

August 14, 2017

Timothy Van Norman, Chief
Branch of Permits, Division of Management Authority
U.S. Fish and Wildlife Service

Via electronic submission

Re: PRT-30596C, Submitted by Feld Entertainment, Inc.
Docket No. FWS-HQ-IA-2017-0032

Dear Mr. Van Norman,

On behalf of People for the Ethical Treatment of Animals (PETA), I submit the following comments urging the U.S. Fish & Wildlife Service (FWS) to deny Feld Entertainment, Inc.'s (FEI) request under the Endangered Species Act (ESA) for a captive-bred wildlife (CBW) registration (the "Application") authorizing it to harm, harass, sell, and buy captive-bred endangered Asian elephants.

At least seven calves bred by FEI died before reaching the age of five. This includes Nate, who died last year at age three of a disease associated with stress that impacts one in four captive-born calves and swiftly kills 80 percent of those who get it by causing multiple organs to painfully hemorrhage. Two-year-old Mike also died of this disease in 2016, and a third calf, Barack, suffered the disease *twice*. A fourth calf, three-year-old Kenny, was found dead and bleeding from his rectum backstage at a Ringling Bros. circus venue after appearing in three performances on the day he died—he likely also succumbed to this disease.

Elephants at FEI's breeding and training compound—the so-called Center for Elephant Conservation (CEC)—have also been afflicted by tuberculosis (TB), an airborne disease that is transmitted between elephants and humans and is also stress-related. At least eight of the elephants currently held at the CEC have had active TB, including Aree, who tested positive as recently as 2016. Icky II, Banko, Asia, and Smokey have all tested positive for the disease in the last five years as well.

FEI has held a CBW registration for more than 30 years. These comments show that during that time, it has chained elephants on concrete every single night, separated calves from their mothers to indoctrinate them into circus life, and trained elephants using weapons so cruel that they've been outlawed in states and cities around the US.

These activities have harmed, harassed, and injured virtually every endangered Asian elephant in FEI's custody, leading to the premature deaths of numerous animals. All of these activities—as well as the sales and exchanges of

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elephants that it has conducted with other circuses and zoos—have been for *purely* commercial entertainment purposes.

For all of the reasons discussed in these comments, FWS must deny the Application. PETA requests notification of FWS's final action on the Application. Pursuant to 50 C.F.R. § 17.22(e)(2), should FWS decide to issue the permit despite these objections, I hereby request notice of that decision at least ten days prior to the issuance of the permits via e-mail to RMathews@petaf.org or telephone to 202-680-8276.

Very truly yours,



Rachel Mathews, Esq.

Associate Director

Captive Animal Law Enforcement

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in Opposition to PRT-30596C, Submitted by Feld Entertainment, Inc.**

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I. The Application

On November 7, 2016, FEI submitted a renewal Application¹ for a CBW registration to cover Asian elephants.

On July 13, 2017, FWS published notice of the Application in the Federal Register, commencing a comment period ending on August 14, 2017.

¹ Ex. 1, Application.

On July 25, 2017, counsel for PETA contacted FWS regarding a number of materials required by FWS Form 3-200-41 that FEI failed to include in the Application.² Because the Application contained no materials explaining the eight-month delay in publication, the request also asked FWS provide materials explaining the delay, such as correspondence between the agency and the applicant, or to confirm that no such materials existed.³ FWS did not respond to this request.

On August 8, 2017, counsel to PETA inquired whether the agency was going to provide a response to its request for missing materials.⁴ As of August 14—the final day of the comment period—PETA had not received a response.

II. Statutory And Regulatory Requirements For ESA Permits

A. ESA Prohibitions And Limited Exceptions

The ESA establishes a national policy "that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of [the Act]."⁵ Section 9 of the Act prohibits persons from taking endangered species; carrying, transporting, or shipping them in interstate commerce in the course of a commercial activity; and selling or offering them for sale in interstate commerce.⁶ ""

The term "take" is to be construed in the "broadest possible" manner when interpreting the ESA.⁷ To "take" an animal means to "harass, harm, . . . wound, kill, . . . or to attempt to engage in any such conduct."⁸ "Harm" is defined by regulation as "an act which actually kills or injures wildlife."⁹ "Harass" is defined by regulation as "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering."¹⁰ As it pertains to captive animals, such as the elephants at issue, the definition of "harass" exempts:

² Ex. 2, Letter from Rachel Mathews, PETA Foundation, to Tim Van Norman & Joyce Russell, FWS (July 25, 2017).

³ *Id.*

⁴ Ex. 3, Email from Rachel Mathews, PETA Foundation, to Tim Van Norman & Joyce Russell, FWS (Aug. 8, 2017).

⁵ 16 U.S.C. § 1531(c).

⁶ *Id.* § 1538(a)(1)(A), (E), (F).

⁷ *Babbitt v. Sweet Home Ch. of Cmtys. for a Great Or.*, 515 U.S. 687, 704 (1995).

⁸ 16 U.S.C. § 1532(19).

⁹ 50 C.F.R. § 17.3.

¹⁰ *Id.*

- "generally accepted" animal husbandry practices that "meet or exceed the minimum standards for facilities and care under the Animal Welfare Act,"
- "generally accepted" breeding procedures, and
- "generally accepted" veterinary procedures "for confining, tranquilizing, or anesthetizing," but only "when such practices, procedures, or provisions are not likely to result in injury to the wildlife."¹¹

FWS has recognized that "[o]bviously, maintaining animals in inadequate unsafe or unsanitary conditions, feeding an improper diet, and physical mistreatment constitute harassment because such conditions might create the likelihood of injury or sickness of an animal."¹²

The term "wound" is not further defined in the statute or its implementing regulations, however, the verb means "to injure (someone or something) by cutting or breaking the skin" or "to cause (someone) to feel emotional pain."¹³ The noun is defined as "an injury to the body (as from violence, accident, or surgery) that typically involves laceration or breaking of a membrane (such as the skin) and usually damage to underlying tissues," as well as "a mental or emotional hurt or blow."¹⁴

Section 10 of the ESA affords FWS limited authority to issue permits to allow activities that are otherwise prohibited by Section 9 "for scientific purposes or *to enhance the propagation or survival of the affected species*" (the "Enhancement Requirement").¹⁵ 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."¹⁶ Such was Congress's desire to

¹¹ *Id.*; see also Final Rule: Captive-bred Wildlife Regulation, 63 Fed. Reg. 48,634, 48,636 (Sept. 11, 1998) ("The purpose of amending the Service's definition of 'harass' is to exclude proper animal husbandry practices *that are not likely to result in injury* from the prohibition against 'take.'" (emphasis added)); *id.* at 48,638 ("[T]he definition of 'harass' in 50 CFR 17.3 is modified to exclude normal animal husbandry practices *that are not likely to result in injury* such as humane and healthful care when applied to captive wildlife." (emphasis added)).

¹² Proposed Rule: Captive-Bred Wildlife Regulation, 58 Fed. Reg. 32,632, 32,637 6 (June 11, 1993); accord Final Rule: Captive-bred Wildlife Regulation, 63 Fed. Reg. 48,634, 48,638 (Sept. 11, 1998).

¹³ *Wound*, Merriam-Webster.com, <http://www.merriam-webster.com/dictionary/wound> (last visited July 31, 2017).

¹⁴ *Id.*

¹⁵ 16 U.S.C. § 1539(a)(1)(A) (emphasis added).

