Comments of People for the Ethical Treatment of Animals in Opposition to PRT-75313B

I. Introduction

People for the Ethical Treatment of Animals (PETA) urges the U.S. Fish and Wildlife Service (FWS) to reject the application submitted by Patty Perry, on behalf of Wildlife & Environmental Conservation, Inc. (collectively "Perry"), to purchase two captive-born African leopards in interstate commerce from Living Treasures Wild Animal Park (LTWAP) in New Castle, Pennsylvania (PRT-75313B) ("App.") (Ex. 1). The application should be rejected because Perry:

- has failed to demonstrate that purchasing the leopards will enhance the propagation or survival of the species in the wild;
- has failed to show that she has the expertise to enhance the propagation or survival of endangered leopards; and
- has failed to make the required showing of responsibility.

Should the agency decide to grant the permit despite these objections, PETA hereby requests notice of that decision, pursuant to 50 C.F.R. § 17.22(e)(2), to Brittany Peet at BrittanyP@petaf.org or 202-540-2191 at least ten days prior to the issuance of the permit.

II. Legal Background

The Endangered Species Act (ESA) establishes a national policy "that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of [the Act]." 16 U.S.C. § 1531(c). In relevant part, the ESA prohibits persons from taking, importing or exporting, selling or offering for sale, or receiving in interstate commerce in the course of commercial activity any endangered species. *Id.* § 1538(a)(1)(A)-(F).

Section 10 of the ESA gives the FWS limited authority to issue permits to allow otherwise prohibited activities such as takes, transport, shipment, and sale *only* "for scientific purposes or to enhance the propagation or survival of the affected species." *Id.* § 1539(a)(1)(A) (emphasis added). This section was intended "to *limit substantially* the number of exemptions that may be granted under the Act, . . . given that these exemptions apply to species which are in danger of extinction." H.R. Report 93-412, at 156 (1973) (Ex. 2) (emphasis added). Perry seeks a permit pursuant to the second exception, which requires that she demonstrate that her activities will enhance the propagation or survival of the species at issue (the "Enhancement Requirement"). Pursuant to this limited authority, FWS regulations provide an exemption from § 10's prohibitions for foreign species that are captive-bred in the U.S. if the "purpose" of taking, transporting, shipping, selling, or receiving the captive-bred species "*is to enhance the propagation or survival of the affected species*." 50 C.F.R. § 17.21(g)(1)(ii) (emphasis added). Persons who seek to engage in any of these activities must apply for, and obtain, a permit. *Id*. § 17.21(g)(1), (g)(2).

The FWS may issue a permit only after making specific findings that: "(1) such exceptions were applied for in good faith, (2) if granted and exercised will not operate to the disadvantage of such endangered species, and (3) will be consistent with the purposes and policy set forth in section 2 of this Act." 16 U.S.C. § 1539(d).

III. Argument

A. Perry Fails to Demonstrate that her Proposed Activities Will Enhance the Propagation or Survival of Endangered Leopards in the Wild.

Again, § 10 of the ESA gives the FWS limited authority to issue permits to allow otherwise prohibited activities such as takes, transport, shipment, and sale *only* "*for scientific purposes or to enhance the propagation or survival of the affected species*." 16 U.S.C. § 1539(a)(1)(a) (emphasis added); *accord* 50 C.F.R. § 17.21(g)(1)(ii). The FWS has repeatedly recognized that, to meet the Enhancement Requirement, one must "demonstrate how [her] proposed activities directly relate to the survival of th[e] species *in the wild*." *E.g.*, Fax from Anna Barry, Senior Biologist, Division of Management Authority (DMA), FWS, to John F. Cuneo, Jr., Hawthorn Corp. (Mar. 12, 2012) (Ex. 3) (emphasis added); *accord* E-mail from Anna Barry to Anton and Ferdinand Fercos-Hantig (Feb. 8, 2012) (Ex. 4). The applicant—not the FWS or private commenters—bears the burden of demonstrating whether it satisfies the Enhancement Requirement. *See* 50 C.F.R. § 13.21(b) ("fail[ure] to demonstrate a valid justification for the permit" warrants denial); *see also, e.g.*, Letter from Anna Barry to John F. Cuneo Jr. (Oct. 14, 2011) (Ex. 5) ("To meet the requirements under the ESA *you need to be able to demonstrate* how your proposed activities directly relate to the survival of this species in the wild.") (emphasis added). Perry has wholly failed to meet the burden she bears of demonstrating how her proposed activities with leopards directly relate to the survival of the species in the wild.

