the ammo is bought and the taxidermist called – a failure to undertake this required process certainly is not harmless.

C. The Challenged Decisions Should be Set Aside and Remanded

We respectfully request that this Court follow the APA and “hold unlawful and set aside” the Service’s 2017 African elephant and lion Zimbabwe enhancement findings, which were made in violation of the APA. 5 U.S.C. § 706(2). We further move the Court to order that during the remand proceedings FWS may not issue permits to import any African elephant or lion trophies from Zimbabwe until the Service has completed the remand proceedings and complied with the notice and comment requirements of Section 553 of the APA. This relief is a proper exercise of the Court’s equitable discretion as it is necessary to protect threatened African elephants and lions in the interim while the Service complies with its rulemaking obligations. *See Humane Soc’y of the U.S. v. Kempthorne*, 579 F. Supp. 2d 7, 21 (D.D.C. 2008) (relying upon “the ESA’s preference for protecting endangered species” in crafting relief (internal citation omitted)); *TVA v. Hill*, 437 U.S. at 194; *Safari Club Int’l*, 878 F.3d at 336 (directing the need for remand proceedings).

VI. CONCLUSION

For the reasons stated herein, Plaintiffs respectfully request that the Court grant this partial motion for summary judgment.

DATED: February 6, 2018

Respectfully submitted,

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CENTER FOR BIOLOGICAL DIVERSITY *et al.*,

Plaintiffs,

v.

RYAN ZINKE, *et al.*,

Federal Defendants,

and

SAFARI CLUB INTERNATIONAL, *et al.*,

Defendant-Intervenors.

No. 1:17-cv-02504 (RCL)

PLAINTIFFS' STATEMENT OF UNDISPUTED FACTS

Pursuant to Local Civil Procedure Rule 7(h), Plaintiffs the Center for Biological Diversity, Humane Society International, The Humane Society of the United States, Natural Resources Defense Council, Born Free USA, and Ian Michler submit the following Statement of Undisputed Facts.

1. African elephants (*Loxodonta africana*) found in Zimbabwe are threatened with extinction. 43 Fed. Reg. 20,499 (May 12, 1978); 50 C.F.R. § 17.11(h).
2. The U.S. Fish and Wildlife Service has found that listing African elephants in Zimbabwe as endangered under the Endangered Species Act may be warranted. 81 Fed. Reg. 14,058 (March 16, 2016).
3. Effective July 6, 2016, any person seeking to import a hunting trophy of an elephant from Zimbabwe must first obtain a threatened species permit. 50 C.F.R. § 17.40(e)(6); 81 Fed. Reg. 36,388 (June 6, 2016).
4. African lions (*Panthera leo melanochaita*) found in Zimbabwe are threatened with extinction. 80 Fed. Reg. 80,000 (Dec. 23, 2015); 50 C.F.R. § 17.11(h).

5. Effective January 22, 2016, any person seeking to import a hunting trophy of a lion from Zimbabwe must first obtain a threatened species permit. 50 C.F.R. § 17.40(r).

6. The U.S. Fish and Wildlife Service cannot issue a permit to import an elephant or lion trophy from Zimbabwe unless there is scientific evidence to support a finding that recreational hunting of the species' population enhances the survival of the species in the wild. 50 C.F.R. §§ 17.32, 17.40(e)(6)(i), 17.40(r).

7. In 2014 and 2015, the Service determined that hunting African elephants in Zimbabwe does not enhance the survival of the species because of the lack of an elephant management plan; lack of sufficient data on population numbers and trends on which to base management decisions; weak implementation and enforcement; lack of evidence that legal offtake is biologically sustainable, taking into account illegal offtake; lack of information about how money from trophy hunting by U.S. hunters is distributed within Zimbabwe; and lack of a national mechanism to sustain elephant conservation efforts in the country. *See* 79 Fed. Reg. 44,459 (July 31, 2014); 80 Fed. Reg. 42,524 (July 17, 2015).