¹⁶ Ex. 4, H.R. Rep. No. 93-412, at 156 (1973) (emphasis added).

limit exemptions that it prohibited "[v]irtually all dealings with endangered species, . . . except in *extremely narrow* circumstances."¹⁷

Persons who seek to engage in any of the otherwise prohibited activities must apply for and obtain a permit pursuant to Section 10. FWS may only issue a permit after making specific findings that the permit was "applied for in good faith" (meaning "not for the purpose of stockpiling animals or products"¹⁸), and that the proposed activities "will not operate to the disadvantage of such endangered species" and "will be consistent with the purposes and policy set forth" in the ESA.¹⁹ Likewise, Section 7 of the ESA requires all federal agencies to "insure that any action authorized . . . by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species."²⁰

In making these findings, the agency must consider, *inter alia*:

- "The 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";²¹
- "Whether 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";²² and
- "Whether the expertise, facilities, or other resources available to the applicant appear adequate to successfully accomplish the objectives stated in the application."²³

FWS may only issue a permit upon receipt of a "complete" and "properly executed" application,²⁴ and shall not issue such permit if:

- "The applicant has been assessed a civil penalty . . . relating to the activity for which the application is filed, if such assessment . . . evidences a lack of responsibility."²⁵
- "The applicant has failed to disclose material information required, or has made false statements as to any material fact, in connection with his application."²⁶

¹⁷ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978) (emphasis added).

¹⁸ H.R. Rep. No. 93-412, at 156.

¹⁹ *Tenn. Valley Auth.*, 437 U.S. at 180.

²⁰ 16 U.S.C. § 1536(a)(2).

²¹ 50 C.F.R. § 17.22(a)(2)(ii).

²² *Id.* § 17.22(a)(2)(iv).

²³ *Id.* § 17.22(a)(2)(vi).

²⁴ *Id.* §§ 17.22, 13.21(b).

²⁵ *Id.* § 13.21(b)(1).

²⁶ *Id.* § 13.21(b)(2).

- "The applicant has failed to demonstrate a valid justification for the permit and a showing of responsibility."²⁷
- "The authorization requested potentially threatens a wildlife or plant population."²⁸
- FWS finds that the applicant is "not qualified."²⁹

B. CBW Registrations

FWS has long maintained that the purposes of the ESA are "best served by conserving species *in the wild* along with their ecosystems," and captive animals "have a role in the survival of the species *only* to the extent that they maintain genetic integrity and offer the potential of restocking natural ecosystems[.]"³⁰ With the "original purpose" of "encourag[ing] responsible breeding efforts"³¹—meaning the maintenance of "*healthy*," "*self-sustaining*" and "*genetically viable*" captive populations through "normal husbandry practices"³²—the agency developed the CBW registration scheme to relax the requirements of Section 10 for exotic species conceived and born in captivity.³³

Under this system any person may take, sell, or otherwise engage in commercial activity with non-native wild animals who were bred in captivity in the United States provided that "[t]he purpose of such activity is to enhance the propagation or survival of the affected species," and the person "first register[s]" with FWS.³⁴

²⁷ *Id.* § 13.21(b)(3).

²⁸ *Id.* § 13.21(b)(4).

²⁹ *Id.* § 13.21(b)(5).

³⁰ Advanced Notice of Proposed Rulemaking: Captive Wildlife Regulation, 43 Fed. Reg. 16,144, 16,144 (Apr. 14, 1978) (second emphasis added); *see also* Proposed Rule: Captive-Bred Wildlife Regulation, 58 Fed. Reg. 32,632, 32,633 (June 11, 1993) ("The Service considers the purpose of the Act to be best served by conserving species in the wild along with their ecosystems. Populations of species in captivity are, in large degree, removed from their natural ecosystems and have a role in survival of the species only to the extent that they maintain genetic integrity and offer the potential of restocking natural ecosystems where the species has become depleted or no longer occurs.").

³¹ Proposed Rule: Captive-Bred Wildlife Regulation, 58 Fed. Reg. 32,632, 32,636 (June 11, 1993).

³² Proposed Rule: Captive Wildlife Regulation, 44 Fed. Reg. 30,044, 30,045 (May 23, 1979) (emphases added); Final Rule: Captive Wildlife Regulation, 44 Fed. Reg. 54,002, 54,005 (Sept. 17, 1979); Proposed Rule: Captive-bred Wildlife Regulation, 57 Fed. Reg. 548, 549 (Jan. 7, 1992).

³³ *See* 50 C.F.R. § 17.21(g); *id.* § 17.3 (definition of "bred in captivity").

³⁴ *Id.* § 17.21(g)(1)(i)-(ii), (g)(2).

In deciding whether to approve a registration request, FWS must consider both the general criteria for ESA permits,³⁵ as well as "whether the expertise, facilities, or other resources available to the applicant appear adequate to enhance the propagation or survival of the affected wildlife."³⁶ These conditions are "designed to protect wild populations of wildlife and to ensure that the activities will be conducted to enhance the propagation or survival of the species."³⁷ Hence, the "required goals" of CBW applicants are "to preserve the genetic makeup of the species, to establish a self-sustaining captive population, and to make animals available for any legitimate and appropriate effort to re-establish or augment wild populations of the species."³⁸ Meanwhile, "inbreeding" and "over-representation in the gene pool" render animals "unsuitable for organized breeding programs aimed at preservation of the species."³⁹

If it approves a registration, FWS must make and publish its findings that "the registration was applied for in good faith, that issuing the registration will not operate to the disadvantage of the species for which registration was sought, and that issuing the registration will be consistent with the purposes and policy" of the ESA.⁴⁰

C. FWS Permit Conditions

FWS regulations applicable to all Section 10 permits, including CBW registrations, require that wildlife "possessed under a permit must be maintained under humane and healthful conditions."⁴¹ They also emphasize that "[p]ermits are *specific*," setting out "specific times, dates, places, and methods of taking or carrying out the permitted activities[.]"⁴² They authorize "certain circumscribed transactions[] or otherwise allow a specifically limited matter, to be strictly interpreted."⁴³ Permits shall not be "interpreted to permit similar or related matters outside the scope of strict construction."⁴⁴

³⁵ See text accompanying notes 24-29.

³⁶ 50 C.F.R. § 17.21(g)(3)(i).

³⁷ Final Rule: Captive Wildlife Regulation, 44 Fed. Reg. 54,002, 54,002 (Sept. 17, 1979).

³⁸ Proposed Rule: Captive-Bred Wildlife Regulation, 58 Fed. Reg. 32,632, 32,636 (June 11, 1993).

³⁹ Proposed Rule: Captive-bred Wildlife Regulation, 57 Fed. Reg. 548, 550 (Jan. 7, 1992).

⁴⁰ 50 C.F.R. § 17.21(g)(3)(ii).

⁴¹ *Id.* § 13.44.

⁴² *Id.* § 13.42 (emphasis added).

⁴³ *Id.*

⁴⁴ *Id.*

In practice, and despite the specificity requirement, CBW registrations typically authorize unlimited takes and commercial activities involving covered animals for a period of five years. Although registrants must "must maintain accurate written records of activities conducted under the registration," such information is maintained privately by the registrant not accessible to the public.⁴⁵ The only information that registrants must submit to FWS is a "written annual report of activities, including all births, deaths, and transfers of any type."⁴⁶

III. FEI's Elephant Breeding Program Is A Failure.

FEI has held a CBW registration for more than 30 years.⁴⁷ During that time, its activities have harmed, harassed, and injured virtually every endangered Asian elephant in its custody, leading to the premature deaths of far more elephants than the circus has produced. All of these activities—as well as the sales and exchanges of elephants that it has conducted with other circuses and zoos—have been for *purely* commercial entertainment purposes.

FEI breeds elephants to perpetuate their existence *in captivity*,⁴⁸ with no intention of releasing them into their native ecosystems,⁴⁹ or even the "potential of restocking natural ecosystems."⁵⁰ Its business is "first a[nd] foremost about entertainment,"⁵¹ from Monster Jam to Disney On Ice. It admits that it is "not a conservation organization,"⁵² and that its goal is

⁴⁵ See *id.* § 17.21(g)(3)(iii); see also *id.* § 13.46 ("From the date of issuance of the permit, the permittee shall maintain complete and accurate records of any taking, possession, transportation, sale, purchase, barter, exportation, or importation of . . . wildlife pursuant to such permit.").