1. Perry's purported educational activities are insufficient to satisfy the Enhancement Requirement.

Perry's purported public-education activities cannot justify issuance of this permit. It is the clear policy of the FWS that "[p]ublic education activities may not be the sole basis to justify issuance" of an exemption from § 9 of the ESA. 50 C.F.R. § 17.21(g)(3). When the agency amended the captive-bred-wildlife-registration regulations to codify this policy in 1993, it voiced concern that, in the absence of such limitation, "captive-bred animals . . . might be used for purposes that do not contribute to conservation, such as . . . for entertainment." Captive-Bred Wildlife Regulation, 57 Fed. Reg. 548-01, 550 (Jan. 7, 1992) (Ex. 6). In the preamble to the final rule, the agency explained that it has "*sincere doubts about the relative conservation benefits that are provided to non-native species in the wild from the public exhibition of living wildlife*." Captive-Bred Wildlife Regulation, 58 Fed. Reg. 68323, 68324 (Dec. 27, 1993) (emphasis added) (Ex. 7). The agency has also advised applicants seeking import/export permits under § 10 that "Conservation Education alone can no longer suffice for meeting the enhancement requirements under the Endangered Species Act" and that "[t]o meet the requirements under the ESA you need to be able

to demonstrate how your proposed activities directly relate to the survival of this species in the wild." *See* Fax from Anna Barry, Senior Biologist, Division of Management Authority, FWS, to John F. Cuneo, Jr., Hawthorn Corp. (Mar. 12, 2012) (Ex. 3); *see also* E-mail from Anna Barry, Senior Biologist, Division of Management Authority, FWS, to Anton and Ferdinand Fercos-Hantig (Feb. 8, 2012) (Ex. 4) (noting, in context of exhibitor's application to export/re-import endangered tigers, that "Conservation Education alone" does not "suffice for meeting the requirements under the Endangered Species Act (ESA), you need to be able to demonstrate how your proposed activities directly relate[] to the survival of this species in the wild").

The FWS's policy that public-education activities may not be the sole basis to justify an exemption from § 9 of the ESA also reflects the near consensus in the scientific community that using endangered species in exhibitions and entertainment has no impact on public attitudes about conservation. *E.g.*, Lynn D. Dierking, *Visitor Learning in Zoos and Aquariums: Executive Summary*, Association of Zoos and Aquariums (AZA), at i (2001-2002) (Ex. 8) (Claims that zoos have potential to impact guests' conservation knowledge and behavior positively "were not substantiated or validated by actual research."); Aline H. Kidd & Robert M. Kidd, *Aquarium Visitors' Perceptions and Attitudes toward the Importance of Marine Biodiversity*, 81 Psychological Reports 1083-88 (1997) (Ex. 9) (Majority of visitors to aquarium reported that they felt they had not learned anything.); K. E. Lukas & S. R. Ross, *Zoo Visitor Knowledge and Attitudes Gorillas and Chimpanzees*, 36 Journal of Environmental Education 33, 33-34, 41, 46-47 (2005) (Ex. 10) (Study of zoo's exhibit of gorillas and chimpanzees showed that frequent visitors were no more knowledgeable about the animals than first-time visitors.); Jeffrey S. Swanagan, *Factors Influencing Zoo Visitors' Conservation Attitudes and Behavior*, 31 Journal of Environmental Education 26, 26-30 (2000) (Ex. 11) (Only 5.9% of visitors to interactive elephant exhibit mailed stamped postcard to White House to express opinion on moratorium on ivory trade.).

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

The application materials that the FWS provided to PETA include almost no information about the content of Perry's purported educational activities. Although the application requires that an applicant "provide copies of educational materials (e.g., handouts, text of signage or public presentations), and include the purpose and objectives of the proposed activity," FWS Form 3-200-37 at 4 (Ex. 12) (hereinafter "FWS Form"), the application initially included just a brief, vague description of the facility's general activities. App., Ex. 1 at 8. In an e-mail to Perry, Anna Barry reiterated the application's requirements that Perry provide "copies of educational materials

(e.g[.,] handouts, text of signage or public presentations) that discuss[] the *ecological role and conservation needs* of the leopard," and that "[t]he material . . . be original in nature and . . . be the actual material that will be presented each time the animal is viewed by the targeted audience." *Id.* at 49 (emphasis in original). Perry then submitted a shorter-than-two-page "script that [she] use[s] for the African leopard," with no visual materials, charts, graphs or other educational materials. *Id.* at 40, 42-43. Despite the requirement that Perry provide original material, she appears to have pulled the text directly from Wikipedia, omitting just a few irrelevant portions, such as that referring to radio collars. *Compare id. with* African Leopard, Wikipedia, https://en.wikipedia.org/wiki/African_leopard (last visited Oct. 30, 2015).