8. In response to a lawsuit challenging these 2014 and 2015 Zimbabwe elephant findings, on December 22, 2017, the U.S. Court of Appeals for the D.C. Circuit held that applying the enhancement standard to trophy imports of threatened species is justified. *Safari Club Int'l v. Zinke*, 878 F.3d 316, 326-331 (D.C. Cir. 2017).

9. The U.S. Court of Appeals for the D.C. Circuit also held that country-wide enhancement findings issued for trophy imports of threatened species are administrative rules that must comply with the notice and comment procedures of the Administrative Procedure Act. *Safari Club Int'l*, 878 F.3d at 331-335.

10. On November 16, 2017, the U.S. Fish and Wildlife Service issued a country-wide enhancement finding authorizing the import of elephant trophies from Zimbabwe for elephants killed in 2016-2018. Exhibit A to Declaration of Anna Frostic (Attachment 1) (FWS, Enhancement Finding for African Elephants Taken as Sport-hunted Trophies in Zimbabwe On or After January 21, 2016 and On or Before December 31, 2018 (Nov. 16, 2017)) (hereafter “Elephant Finding”).

11. The Elephant Finding draws conclusions about elephant management in Zimbabwe. Elephant Finding at 10-13.

12. The Elephant Finding provides determinations about the overall status of elephant populations in Zimbabwe. Elephant Finding at 13-15.

13. The Elephant Finding includes FWS’s pronouncement on the regulatory regime in Zimbabwe and enforcement of the same. Elephant Finding at 15-18.

14. The Elephant Finding compiles certain known offtakes of elephants in Zimbabwe. Elephant Finding at 18-21.

15. The Elephant Finding documents how revenues from trophy hunting are allocated. Elephant Finding at 21-24.

16. The Elephant Finding summarizes local conservation efforts. Elephant Finding at 24.

17. The Elephant Finding documents that according to Zimbabwe “historically 54% of the hunting market in Zimbabwe is made up of US hunters.” Elephant Finding at 15.

18. No public comment was solicited on the Elephant Finding.

19. Notice of the Elephant Finding was published in the Federal Register, but only after the decision was finalized. 82 Fed. Reg. 54,405 (Nov. 17, 2017).

20. On December 23, 2015, the U.S. Fish and Wildlife Service listed African lions in Zimbabwe as a threatened species and found that Zimbabwe's lion quotas are not based on scientific evidence or accurate survey data; stating that age restrictions must be strictly enforced in order to be an adequate management technique; and Zimbabwe's hunting regulations incentivize killing lions under the minimum age limit. 80 Fed. Reg. 80,000, 80,016-38 (Dec. 23, 2015).

21. On October 11, 2017, the U.S. Fish and Wildlife Service issued a country-wide enhancement finding authorizing the import of lion trophies from Zimbabwe for lions killed in 2016-2018. Exhibit B to Declaration of Anna Frostic (FWS, Enhancement Finding for Lions Taken as Sport-hunted Trophies in Zimbabwe during 2016, 2017 and 2018 (Oct. 11, 2017)) (hereafter "Lion Finding")

22. The Lion Finding draws conclusions about the regulatory regime in Zimbabwe and enforcement of the same. Lion Finding at 6-8.

23. The Lion Finding provides determinations about the overall status of lion populations in Zimbabwe. Lion Finding at 8-10.

24. The Lion Finding includes FWS's pronouncements on lion management in Zimbabwe including how some revenues generated from trophy hunting are managed. Lion Finding at 10-15.

25. The Lion Finding documents that U.S. hunters contributed 51% of sport hunting revenue from 2010-2015 in Zimbabwe. Lion Finding at 15.

26. The Lion Finding documents that U.S. hunters account for 72% of lion hunts within Zimbabwe. Lion Finding at 16.

27. No public comment was solicited on the Lion Finding.

28. No notice of the Lion Finding was published in the Federal Register.

DATED: February 6, 2018

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