⁴⁶ *Id.* § 17.21(g)(3)(iii).

⁴⁷ Application at 9.

⁴⁸ *Id.* at 74 (emphasis added).

⁴⁹ Ex. 5, Trial Test. of Dennis Schmitt, Trial Tr. at 27-28, *ASPCA v. Feld Entm't Inc.*, 677 F.Supp.2d 55 (Mar. 17, 2009, p.m.) (Civ. No 03-2006) ("Q. But you're not creating these new elephants for reintroduction purposes, are you?" A. "No."; "Q. But in terms of conservation, the principle focus is not developing these animals for reintroduction into the wild in Asia, right? A. No.").

⁵⁰ Advanced Notice of Proposed Rulemaking: Captive Wildlife Regulation, 43 Fed. Reg. 16,144, 16,144 (Apr. 14, 1978)

⁵¹ Ex. 6, N.Y.C. City Council, Transcript of the Minutes of the Comm. on Health 122, 123-24 (Oct. 20, 2016) [hereinafter "N.Y.C. City Council Transcript"]; *id.* at 123-24 ("first and foremost we're about making people happy. We're about entertainment. We're about putting smiles on kids' faces.").

⁵² Ex. 7, Mia MacDonald, *All for Show: Ringling Brothers Circus Claims to Promote Conservation*, E Magazine (Oct. 31, 2003).

"[g]enerating the smiles—and the dollars."⁵³ The company has bred elephants "[b]ecause . . . the vast majority of the people that come to our shows come to see the elephants,"⁵⁴ which is why entertainment has *always* come before animal health and welfare for this company.

The circus's breeding program has failed to "enhance" anything. At least seven calves—more than a quarter of the elephants that FEI says it has bred—died before reaching the age of five, and even more died in utero. Most of these deaths are attributable to FEI's irresponsible and inhumane animal husbandry practices, which cause animals stress, fear, and injury. For example, FEI separates calves from their mothers by the time they reach the age of two,⁵⁵ depriving them of essential species-appropriate nurturing and education. There is no "generally accepted" animal husbandry or veterinary justification for doing this—FEI has done it solely to indoctrinate the calves and to put them on display for the paying public. As a result, elephants have developed illnesses, injuries, and even died.

A. Many FEI Elephants Died As Babies As A Result Of FEI's Animal Husbandry Practices.

1. Multiple Calves Have Died Of EEHV.

In 1998, a 3-year-old calf named Kenny was found dead backstage at a Ringling performance venue with "blood on [his] rear end."⁵⁶ Workers reported in the days before that he was lethargic and avoiding food and water.⁵⁷ On the day he died, Kenny performed in three shows despite showing signs of abdominal pain and illness.⁵⁸ During the first show, a worker reported that Kenny was "acting slow" and had warm ears.⁵⁹ He was given an analgesic, and then made to

⁵³ Ex. 8, Marc Gunther, *The Greatest Business on Earth Okay, so P.T. Barnum is a tough act to follow. But impresario Kenneth Feld owns three circuses, nine ice shows, and an elephant ranch*, Fortune (Nov. 8, 1999), http://archive.fortune.com/magazines/fortune/fortune_archive/1999/11/08/268505/index.htm (emphasis added).

⁵⁴ Ex. 9, Trial Test. of Kenneth Feld, Trial Tr. at 7, *ASPCA v. Feld Entm't Inc.*, 677 F.Supp.2d 55 (Mar. 3, 2009) (Civ. No 03-2006).

⁵⁵ Ex. 10, Decl. of Samuel Dewitt Haddock Jr. ¶ 8 (Aug. 28, 2009) [hereinafter "Haddock Decl."] ("Babies are typically pulled from their mothers around 18–24 months of age. Once they're pulled from their mothers, they've tasted their last bit of freedom and the relationship with their mother ends.")

⁵⁶ Ex. 11, Affidavits of Ringling Bros. Emps. at 1 (1998).

⁵⁷ *Id.* at 3-4.

⁵⁸ *Id.* at 3.

⁵⁹ *Id.*

perform again.⁶⁰ This time, he had three bouts of diarrhea on stage.⁶¹ Off-stage, Kenny passed some blood and acted "painful and colicky."⁶² Even so, trainers brought Kenny back on stage for a third show.⁶³ He died less than two hours later.⁶⁴ The U.S. Department of Agriculture (USDA) sued FEI for making Kenny perform even though he was ill, and settled the case by requiring FEI to implement an employee-education program and to donate \$20,000 to animal charities.⁶⁵

FEI now believes that Kenny died from "a very deadly virus for elephants that really hadn't been discovered at that time."⁶⁶ This likely refers to elephant endotheliotropic herpesvirus (EEHV), a disease that is highly fatal for captive Asian elephants calves aged one to four.⁶⁷ Nearly 25 percent of captive-born calves are sickened by the disease, which kills 80 percent of those who contract it.⁶⁸ Symptoms progress rapidly, and typically include lethargy, abdominal pain, mouth ulcers, severe swelling, and hemorrhaging of multiple organs.⁶⁹ In other words, EEHV is about as deadly and agonizing to baby elephants as the Ebola virus is to humans.⁷⁰

Most elephants carry some strain of this disease without ever getting sick. "EEHV appears to affect *only immunocompromised or recently stressed individuals*"⁷¹ and research suggests that stressful conditions such as those at the CEC—including maternal separation during infancy and

⁶⁰ *Id.*

⁶¹ *Id.* at 3, 5.

⁶² *Id.* at 6 (Affidavit of Gary D. West, DVM (Feb. 5, 1998).

⁶³ *Id.*

⁶⁴ *Id.* Despite numerous accounts from Ringling staff, FEI's Vice President of Government Relations, Thomas Albert—who signed this Application—recently claimed that Kenny "did not perform the night he died." N.Y.C. City Council Transcript, *supra* note 51, at 80.

⁶⁵ Ex. 12, Complaint, *In re: Feld Entm't, Inc.*, FL 98026 (July 15, 1998); Ex. 13, Consent Decision, *In re: Feld Entm't, Inc.*, FL 98026 (July 15, 1998).

⁶⁶ *Id.*

⁶⁷ Ex. 14, Gary S. Hayward, *Conservation: clarifying the risk from herpesvirus to captive Asian elephants*, 170 *Vet. Rec.* 202 (2012), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3587150/pdf/nihms438120.pdf>.

⁶⁸ *Id.*

⁶⁹ Ex. 15, Daniela Denk, et al., Letter, *Fatal elephant endotheliotropic herpesvirus type 5 infection in a captive Asian elephant*, 171 *Vet. Rec.* 380 (2012); Ex. 16, Murray E. Fowler, *Infectious Diseases*, in *Biology, Medicine, and Surgery of Elephants* 131-58, 132 (Murray E. Fowler & Susan K. Mikota, eds. 2006).

⁷⁰ See WHO, *Ebola Virus Disease*, <http://www.who.int/mediacentre/factsheets/fs103/en/> (last visited Aug. 3, 2017) (describing the symptoms and fatality rates).

⁷¹ Ex. 17, C.E. Reid, et al., *Endotheliotropic Elephant Herpes Virus (EEHV) infection. The first PCR-confirmed fatal case in Asia*, 28 *Vet. Q.* 61 (2006) (emphasis added).

abusive training practices—may contribute to a young elephant's susceptibility to EEHV.⁷² Stress interferes with an elephant's ability to fend off disease, and immunosuppression is strongly associated with the development of EEHV.⁷³ Stress is endemic at the CEC because of unnatural and inadequate environmental and social conditions, among other factors. According to a report by veterinary surgeon Jonathan Cracknell on the EEHV closed-session workshop of the 2007 International Elephant Foundation Conservation and Research Symposium, key stressors include premature weaning of calves and changes in elephant group composition.⁷⁴

In 2016, two additional young elephants—Mike and Nate—died at the CEC of EEHV (though only Nate's death was reported in FEI's 2016 annual report to FWS).⁷⁵ Mike died in January 2016 at only two years-old; Nate died in October at age three, just one week before FEI submitted this Application. The circus never publicized Nate's death.