Even if the FWS could issue ESA permits on the basis of public-education activities alone—which it cannot, the two pages of possibly inaccurate material pulled from Wikipedia, which Perry has provided, cannot satisfy the bedrock requirement that permitted activities enhance the survival of animals on the brink of extinction.

2. The FWS cannot issue the requested permit on the basis of the agency's illegal Pay-to-Play policy.

The materials submitted as part of the application suggest that Perry is also seeking to justify the requested permit on the basis of a few financial donations to purported conservation efforts. *See* App., Ex. 1 at 44-45.[1]

The "Pay-to-Pay" policy allows permit holders to conduct activities prohibited by the ESA for purely commercial purposes that do not themselves enhance the propagation or survival of the species in exchange for *de minimis* contributions to the conservation of the affected species generally. *See, e.g.*, Email from Anna Barry, Senior Biologist, Division of Management Authority, FWS, to Harriet, Tarzan Zerbini Productions (Jan. 6, 2014) (Ex. 13) (explaining that the applicant could meet the Enhancement Requirement by donating money to "in situ conservation work in the species' range states"); Fax from Anna Barry, Senior Biologist, Division of Management Authority, FWS, to John F. Cuneo, Jr., Hawthorn Corp. (Mar. 12, 2012) (Ex. 3) ("To meet the requirements under the ESA you need to be able to demonstrate how your proposed activities directly relate to the survival of this species in the wild. Many of our applicants achieve this goal by donating to a well-established conservation program in the range state.").

Section 10(a)(1)(A) of the ESA provides that the FWS may permit "any act otherwise prohibited by Section 1538 [§ 9] . . . to enhance the propagation or survival of the affected species." 16 U.S.C. § 1539(a)(1)(A). Likewise, the FWS regulations governing enhancement permits provide that "the Director may issue a permit authorizing activity otherwise prohibited by § 17.21 . . . for

[1] Donations from 2010-12 are also noted on page 39 of the application. However, FWS Senior Biologist Anna Barry appears concerned with more recent donations, *see* App., Ex. 1 at 49, so these comments also focus on Perry's recent activity.

enhancing the propagation or survival . . . of endangered wildlife." 50 C.F.R. § 17.22. On the face of these provisions, an applicant only qualifies for an exemption if it demonstrates that activities *that would otherwise be prohibited by § 9 of the ESA*—e.g., exporting, importing, harming, harassing, or wounding an endangered animal—will likely enhance the propagation or survival of the species. The conservation benefit must directly stem from the proposed use of the endangered animals. It is irrelevant whether the applicant conducts collateral activities not otherwise prohibited by § 9 that enhance the species' survival—such as giving money to unrelated conservation efforts.

Senator John Tunney of California, who proposed the Enhancement Requirement, stated that the requirement "would permit otherwise prohibited acts *when they* are undertaken to enhance the propagation or survival of the affected species." Cong. Research Serv., 97th Cong., Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, and 1980, at 358 (Comm. Print 1982) (Sen. Tunney) (Ex. 14) (emphasis added). He explained that "[t]his is a needed management tool recommended by all wildlife biologists, . . . for example, where a species is destroying its habitat or where the species is diseased." *Id.* at 396. But the Pay-to-Play policy allows otherwise prohibited acts undertaken for *any* reason, so long as permit applicants pay for the privilege with a donation to conservation.

Issuing an ESA permit to anybody who will donate money to a conservation organization is also inconsistent with Congress' goal of substantially limiting the number of exemptions granted under § 10—and allows the exception to swallow the rule. *See* H.R. Rep. No. 93-412, at 156 (1973) (Ex. 2) (safeguards in § 10 were intended "to *limit substantially* the number of exemptions that may be granted under the Act, *. . . given that these exemptions apply to species which are in danger of extinction*" (emphases added)). Such was Congress's desire to limit exemptions that it prohibited "[v]irtually all dealings with endangered species, . . . except in *extremely narrow* circumstances." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978)(emphasis added).