Despite suggesting elsewhere that Kenny died of this virus, FEI claims that Mike and Nate's EEHV deaths are the "first such deaths in our herd."⁷⁶ The company also fails to disclose that another elephant calf—Barack—was afflicted by it *twice*. FEI "debuted" Barack with the circus in late 2009, at just 11 months old. After only two tour stops, he was shipped back to the CEC and FEI eventually revealed that he was suffering from EEHV.⁷⁷ FEI later returned him to the tour. The next year, Barack was infected with the disease a second time.⁷⁸

⁷² Ex. 18, Laura Bennet, et al., *Longitudinal study of Asian elephants, Elephas maximus, indicates intermittent shedding of elephant endotheliotropic herpesvirus 1 during pregnancy*, 2 *Vet. Rec. Open* (2015) ("behavioural stressors may be related to an increase in EEHV-1 shedding."); C.E. Reid, et al., *supra* note 71, at 62; Ex. 19, Jonathan Cracknell, UK Elephant Health Programme, *Elephant Endotheliotropic Herpesvirus (EEHV) Protocol* Ver. 1.3 11 (undated); *see* Ex. 20, Ross Clubb & Georgia Mason, *A Review of the Welfare of Zoo Elephants in Europe* 184 (2002) (discussing the potential role of stress in the development of EEHV).

⁷³ Reid, et al., *supra* note 71; Bennet et al., *supra* note 72; Murray E. Fowler, *Infectious Diseases, in Biology, Medicine, and Surgery of Elephants*, *supra* note 69, at 132 ("From a clinician's standpoint, immune suppression is of paramount importance. Stress is a major external factor that interferes with immune competence.").

⁷⁴ Cracknell, *supra* note 72, at 36, 49.

⁷⁵ Application at 91, 131-33.

⁷⁶ *Id.* at 91.

⁷⁷ Ex. 21, Alec Harvey, *Baby Barack, the elephant, will not appear at circus stop in Birmingham*, AL.com (Jan. 26, 2010), http://blog.al.com/spotnews/2010/01/baby_barack_the_elephant_will.html; Ex. 22, FEI, *Statement on Elephant Endotheliotric Herpesvirus (EEHV) Diagnosis And Treatment For Elephant Calf* (Feb. 3, 2010).

⁷⁸ Ex. 23, FEI, *Statement on Elephant Endotheliotric Herpesvirus (EEHV) Diagnosis And Treatment For Elephant Calf* (Feb. 8, 2011).

The Application asks FEI to explain the measures it has taken to prevent future mortalities. FEI has chosen not to pursue any kind of self-examination by altering the conditions under which it breeds, rears, and trains elephants. Instead, and not surprisingly, it has responded by throwing money at the problem.⁷⁹

2. Two Calves Died As A Result Of Cruel Training Practices.

In 2004, when he was just eight months old, FEI euthanized a baby elephant named Riccardo after he sustained severe fractures to both hind legs when he fell from a pedestal during a training session. FEI representatives attempted to cover up the circumstances of his death by issuing a press release stating that "Riccardo was playing in an outside area as part of his daily recreational activity."⁸⁰ Gary Jacobson, the general manager of the CEC, told the USDA that the pedestal he fell from was an "enrichment and exercise toy" that Riccardo liked to play with.⁸¹ An FEI vice president also told the USDA that "Riccardo had not yet begun training."⁸² Jacobson later admitted under oath that in reality Riccardo fell while Jacobson and his wife were training him to climb onto the tub using a rope tied around his trunk and a bullhook.⁸³ Riccardo's necropsy revealed that he had multiple fractures and bone fragments in both hind legs caused by the fall.⁸⁴ At 8-months-old, he was also found to have osteoporosis—weak, brittle bones caused by a nutritional deficiency—as well as other painful bone conditions.⁸⁵

Riccardo's poor physical condition that predisposed him to fatal injury was almost certainly related to the circumstances under which he was raised. He was born when his mother Shirley was still a juvenile, at only 8 years old.⁸⁶ In contrast, wild Asian elephants do not usually have their first

⁷⁹ Application at 91.

⁸⁰ Ex. 23, FEI, Press Release *August 6, 2004 Statement on Riccardo*; see also Ex. 24, Email forwarded from FEI to USDA re: Riccardo Announcement (Sept. 22, 2004, 3:07 PM) (FEI's president and CEO Kenneth Feld sent a company-wide email claiming that Riccardo died during his "daily recreational activity."); Ex. 25, Declaration of USDA Investigator ¶ 9 (Dec. 29, 2010) (stating that FEI led USDA investigator to believe Riccardo was injured while playing).

⁸¹ Ex. 26, Statement of Gary Jacobson (Nov. 4, 2004).

⁸² Ex. 27, Letter from Julie Alexa Strauss, FEI, to Dale R. Boyles, USDA (Nov. 4, 2004).

⁸³ Ex. 28, Trial Test. of Gary Jacobson Trial Tr. at 18-34, *ASPCA v. Feld Entm't Inc.*, 677 F.Supp.2d 55 (Mar. 9, 2009) (Civ. No 03-2006) [hereinafter "Mar 9. Jacobson Test."].

⁸⁴ Ex. 29, Riccardo Necropsy Report & Addenda (Oct. 28, 04).

⁸⁵ *Id.*

⁸⁶ See AZA, Asian Elephant North American Regional Studbook 145, 147 (2014) (Shirley was born on Feb. 19, 1995, and Riccardo was born to Shirley on Dec. 5, 2003.).

calves until they reach their mid-teens.⁸⁷ Shirley was also captive-bred, and had been deprived of a species-appropriate up-bringing by her mother and among a family herd. Instead, FEI put her on the road and used her for circus performances as a baby. When Riccardo was born, Shirley was separated from other elephants who would normally provide guidance and support during labor. She was chained by three legs and yanked with a bullhook during the birth.⁸⁸

FEI claimed that Shirley immediately rejected Riccardo, but video of the birth shows that staff pulled Riccardo away from her as she desperately tried to reach for him.⁸⁹ Even if it is true that she ultimately rejected Riccardo, it wouldn't be a surprise because of her young age and because FEI had prevented her from learning to parent from her own mother.

Riccardo was ultimately raised by humans who started his circus training at just a few months old.⁹⁰ Veterinary notes show that early on, he was being treated with pain-killers for swollen joints and other signs of discomfort.⁹¹ The bone conditions found on necropsy are consistent with metabolic bone disease and attributable to nutrient deprivation—nutrition that an elephant calf would normally get from his mother's milk.

In 1999, another calf died as a result of FEI's poor husbandry practices. That summer, a worker was transporting two four-year-old calves—Benjamin and Shirley—between cities (without their mothers) and stopped for the night at a rural property in Texas, where he allowed the calves to play in a pond. When it came time to get the elephants out of the pond, Shirley complied with the worker but Benjamin refused. According to the property owner, who witnessed the events, the trainer then used a "rod" to poke Benjamin who tried to get away.⁹² The young elephant drowned. A USDA investigator wrote that " concluded that "[t]he elephant seeing and/or being 'touched' or

⁸⁷ Ex. 30, Shermin de Silva, et al., *Demographic Variables for Wild Asian Elephants Using Longitudinal Observations*, 8 PLoS ONE 1, 7 (2013) (for one population of elephants in Sri Lanka, average age at first reproduction was 13.5 years); Clubb & Mason, *supra* note 72, at 202 (stating that wild Asian elephants have their first calves between the ages of 18 and 20).

⁸⁸ See Video footage of Riccardo's birth,

http://www.petapreview.com/4preview/permanent/baby_elephant_taken_by_ringling_bros_circus_preview.asp (also sent via UPS).

⁸⁹ FEI, Press Release *August 6, 2004 Statement on Riccardo*; Video footage of Riccardo's birth,

http://www.petapreview.com/4preview/permanent/baby_elephant_taken_by_ringling_bros_circus_preview.asp.

⁹⁰ See Ex. 31, Veterinary Notes, Government Exhibit 100 E (2004).

⁹¹ *Id.*

⁹² Ex. 32, Affidavit of Henry Lawler (Aug. 2, 1999); Ex. 33, David Green, USDA, *Report of Investigation*, FEI, Case no. TX99237-AC (Sept. 1, 1999).

'poked' . . . with a[n] ankus created behavioral stress and trauma which precipitated in the physical harm and ultimate death of the animal."⁹³

3. Other Infant Deaths Indicate Major Problems With FEI's Breeding Program.

FEI was expecting two elephant births at the CEC in the fall of 2016: Shirley was "due to calve in September 2016,"⁹⁴ and Sally was due in November "if she carries her calf the full 22-month term."⁹⁵ FEI failed to report the births and/or deaths of either of these calves in the Application or in its 2016 annual report to the FWS.⁹⁶ Likewise, according to the Association of Zoos and Aquariums' (AZA) Asian Elephant Studbook, a calf named Ned was born at Ringling and died three months later in 2001.⁹⁷ Another calf, who was never named, died on the day he or she was born in 2002.⁹⁸ A calf named Bertha was born in 2005, and lived only 11 days.⁹⁹ Two calves died in utero in 1996 and 2005.¹⁰⁰ None of these births or deaths were ever reported to the public or on FEI's annual CBW reports,¹⁰¹ and the circumstances are unknown.

These unreported infant deaths and stillbirths highlight important questions that must be answered in order to evaluate whether FEI's decades-long breeding program is humane and actually fulfilling its purported goal of enhancing the propagation or survival of the species. FWS Form 3-200-41 only asks for a report of "successful births" over the last five years and how many of the animals "survived beyond 30 days."¹⁰² Hence, while FEI touts the number of elephants that it has produced in captivity, FWS is not seeing the full picture. The circus has never revealed:

- The number of pregnancies that have ended prematurely.

⁹³ David Green, USDA, *Report of Investigation*, FEI, Case no. TX99237-AC (Sept. 1, 1999).

⁹⁴ Ex. 34, Susan Ager, *As Ringling Ends Circus, See Where Its Elephants Retired*, NationalGeographic.com (Sept. 17, 2015), <http://news.nationalgeographic.com/2015/09/150916-ringling-circus-elephants-florida-center/>.

⁹⁵ Ex. 35, Greg Cima, *Ringling Bros. moves elephants to Florida for retirement, breeding, research*, JAVMA News (Aug. 17, 2016), <https://www.avma.org/News/JAVMANews/Pages/160901a.aspx>.

⁹⁶ Although CBW registrants are only required to report births if the animal survived longer than 30 days, it *does* require registrants to report all deaths. This ought to include calves who died within 30 days of birth, as well as stillbirths.

⁹⁷ AZA Asian Elephant Studbook, *supra* note 86, at 137.

⁹⁸ *Id.*

⁹⁹ *Id.* at 148.

¹⁰⁰ *Id.* at 145, 147.

¹⁰¹ *See* Ex. 36, FEI Annual Reports (1999-2016).

¹⁰² Application at 3.

- The number of babies who were stillborn.
- The number of calves who have *not* survived past 30 days.
- The number of artificial insemination attempts on each female elephant, and how many have been successful.
- The procedures used during invasive artificial insemination and sperm collection.

This information is critical to evaluating animal welfare, the success of a breeding program, whether the program is "responsible,"¹⁰³ and how often the program is harming, harassing, injuring, wounding, and killing endangered elephants in an attempt to breed them.

B. The Training, Conditions, And Husbandry At FEI's CEC Harass, Harm, Wound, Sicken, And Kill Endangered Elephants.

The Application states that "[d]ifferences in approaches to elephant handling and management . . . have negatively impacted opportunities for coordination and collaboration" because they raise "ethical questions about the psychological and physical well-being of elephants . . . and concerns about the safety of elephant handlers."¹⁰⁴ This is a nod to the fact that *nothing* about FEI's elephant management conforms to modern industry standards, which are designed with the welfare of elephants and safety of staff in mind. FEI is transparently asking FWS to set aside ethics and welfare by issuing it a permit.

As discussed briefly above, the elephants FEI's stable are unhealthy, deprived of maternal care and rearing, trained using cruel and archaic methods, and confined under woefully inadequate conditions.¹⁰⁵ These conditions harass, harm, injure, and sometimes even kill the elephants. They also evidence a lack of responsibility and demonstrate that that FEI is not qualified for a CBW permit because it fails to hold elephants under humane and healthful conditions.

1. FEI's Elephants Are Unhealthy.

a. Tuberculosis

In addition to EEHV, discussed above, FEI's herd is also afflicted by tuberculosis (TB), an airborne disease believed to have originally spread from humans to elephants and that is still spread between the species. Records show the following:

¹⁰³ See Proposed Rule: Captive-Bred Wildlife Regulation, 58 Fed. Reg. 32,632, 32,636 (June 11, 1993).

¹⁰⁴ Application at 8.

¹⁰⁵ See *generally* Ex. 37, PETA, CEC White Paper (2016).

- At least 18 FEI elephants have tested positive for TB, *eight* of whom are still living. Aree tested positive as recently as 2016, and Icky II, Banko, Asia, and Smokey have all tested positive for the disease in the last five years.¹⁰⁶
- An additional eight elephants have tested positive on serological tests measuring TB antibody responses.¹⁰⁷ Serological tests detect TB years in advance of a positive culture or symptoms, and can also detect well as reactivation of the disease.¹⁰⁸ For example, Asia and Banko both had positive serological tests in 2010 and 2011. They developed active disease while on the road with Ringling in 2013 and 2014, respectively.¹⁰⁹
- Smokey and Vance (one of only two reproductive males that FEI has) have each tested positive for TB twice. At least six additional elephants who are now dead tested positive multiple times while alive.¹¹⁰ Siam I had TB at least four times.¹¹¹
- The Application states that a 46-year-old elephant died in 2013 of a "bacterial infection,"¹¹² but provides no further information about who the elephant was, the kind of infection she was suffering from, and the measures FEI will take to prevent further similar deaths. The elephant was likely Mala, and she likely died of TB. She previously tested positive for TB in 2011 and 1998.¹¹³
- FEI has transferred elephants carrying TB to other facilities. For example, FEI sent Jewell to the Little Rock Zoo in 2011 in violation of a quarantine order imposed by the state of Florida.¹¹⁴ She had positive serological tests in 2011 and 2012 and was found to have TB on a necropsy when she died in 2013.¹¹⁵

¹⁰⁶ See Ex. 38, Positive TB Tests for Ringling Elephants (Living: Aree, Asia, Banko, Icky II, Osgood, Shirley, Smokey, Vance. Deceased: Calcutta I, Calcutta II, Dolly, India, Louie, Lutzi, Mala, Putzi, Siam I, Sid, Susan, Teetchie).

¹⁰⁷ *Id.* (Angelica, Cora, Emma, Karen, Mable, Sarah, Siam II, Toby).

¹⁰⁸ Ex. 39, Konstantin Lyashchenko, et al., *Field Application of Serodiagnostics to Identify Elephants with Tuberculosis prior to Case Confirmation by Culture*, 19 Clinical and Vaccine Immunology 1269, 1273 (2012).

¹⁰⁹ See Positive TB Tests for Ringling Elephants.

¹¹⁰ See *id.* (Calcutta II, India, Mala, Siam I, Sid, Teetchie).

¹¹¹ *Id.*

¹¹² Application at 91.