Permitting any company or organization willing to pay a fraction of its funds to exploit endangered species stretches § 10's "extremely narrow" exemption beyond its breaking point. It also conflicts with the general purposes and policies underlying the ESA. The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Babbitt v. Sweet Water Home Chapter of Cmtys. for a Greater Or.*, 515 U.S. 687, 698 (1995). The Act "encompasses a vast range of economic . . . enterprises and endeavors." *Id.* at 708. "[L]iterally every section of the statute" reflects the "plain intent of Congress . . . to halt and reverse the trend toward species extinction, whatever the cost." *Tenn. Valley Auth.*, 437 U.S. at 184; *see, e.g.*, Sen. Rep. No. 93-307, at 7 (1973) (Ex. 15) (noting that the Act defines "take" "in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife"); H.R. Rep. No. 93-412, at 154 (1973) (stating that the ESA uses the "broadest possible terms" to define restrictions on takings) (Ex. 2). Therefore, the

Supreme Court has "expansively interpret[ed] ESA [prohibitions] in light of the statute's 'broad purpose' of saving species from extinction." *United States v. Snapp*, 423 F. App'x 706, 708 (9th Cir. 2011) (citing *Babbitt*); *see also Aransas Project v. Shaw*, 835 F. Supp. 2d 251, 270-71 (S.D. Tex. 2011) ("[A] broad interpretation of ESA Section 9" is "in harmony with the ESA's purpose [and] legislative history."). The permissive Pay-to-Play policy is utterly inconsistent with the "broad scope [of the ESA's] prohibitions." H.R. Rep. No. 94-823, at 7 (1976) (Ex. 16).

This reading of § 10(a)(1)(A) finds further support in the FWS regulations. Pursuant to § 17.21 of the FWS, the Director may only issue a captive-bred wildlife permit to "deliver, receive, carry, transport or ship in interstate or foreign commerce" endangered wildlife bred in captivity in the United States if "[t]he purpose *of such activity* is to enhance the propagation or survival of the affected species." 50 C.F.R. § 17.21(g) (emphasis added). The purpose of other, unrelated activities—such as the work of a conservation organization with no connection to the transaction at issue, *see* App., Ex. 1 at 42-43—is simply irrelevant.

Furthermore, § 17.22 of the regulations, which governs enhancement permits generally, requires that applicants provide "[a] full statement of the reasons why the applicant is justified in obtaining a permit including the details *of the activities sought to be authorized by the permit*. 50 C.F.R. § 17.22(a)(1)(vii) (emphases added). If donating money to a conservation organization can justify issuance of a § 10 permit, there is no reason why the FWS should require applicants to detail the "activities sought to be authorized by the permit" to show why they are "justified in obtaining [the] permit." Under the FWS's Pay-to-Play scheme, the "justification" for the permit—the donation—is wholly independent of the "activities sought to be authorized by the permit"—such as moving endangered African leopards in interstate commerce in the course of a commercial activity.

Likewise, in issuing a § 10 permit, § 17.22 mandates that the Director consider "[w]hether *the purpose for which the permit is required* is adequate to justify removing from the wild or otherwise changing the status of the wildlife sought to be covered by the permit." *Id.* § 17.22(a)(2)(i) (emphases added). But, again, if making a small donation for conservation "is adequate to justify removing from the wild or otherwise changing the status of the wildlife sought to be covered by the permit," "the purpose for which the permit is required" should be irrelevant. Clearly, the FWS's Pay-to-Play policy is inconsistent with the requirements of 50 C.F.R. § 17.22.

The Pay-to-Play policy also conflicts with the regulations of the National Marine Fisheries Service ("NMFS"), which shares responsibility with the FWS for administering the ESA. To obtain a § 10 enhancement permit, the NMFS regulations require an applicant to demonstrate that "*[t]he proposed activity* furthers a bona fide . . . enhancement purpose." *Id.* § 216.41(b)(1) (emphasis added); *see also* NMFS, Application Instructions for a Permit for Scientific Purposes or to Enhance the Propagation or Survival of Threatened and Endangered Species 1 (Exp. Aug.

31, 2015) (Ex. 17) ("*Permitted activities* must . . . enhance the propagation or survival of the listed species." (emphasis added)). An applicant must also demonstrate that "*the activity will likely contribute significantly* to maintaining or increasing distribution or abundance, enhancing the health or welfare of the species or stock, or ensuring the survival or recovery of the affected species or stock in the wild." *Id.* § 216.41(b)(6)(ii) (emphasis added). "Only" endangered wildlife "necessary for enhancement of the survival, recovery, or propagation of the affected stock may be taken, imported, exported, or otherwise affected under the authority of an enhancement permit." *Id.* § 216.41(b)(6)(i); *see also id.* § 216.33(c)(2) (requiring that "the proposed activity" be "for enhancement purposes"). The regulations do not authorize permit holders to import and export endangered wildlife for purposes wholly unconnected to enhancement and survival, so long as they make a small donation to an unrelated conservation project. Rather, unlike the FWS's Pay-to-Play policy, the NMFS regulations are faithful to the plain meaning of the Enhancement Requirement: that permit applicants must establish a direct relationship between the activities for which the permit is sought and the survival of endangered species in the wild.