¹¹³ See Positive TB Tests for Ringling Elephants.

¹¹⁴ Ex. 40, E-mail from Sam Lamb, Bureau of Animal Disease Ctrl., Fla. Dep't of Ag. & Consumer Servs., to Thomas Holt, State Veterinarian, Fla. Dep't of Ag. & Consumer Servs. (Oct. 8, 2013).

¹¹⁵ Ex. 41, TB results for Jewell at Little Rock Zoo.

The USDA's field specialist for elephants once wrote that "[t]he facility with the highest incidence of TB in their elephants at this time is the Ringling CEC."¹¹⁶ And whistleblower Samuel Haddock, who worked for Ringling on and off from 1976 to 2005, wrote that "All the elephants at CEC have been treated for TB, some because they were TB-positive, others because they were exposed."¹¹⁷ In his August 2009 declaration, he discussed the Vance in particular:

Vance . . . is in bad shape from TB. He has lots of trunk discharge and is spitting sputum all over the place. He had TB while I worked there, and I saw him again 6 to 8 months ago. He's lost a lot of weight. He's rogue, treatment is a big ordeal so they've stopped.¹¹⁸

Fast-moving and transmissible through the air, TB can spread easily within restrictive quarters such as those at the CEC.¹¹⁹ According to Haddock's sworn statement, "At the CEC, the vet ordered TB meds in bulk. . . . He would order 750,000 tablets at a time."¹²⁰

Haddock reported that he had tested positive for tuberculosis himself, as had most CEC employees.¹²¹ Indeed, in 2011, two Ringling elephant handlers working on the circus's Blue Unit converted to positive on a tuberculin skin test (TST) and a third had a recent history of positive TST conversion.¹²² Likewise, in November 2015, a Ringling worker was placed under observation for TB in Chicago, and in December 2015, two workers were barred from performing in Indianapolis after testing positive for possible TB.¹²³ The real number of workers exposed or infected by the disease is probably much higher, as Ringling has a long history of trying to conceal this information.¹²⁴

¹¹⁶ Ex. 42, E-mail from Denise Sofranko, USDA-APHIS-Animal Care Elephant Specialist, to Nora E. Wineland, USDA Ctr. for Animal Welfare Director (Sept. 14, 2010).

¹¹⁷ Haddock Decl., *supra* note 55, ¶ 37.

¹¹⁸ *Id.* ¶ 37.

¹¹⁹ See generally Ex. 43, Amy Zlot, et al., *Diagnosis of Tuberculosis in Three Zoo Elephants and a Human Contact – Oregon, 2013*, 64 *Morbidity & Mortality Weekly Rep.* 1398 (2016); Ex. 44, Rendi Murphree, et al., *Elephant-to-Human Transmission of Tuberculosis, 2009*, 17 *Emerging Infectious Diseases* 366 (2011).

¹²⁰ Haddock Decl., *supra* note 55, ¶ 39.

¹²¹ *Id.* ¶¶ 35–37, 40.

¹²² Ex. 45, Email from Victor Tomlinson, CDC, to John Jerub, CDC (Apr. 14, 2011, 4:46 PM).

¹²³ Ex. 46, Shari Rudavsky, *Health officials screen circus for TB*, *Indianapolis Star* (Dec. 4, 2015), <http://www.indystar.com/story/news/2015/12/04/health-officials-screen-circus-tb/76777086/>.

¹²⁴ See Ex. 47, Delcianna Winders & Heather Rally, PETA Foundation, *Tuberculosis in Elephants With Ringling Bros.* 3-4 (2015), <https://www.peta.org/wp-content/uploads/2021/06/RinglingReport.pdf>

Hurdles to eradicating TB in the United States and in Asian elephants' range countries include the emergence of multidrug resistant (MDR) strains of the disease, as well as the presence of humans and animals who are highly susceptible to the disease—such as those who are stressed.¹²⁵ The captive elephant population is particularly susceptible, and MDR TB is more likely to develop in patients who are insufficiently or improperly treated, as is often the case with elephant patients.¹²⁶ Clinical signs of TB are often absent in elephants until it is well advanced, at which point the disease is serious, debilitating, and deadly—making treatment difficult.¹²⁷ For this reason, there is every reason to implement absolute caution when it comes to diagnosing and treating TB in elephants.

FEI, despite being the country's "worst offender" when it comes to elephant TB, has actively fought regulatory measures taken to *prevent* the spread of the disease. For example, in opposing federal guidelines that would restrict travel in sero-positive elephants (such as Asia and Banko, the sero-positive elephants who developed active TB while traveling) FEI argued that requiring testing and treatment would be "onerous" because it imposes a "substantial cost" on exhibitors and would "interrupt . . . elephant conservation efforts."¹²⁸ Likewise, one of the publications that FEI lists in the Application—a short communication co-authored by FEI's Dr. Dennis Schmitt—bemoans the fact that "large sums of funding are spent on the diagnosis, treatment, and management of TB, diverting potential resources from conservation."¹²⁹ It is absolutely true that FEI and other captive-elephant facilities spend an inordinate amount of money on managing the multitude of health problems created and exacerbated by captivity.

But conservation of wild populations is exactly why *responsible* captive elephant facilities are working to *eradicate* the disease by properly testing and treating animals, and limiting travel of potentially sick elephants. Dr. Susan K. Mikota, a veterinarian and elephant TB expert advises that

¹²⁵ Ex. 48, Susan K. Mikota, *Stress, Disease, and Tuberculosis in Elephants*, in *An Elephant in the Room: The Science and Well-Being of Elephants in Captivity* (Debra L. Forthman, et al, eds. 2009).

¹²⁶ Ex. 49, Konstantin P. Lyashchenko, et al., *Tuberculosis in Elephants: Antibody Responses to Defined Antigens of Mycobacterium tuberculosis, Potential for Early Diagnosis, and Monitoring of Treatment*, 13 *Clinical & Vaccine Immunology* 722, 728 (2006).

¹²⁷ Ex. 50, Susan K. Mikota, *A Review of Tuberculosis in Captive Elephants and Implications for Wild Populations*, 28 *Gajah* 8, 9, 15 (2008).

¹²⁸ Ex. 51, Tom Albert and Dennis Schmitt, Comments of FEI, Docket no. APHIS-2011-0079 5-6 (Mar. 5, 2013).

¹²⁹ Ex. 52, Heidi S. Riddle, David S. Miller, & Dennis L. Schmitt, Short Communication, *Tuberculosis in Elephants: Assessing Risks Versus Resources*, 37 *Gajah* 31, 31 (2012).

"aggressively controlling TB among captive elephants may avert the introduction of TB into wild populations."¹³⁰ Dr. Mikota further explains:

The majority of elephants that have died with TB in the U.S. have had advanced disease and were a source of infection for other elephants and humans. Despite 10 years of surveillance by culture, new cases are still being found. Perhaps if [serological testing] had been available earlier and had formed the basis of prompt treatment, we would have broken the cycle of infectious TB before now.

Deciding to treat serologically positive elephants might be a bold but necessary move if we are to control TB in elephants. In the early 1980's TB was thought to be under control in the U.S. and surveillance programs weakened. This led to a resurgence of TB between 1985 and 1992. Today we face forms of TB that cannot be treated because of inadequate global control programs.¹³¹

FWS must therefore consider TB's direct and indirect impacts on wild populations of elephants—the disease is already impacting wild populations¹³² and is therefore *increasing* the threat of extinction of the species if it is not properly detected and treated. FEI's breeding program has long been—and continues to be—a major reservoir for the disease in the US, yet the company actively opposes common-sense disease control measures that would hurt its bottom line.

b. Physical And Psychological Maladies Related To Prolonged Chaining

The Application indicates that *every* barn at the CEC has a concrete substrate,¹³³ and elephants there are "trained from birth to sleep indoors . . . tethered with an ankle chain for the night."¹³⁴ Indeed, according to the 2007 sworn testimony of Gary Jacobson, some elephants at the facility are routinely chained on concrete floors for up to 23 hours a day.¹³⁵ They are typically chained by two legs—one hind leg and one foreleg—which prevents movement beyond a step or

¹³⁰ Mikota, *A Review of Tuberculosis in Captive Elephants*, *supra* note 127, at 14.