Finally, the FWS has long interpreted the Enhancement Requirement to require that "the *purpose* of" the otherwise prohibited activity—and not of a collateral activity, such as donating to conservation—be "enhancing propagation or survival of the affected species." Captive Wildlife Regulation, 44 Fed. Reg. 54002, 54002 (Sept. 17, 1979) (emphasis added) (stating that, under the ESA, "persons may be permitted to undertake otherwise prohibited activities for the purpose of enhancing propagation or survival of the affected species"); *see also id.* at 54005 (explaining that the rule pertaining to § 10 exemptions for captive-bred wildlife "is intended to facilitate activities *for the purpose* of enhancing propagation or survival of the affected species" (emphasis added)). As far back as 1979, the agency explained that "permission may be granted for [otherwise prohibited] activities *if they are conducted for certain purposes*. In the case of endangered wildlife, the Act limits them to scientific purposes or to purposes of enhancing the propagation or survival of the affected species." *Id.* (emphasis added); *see also id.* at 54005 ("Only those activities *conducted to enhance propagation or survival of the affected species* may be authorized by the present rule." (emphasis added)). Based on its longstanding interpretation, the FWS cannot issue Perry the requested permit unless she shows that the purpose of purchasing the endangered African leopards and moving them in interstate commerce in the course of a commercial activity—and not of her donations to unrelated conservation groups—is to enhance the survival and propagation of the species.

It is black letter law that "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). The FWS failed "to supply a reasoned analysis" for the abandonment of its policy that the purpose of *the proposed activity* must be to enhance the

propagation or survival of the species. This failure provides an independent reason why the FWS cannot rely on the Pay-to-Play policy as a basis for issuing Perry the requested permits.

For all of these reasons, the FWS cannot rely on its unlawful Pay-to-Play policy in deciding whether to issue the requested ESA permit to Perry.

However, even if the Pay-to-Play policy were lawful, it would be arbitrary and capricious for the FWS to issue the requested permit to Perry. *See* 5 U.S.C. § 706(2)(A) ("The reviewing court shall hold unlawful and set aside agency actions, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]"). Perry has failed to demonstrate that more money will be devoted to the conservation of African leopards in the wild if the FWS issues the facility the requested permit. *See, e.g.*, Fax from Anna Barry, Senior Biologist, Division of Management Authority, FWS, to John F. Cuneo, Jr., Hawthorn Corp. (Oct. 14, 2011) (Ex. 18) (Applicant is required to "demonstrate how [her] proposed activities directly relate to the survival of this species in the wild."). It does not appear for example, that any percentage of revenues of the sale will be spent on leopard conservation. In fact, the opposite is true: Since Perry has already pledged financial contributions to the Feline Conservation Federation (FCF), App., Ex. 1 at 44, and made donations to the Rare Species Fund (RSF) in 2013 and 2014, *id*. at 45—regardless of whether she receives the requested permit, the issuance of the requested permit will have no impact on the FCF's or RSF's purported conservation efforts. Therefore, the FWS cannot issue the requested permit even under its Pay-to-Play policy given that there is no connection between the proposed activity—purchasing African leopards and moving them in interstate commerce—and Perry's donations.

It is further unclear whether all of Perry's donations will specifically assist *leopards* in the wild. The letter acknowledging her pledge to the FCF does not even mention leopards, so it is unclear whether the funds would be used for the requested species or other felids. *See id*. at 44.

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Because Perry has failed to satisfy the bedrock requirement for an enhancement permit—that purchasing the endangered leopards will enhance the species' propagation or survival—the FWS must deny the application.

B. The Permit Application Must Be Denied Because the Facility Lacks the Expertise Necessary to Enhance the Propagation or Survival of Endangered Leopards.

In deciding whether to grant a permit, § 17.22 of the FWS regulations provides that, in deciding whether to grant an enhancement permit, the FWS "*shall* consider" whether "the expertise . . . available to the applicant appear[s] adequate to successfully accomplish the objectives stated in

the application." 50 C.F.R. § 17.22(a)(2)(vi) (emphasis added). Applicants seeking an ESA permit must have experience handling or maintaining the species requested. In 2010, the FWS denied a permit for clouded leopards and cheetahs because the "application d[id] not provide information to indicate that [the applicant], or [its] staff, ha[d] experience with handling or maintaining" these species. Letter from Timothy J. Van Norman, Chief, Branch of Permits, DMA, FWS, to R. Donovan Smith, Close-Up Creatures, LLC, 2 (Dec. 3, 2010) (Ex. 19). "Without the requisite experience with these species," the FWS was "not able to find that [the applicant] me[]t the required experience criteria." *Id.* More recently, the FWS explained that it has "received applications . . . where there is a very limited discussion of the applicant's expertise." E-mail from Timothy J. Van Norman, Chief, Branch of Permits, DMA, FWS, to Alan Shoemaker (May 19, 2015), at 3 (Ex. 20). The agency made clear that it requires a "very clear description of [applicants'] abilities to maintain and breed (for conservation purposes) the species they are requesting. [Applicants] should also identify, when appropriate, who is handling their veterinary care. If the applicant is relying on a mentor to address care issues, they should identify the mentor and their expertise." *Id*.

Perry has failed to satisfy her burden of demonstrating the required experience with leopards. *See* 50 C.F.R. § 13.21(b) ("fail[ure] to demonstrate a valid justification for the permit" warrants denial). If the permit is issued, the purchase of the two African leopards will be the facility's "first acquisition of leopards." App., Ex. 1 at 9. The application requires a "[d]escription of the technical expertise of each person," including a "CV or resume," "as it relates to the proposed activities." FWS Form, Ex. 12 at 4. However, the application fails to include a copy of Perry's résumé, as required by the FWS. *See* App., Ex. 1 at 13; FWS Form, Ex. 12 at 4. Elsewhere, the application claims that Perry "completed . . . . 5,000 hours of hands on training" eight or more years ago "with several large exotic feline species including leopards," but provides no details about Perry's leopard-related training, including how much time was spent learning about leopards specifically. App., Ex. 1 at 13. The application also states that Perry "has had significant training in handling African Leopards and other species at T.I.G.E.R.S. Preservation Station located in South Carolina," but again fails to provide how much time was spent specifically training in handling leopards, or any other details of the training. *Id.* at 9. This limited information hardly constitutes the "very clear description of [Perry's] abilities to maintain . . . the [requested] species," which the FWS requires. E-mail from Timothy J. Van Norman, Chief, Branch of Permits, DMA, FWS, to Alan Shoemaker (May 19, 2015), at 3 (Ex. 20).

Moreover, the value of any "training in handling" that Perry received at T.I.G.E.R.S. is dubious at best. Since 1988, the U.S. Department of Agriculture (USDA) has cited T.I.G.E.R.S. or its founder and director, Bhagavan Antle, for dozens of Animal Welfare Act (AWA) violations, many of them related to endangered big cats, including leopards. USDA Inspection Reports (Ex. 21). During the period that Perry likely trained at the facility, the USDA cited T.I.G.E.R.S. because the written program of veterinary care had not been formally reviewed by the attending veterinarian for eighteen months, nor had the attending veterinarian conducted a formal site visit

in that period. The exhibitor was also cited for failure to provide adequate environmental enrichment to a mandrill with marked signs of psychological stress. *Id.* at 11 (Apr. 9, 2007). On June 13, 2007, the USDA cited T.I.G.E.R.S. for failure to observe all animals on a daily basis to assess their health and well-being, after investigators found that a white tiger had a red, raised nodular mass on the inside of his left ear, of which T.I.G.E.R.S. was unaware. *Id.* at 9. And, on April 22, 2008, the USDA cited T.I.G.E.R.S. for failure to establish and maintain programs of adequate veterinary care. The most recent tuberculosis test results available for an elephant were from more than a year before even though this elephant had direct contact with the public and tuberculosis is a contagious disease affecting elephants, humans, and other animals. Professional guidelines indicated that tuberculosis testing needed to be conducted no less than annually. *Id.* at 7. Additionally, Antle admits that T.I.G.E.R.S. sends cubs that it can no longer use for profitable petting and photography sessions to "parks all over the world, including locations in Argentina, Thailand, and California," when the "cats reach four to eight months old." Ian S. Port, *The Man Who Made Animal Friends*, Rolling Stone, Sept. 21, 2015, *available at* http://www.rollingstone.com/culture/news/the-man-who-made-animal-friends-20150921?page=2. And an undercover investigation by the Humane Society of the United States found that T.I.G.E.R.S. separated a three-week-old cub, Sarabi, from his mother and shipped him to Tiger Safari in Oklahoma, where he was handled by twenty-seven visitors on the very day he arrived. *Id.* However, according to the late Ronald Tilson, who served for more than two decades as Director of Conservation for the Minnesota Zoo and coordinator of the AZA Tiger SSP, "[t]iger experts with hundreds of years of experience in captive propagation agree that it is normally in a cub's best interest to stay with its mother until the species-typical age of dispersal (i.e., 2.5-3 years)," and that "[p]rematurely removing a big cat cub from its mother is not condoned by the majority of animal care professionals because it . . . can lead to negative long-term health and behavioral repercussions." Decl. of Ronald Tilson ¶ 8 (Oct. 6, 2012), *available at* http://bigcatrescue.org/wp-content/uploads/2014/10/Public-contact-petition-amended-1-13-and-comments.pdf.