¹³¹ *Id.* at 15.

¹³² See, e.g., Ex. 53, Alex Dudley, *With poaching curtailed, a new menace to Nepal's wildlife*, *Mongabay* (May 17, 2017), <https://news.mongabay.com/2017/05/with-poaching-curtailed-a-new-menace-to-nepals-wildlife/> (discussing an investigation into whether elephants spread deadly TB to a rhinoceros who died of the disease, and explaining that "over ten domestic Asian elephants (*Elephas maximus*) in Nepal died of tuberculosis between 2002 and 2014, and in 2015, a comprehensive screening of captive elephants throughout the country found that 13 percent carry TB antibodies").

¹³³ Application at 96-103.

¹³⁴ Ager, *supra* note 94.

¹³⁵ Ex. 54, Deposition of Gary Jacobson 161-62, 164, *ASPCA v. Feld Entm't Inc.*, 677 F.Supp.2d 55 (Oct. 24, 2007) (Civ. No 03-2006) [hereinafter "Jacobson Dep."].

two in any direction.¹³⁶ During a court-ordered inspection of the CEC, elephant-care specialist Carol Buckley observed that elephants spent so much time chained that they had worn grooves into the concrete floor.¹³⁷

Female and young male elephants at the CEC are commonly chained for at least 16 hours a day—and some are chained for even longer.¹³⁸ According to Jacobson, for example, the elephant Emma was kept chained alone on concrete for up to 23 hours a day, and the elephant Shirley was similarly chained on concrete for 22.5 hours a day.¹³⁹ Jacobson also testified that pregnant elephants at the CEC are chained by two or three legs for at least two weeks prior to their due dates.¹⁴⁰ In 2003, for example, Shirley was chained by three legs when giving birth to Riccardo.

Young calves are also subjected to prolonged chaining or tethering at the CEC. Former Ringling trainer Samuel Haddock described the CEC's forced separation of calves from their mothers in a sworn statement:

Babies are typically pulled from their mothers around 18-24 months of age. Once they're pulled from their mothers, they've tasted their last bit of freedom and the relationship with their mother ends..... When pulling 18–24 month-old babies, the mother is chained against the wall by all four legs. Usually there's 6 or 7 staff that go in to pull the baby rodeo-style. We put ropes around the legs, one leg at a time. No specific leg first. The ropes are tied off to the pipes. We bring in an anchor elephant and put a rope collar around the anchor elephant and put the other end around the baby's neck. The anchor elephant leads the baby to the North end of the barn. It can take between 30 minutes to an hour to capture and restrain the baby. The baby tries to run away and fights having the ropes put on. Some mothers scream more than others while watching their babies being roped. If the screaming matches continue after the baby has been moved, we might take the mothers outdoors to quiet them down.¹⁴¹

After being pulled from their mothers, Haddock reported, they "spend about 23 hours each day restrained" on concrete.¹⁴² Jacobson described keeping one baby elephant, Aree, in chains for

¹³⁶*Id.*; Ex. 55, Trial Test. of Carol Buckley, Trial Tr. at 74, *ASPCA v. Feld Entm't Inc.*, 677 F.Supp.2d 55 (Feb. 23, 2009) (Civ. No 03-2006).

¹³⁷ *Id.* at 76.

¹³⁸ Jacobson Dep., *supra* note 135, at 154, 160-64.

¹³⁹ *Id.* at 160-64.

¹⁴⁰ Ex. 56, Trial Test. of Gary Jacobson Trial Tr. at 102-03, *ASPCA v. Feld Entm't Inc.*, 677 F.Supp.2d 55 (Mar. 5, 2009) (Civ. No 03-2006).

¹⁴¹ Haddock Decl., *supra* note 55, ¶¶ 8–9.

¹⁴² *Id.* at ¶ 12.

four months, except for about 40 minutes a day, when he would work with her.¹⁴³ He also testified that when a baby elephant named Irvin was separated from his mother, he was kept tied up for 10 days.¹⁴⁴ In 2010, during an inspection, an elephant expert observed that Irvin had a bowed rear right leg and hypothesized that "the bowing in his leg may be from excessive chaining," explaining that she "ha[s] seen this in a number of elephants that have been trained by chaining them to something and the force of the chains can cause physical harm such as this."¹⁴⁵ Based on the fact that Irvin had no fresh chaining abrasions, the expert found it "likely [that] the damage was done when he was an infant in training."¹⁴⁶

After observing two elephant calves with "large visible lesions" on their legs at the CEC, the USDA's deputy administrator for animal care informed Feld that "the handling of these two elephants . . . caused unnecessary trauma, behavioral stress, physical harm and discomfort to these two elephants."¹⁴⁷ According to Haddock's sworn statement, "During USDA inspections at the CEC, we would try to hide injuries, such as rope burns, from USDA inspectors by putting mud on their legs."¹⁴⁸

Chaining on hard surfaces makes elephants prone to arthritis, infection, and psychological stress and, ultimately, can lead to a premature death.¹⁴⁹ Deprived of everything that is natural and

¹⁴³ Jacobson Dep., *supra* note 135, at 279-80.

¹⁴⁴ *Id.*

¹⁴⁵ Ex. 57. Memorandum from Margaret Whittaker, Active Environments, Inc., to Cherie Travis, Chicago Animal Care and Control (Nov. 21, 2010).

¹⁴⁶ *Id.*

¹⁴⁷ Ex. 58, Letter from Ron DeHaven, Deputy Administrator, USDA/APHIS/Animal Care, to Julie Strauss, FEI (May 11, 1999); Video Footage of Doc and Angelica from USDA Inspection, http://www.petapreview.com/4preview/calves_with_chaining_wounds_at_ringlings_center_for_elephant_conservation_peta.asp (also sent via UPS).

¹⁴⁸ Haddock Decl., *supra* note 55, ¶ 32.

¹⁴⁹ *See, e.g.*, Ex. 59, Michelle A. Miller, et al., *Housing and Demographic Risk Factors Impacting Foot and Musculoskeletal Health in African Elephants [Loxodonta africana] and Asian Elephants [Elephas maximus] in North American Zoos*, 11 PLoS ONE (2016) ("Our results demonstrate that one of the main housing risk factors for increased foot and musculoskeletal abnormalities was time spent on hard surfaces."); Ex. 60, Matthew R. Holdgate, et al., *Recumbence Behavior in Zoo Elephants: Determination of Patterns and Frequency of Recumbent Rest and Associated Environmental and Social Factors*, 11 PLoS ONE 16 (2016) ("Our results add to a growing body of evidence suggesting that hard substrate negatively impacts animal welfare. Concrete has been associated with higher rates of sole hemorrhages and swollen knees in cattle, and with incidents of foot and joint disease in zoo elephants. Meanwhile, the reduction and removal of hard substrate from zoo elephant exhibits is already underway."); Clubb & Mason, *supra* note 72, at 186-87; Ex.

meaningful to them, chained elephants often engage in stereotypic behavior, such as swaying back and forth, sometimes repeatedly shifting their weight from one foot to another—all well-recognized signs of suffering.¹⁵⁰ In the words of one elephant consultant, hard surfaces, combined with rocking and swaying behaviors, "are the kiss of death for captive elephants."¹⁵¹ Confining them for "upwards of 16 out of 24 hours on hard unyielding, non[-]interactive surfaces . . . [plays a part in] their medical and physical deterioration," and "chaining only increases the effects of the confinement."¹⁵²