Perry has also failed to demonstrate that the experience of other staff members is adequate to meet the Enhancement Requirement. "If the proposed activity involves the import of live animals" applicants are required to "include the experience of each animal caretaker working with the species." FWS Form, Ex. 12 at 4. But, according to the information provided, none of the other staff has *any* specific experience with leopards. *See* App., Ex. 1 at 14-18. Brittany Gonzalez and Kelly Woods' work for Perry involves "[a]nimal husbandry and training with several species of large and small cats (Bengal Tigers, African Servals, North American Cougar, Eurasian Lynx), exotic hoofstock, and a wide variety of raptors." *Id.* at 14, 16. Both Gonzalez and Woods purportedly served as student animal trainers, working with "carnivores, primates, hoof stock, parrots, and birds of prey." *Id.* Gonzalez also worked as an intern with "Giant Otters, Elephants, California Condors, Koalas, Gorillas, and Orangutans," *id.* at 14, while Woods "[h]andled and manned a variety of raptor species"; "[a]ssisted with capture and release of rehabilitated sea

lions"; "[a]ssisted with food preparation and feeding of giraffes, zebras, and ostriches"; and "[p]articipated in [a] jellyfish breeding program," *id.* at 16-17.

Finally, the application fails to identify a person responsible for veterinary care for the requested leopards. *See* E-mail from Timothy J. Van Norman, Chief, Branch of Permits, DMA, FWS, to Alan Shoemaker (May 19, 2015), at 3 (Ex. 20) "[Applicants] should also identify, when appropriate, who is handling their veterinary care. If the applicant is relying on a mentor to address care issues, they should identify the mentor and their expertise.").

Thus, the FWS must deny the requested permit for failure to demonstrate "expertise . . . adequate to enhance the propagation or survival of the affected wildlife." 50 C.F.R § 17.21(g)(3)(ii).

C. The FWS Cannot Issue the Requested Permit Because Perry Has Not Made—and Cannot Make—the Required Showing of Responsibility.

The FWS requires that applicants "demonstrate . . . a showing of responsibility" before they may be issued a permit. 50 C.F.R. § 13.21(b)(3). Demonstrating a "showing of responsibility" means demonstrating that Perry can meet the requirements of a permit issued pursuant to the ESA's enhancement exception. *See OSG Prods. Tankers LLC v. United States*, 82 Fed. Cl. 570, 575 (Fed. Cl. 2008) (in making a responsibility determination in the context of government contracts, the "contracting officer must satisfy herself that that plaintiff can meet the requirements of the contract").[2]

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

In the very transaction for which she now seeks authorization under the ESA, Perry received two African leopard cubs from LTWAP when the cubs were merely days old; they were born on June 26 and acquired on July 1. *See* App., Ex. 1 at 10-11.[3] Pursuant to 9 C.F.R. § 2.131(b)(1) and

[2] Notably, Perry's license from the California Department of Fish and Wildlife authorizes *one* leopard. App., Ex. 1 at 34.

[3] Indeed, LTWAP—from whence Perry received the leopards—has a history of prematurely removing cubs from their mothers, causing an unnecessary risk of harm, discomfort, malnutrition, and even death. *See* correspondence from PETA to the USDA dated March 26, 2006, reporting the death of a leopard cub from apparent weak bone density (Ex. 22). LTWAP also has a history of irresponsibly transferring animals to facilities that allow them to suffer and die from inadequate care. In 2009, LTAP transferred a 4-week-old tiger to Plumpton Park Zoo, *See* USDA

(c)(3), respectively, "[h]andling of all animals shall be done as expeditiously and carefully as possible in a manner that does not cause trauma . . . behavioral stress, physical harm, or unnecessary discomfort" and "[y]oung or immature animals shall not be exposed to rough or excessive public handling or exhibited for periods of time which would be detrimental to their health or well-being." Removing cubs from their mothers prematurely and subjecting them to the stresses and excessive handling required to ship them violates 9 C.F.R. § 2.131(b)(1) and (c)(3) and can cause young cubs without fully developed immune systems to become injured, sick, or highly stressed—and can even result in their deaths. The USDA has determined that infant large cats who are less than approximately eight weeks old should not be subjected to excessive handling because their immune systems have not "developed sufficiently to protect them from most communicable diseases." USDA, Big Cat Question and Answer, https://www.aphis.usda.gov/animal_welfare/downloads/big_cat/big_cat_q&a.pdf (last visited Oct. 30, 2015). In 2013, two three-day-old tiger cubs died within two days of their transfer to Big Cats of Serenity Springs (BCSS). In its inspection report citing BCSS for the deaths, the USDA stated that "[t]ransportation and handling of very young and unhealthy animals may cause trauma, behavioral stress, and unnecessary discomfort and may have contributed to these animals' deaths." *See* USDA Inspection Report, Nick Sculac, License No. 84-C-0069, May 23, 2013 (Ex. 25). The USDA also acknowledged the risks inherent to handling infant cubs earlier this year when Bryan Hovatter was cited for subjecting young cubs to encounters with the public:

> Cubs of this age [five-weeks old] that have not been adequately vaccinated do not have fully intact immune systems and are therefore susceptible to many infectious diseases. The practices described above do not constitute handling these cubs as carefully as possible and unnecessarily risks harm and discomfort. The licensee must ensure that if the tigers are to be removed from the mother, handling must be done as carefully as possible and that exposure to members of the public does not occur until the cubs are immunocompetent and vaccinated.

See USDA Inspection Report, Bryan Hovatter dba "Hovatter's Wildlife Zoo," License No. 54-C-0110, June 4, 2015 (Ex. 26).

The USDA also recently cited Joe Schreibvogel (license no. 73-C-0139) for prematurely removing cubs from their mother and subjecting them to excessive handling, finding the following that nineteen-day-old cubs

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Inspection Report, Plumpton Park Zoological Gardens, License No. 51-C-0021, July 27, 2010 (Ex. 23), and the tiger died nine months later after ingesting plastic materials. The tiger also suffered from metabolic bone disease and anemia caused by a poor diet and was heavily infested with fleas. In 2012, LTWAP transferred two 4-month-old leopards to Tim Stark. A few weeks later, Stark found one of the leopards dead from what he suspected was metabolic bone disease, but he never sought treatment from a veterinarian. USDA Inspection Report, Tim Stark, License No. 32-C-0204, June 25, 2013 (Ex. 24). He barbarically killed the second leopard a few days later with a baseball bat. Kristina Goetz & Erin Keane, *The Troubling Record of a Southern Indiana Wildlife Refuge*, http://wfpl.org/the-troubling-record-of-a-southern-indiana-wildlife-refuge/ (last visited Oct. 30, 2015).

> . . . in the absence of their parents are not able to adequately thermoregulate and exposure to temperatures which may be comfortable for adults may still be detrimental to the health of young cubs. Exposure to an excessive number of people and other animals at this young age poses a disease risk to the cub. Even indirect exposure via the licensee who has contact with the members of the public and other animals can pose a similar risk to the cub of this age. The practices described above do not constitute handling the cub as carefully as possible and unnecessarily risks harm and discomfort. . . . The licensee must ensure that if [cubs] are to be removed from the mother that handling must be done as carefully as possible in a temperature regulated environment and that exposure to members of the public and other animals does not occur until the cubs are immunocompetent and vaccinated.

See USDA Inspection Report, Joe Schreibvogel, License No. 73-C-0139, Aug. 5, 2015 (Ex. 27).

In short, Perry cannot make the required showing of responsibility—highlighted in bold relief by the fact that she received cubs who were just *a few days old* from a facility with a history of premature removal of cubs and irresponsible transfers, and, thus, the FWS must not issue the requested permit.

IV. Conclusion

For all of the reasons detailed above, PETA urges the FWS to deny Perry's application for the requested ESA permit.

Again, should the agency decide to issue the permit despite these objections, PETA hereby requests notice of that decision, pursuant to 50 C.F.R. § 17.22(e)(2), to Brittany Peet at BrittanyP@petaf.org or 202-540-2191 at least ten days prior to the issuance of the permit.