The constant expansion and compression of an elephant's foot on concrete, compounded by ongoing exposure to feces and urine because of the elephant's limited mobility, can result in severe foot problems—one of the leading reasons why captive elephants are euthanized—such as infected cracked nails.¹⁵³ In court testimony, veterinarian and captive elephant expert Dr. Philip K. Ensley described the risk of infection posed by CEC conditions as follows:

61, Gary West, *Musculoskeletal System*, in *Biology, Medicine, and Surgery of Elephants*, *supra* note 69, at 266 ("Chaining elephants for prolonged periods limits their movement and may also contribute to the development of DJD [degenerative joint disease]. Animals that constantly pull or resist chaining may cause joint damage."); Ex. 62, Murray E. Fowler, *Foot Disorders*, in *Biology, Medicine, and Surgery of Elephants*, *supra* note 69, at 287 ("Lack of exercise, housing on hard surfaces, and tethering are frequently brought forward as causes of DJD[.]"); Ex. 63, Carol Buckley, *Captive Elephant Foot Care: Natural Habitat Husbandry Techniques*, in *The Elephant's Foot: Prevention and Care of Foot Conditions in Captive Asian and African Elephants* 54 (Blair Csuti, et al., eds, 2001) ("Chaining has many negative effects on foot health. Not only are elephants forced to stand in their own excrement, but they also rock and sway unnaturally. This movement applies torque pressure on feet and nails. which can cause tissue damage as well as irregular wear and thin foot pads."); Ex. 64, Alan Roodcroft, *Indoors Natural Substrates for Elephants & Medical Issues Associated with Hard Surfaces*, 32 *Animal Keepers Forum* 480, 481 (2005) (Captive elephants face "[a]rthritis, foot abscesses, pressure sores on cheeks and hips, knee calluses that are sensitive to the touch and swellings at the knee joints, etc.," as a "direct result of being housed on hard, unyielding, cold and continuously draughty and damp surfaces." They will also develop stereotypic swaying behaviors out of boredom.); Ex. 65, M. Haspelslagh, et al., *A survey of foot problems, stereotypic behaviour and floor type in Asian elephants (Elephas maximus) in European zoos*, 22 *Animal Welfare* 437 (2013) (finding that elephants confined to concrete "were significantly more likely to have foot problems.").

¹⁵⁰ Clubb & Mason, *supra* note 72, at 51; *see generally id.* at 222–30.

¹⁵¹ Roodcroft, *supra* note 149, at 482.

¹⁵² *Id.*

¹⁵³ Ex. 66, Murray E. Fowler, *An Overview of Foot Conditions in Asian and African Elephants*, in *The Elephant's Foot*, *supra* note 149, at 5-6; Buckley, *Captive Elephant Foot Care*, *supra* note 149, at 54.

With elephants tethered in position, moving back and forth, unable to avoid splashing urine and particulate matter from fecal debris, urine . . . elephants form maybe 15 gallons of urine in a 24-hour period, 200-300 pounds of solid waste in a 24-hour period. So, contained in one location where the elephants are moving, the crack opens and closes, those events precipitate infection.¹⁵⁴

A comprehensive review of Ringling's medical records revealed a high rate of foot problems at the CEC.¹⁵⁵ As explained in the leading veterinary text *The Elephant's Foot*, "There is a general consensus that lack of exercise, long hours standing on hard substrates, and contamination resulting from standing in their own excreta are major contributors to elephant foot problems."¹⁵⁶ Dr. Ensley notes that continuing to chain elephants at the CEC on concrete "will exacerbate past and ongoing musculoskeletal disorders, as well as other maladies brought on by the longstanding practice of forcing these elephants to stand on surfaces causing injury, harm, discomfort, pain and harassment."¹⁵⁷

While foot problems have been documented in approximately two-thirds of elephants in U.S. zoos,¹⁵⁸ Ringling's medical records reveal that nearly 100 percent of the elephants it holds—including those at the CEC—have foot problems as well as musculoskeletal disorders.¹⁵⁹ Especially disturbing is the fact that these problems are prevalent even in younger elephants, such as Riccardo's osteoporosis discussed above. Dr. Ensley reported that a review of the medical records of elephants born at the CEC revealed that "of the sixteen still living" at the time, "all but four have had foot or limb maladies. This represents a failure . . . to recognize that . . . prolonged chaining, training, and housing on hard, unyielding and unnatural surfaces is causing injury, harm, discomfort, pain, and harassment, and aberrant behavior in younger elephants."¹⁶⁰ Examples found in Ringling's medical records include the following:

- At age six, Asha suffered from lameness and recurrent nail-bed abscesses.¹⁶¹

¹⁵⁴ Ex. 67, Trial Test. of Philip K. Ensley, Trial Tr. at 51, *ASPCA v. Feld Entm't Inc.*, 677 F.Supp.2d 55 (Feb. 24, 2009 a.m.) (Civ. No. 03-2006) [hereinafter "Ensley Test."].

¹⁵⁵ See Ex. 68, Plaintiff's Exhibit WC 113 L, *ASPCA v. Feld Entm't Inc.*, 677 F.Supp.2d 55 (undated) (Philip K. Ensley, *Review of Medical Records of the Seven Elephants: Karen, Nicole, Lutzi, Jewell, Zina, Susan, and Mysore*) [hereinafter "Ensley Medical Summary"].

¹⁵⁶ Ex. 69, *Introduction*, in *The Elephant's Foot*, *supra* note 149, at vii.

¹⁵⁷ Ensley Medical Summary, *supra* note 155, at 265.

¹⁵⁸ Miller, et al., *supra* note 149, at 12.

¹⁵⁹ Ensley Medical Summary, *supra* note 155, at 265.

¹⁶⁰ *Id.* at 266.

¹⁶¹ *Id.*

- Also at age six, Gunther suffered from lameness, stiffness, a nail-bed abscess, and a sole lesion.¹⁶²
- A third six-year-old, PT, suffered from acute lameness and nail-bed abscesses.¹⁶³
- Seven-year-old Sara was lame and suffered from toenail cracks and nailbed abscesses.¹⁶⁴

2. FEI Significantly Disrupts Normal Behavioral Patterns By Separating Mothers And Babies.

Elephant society is made up of an extensive and complex social network.¹⁶⁵ The nuclear family usually consists of six to eight individuals led by an experienced matriarch, and is stable over time, rarely splitting.¹⁶⁶ Family groups associate with larger kin groups, and even congregate in clans of hundreds of individuals.¹⁶⁷ The "mother-offspring unit forms the basis of . . . Asian elephant society, and calves are highly dependent on their mothers for proper social development."¹⁶⁸ Calves depend on their mothers' milk for the first two years of their lives, and weaning may occur over a period of years, with calves suckling continuing up to age six.¹⁶⁹ Mothers and calves bond closely, and female relatives help with calf-rearing and behave affectionately and protectively towards the calves in their family group.¹⁷⁰ A female calf will remain with her mother and natal herd for her entire life, which can reach 80 years in the wild. Male elephants leave their natal herds when they are in their early teens. Despite their independence, males congregate in small all-male groups and form life-long associations and friendships.

Splitting elephant families causes "serious disruption of the intricate social networks that underpin social structure in these species, with *severe* impacts on *each* individual's close social

¹⁶² *Id.*

¹⁶³ *Id.* at 267.

¹⁶⁴ *Id.* at 268.

¹⁶⁵ Clubb & Mason, *supra* note 72, at 59-60; Ex. 70, Gay Bradshaw, *Inside Looking Out: Neuroethological Compromise Effects in Elephants in Captivity*, in *An Elephant in the Room: The Science and Well-Being of Elephants in Captivity* (Debra L. Forthman, et al., eds. 2009).

¹⁶⁶ Clubb & Mason, *supra* note 72, at 59.

¹⁶⁷ *Id.*

¹⁶⁸ Ex. 71, Natalia A. Prado-Oviedo, et al., *Evaluation of Demographics and Social Life Events of Asian (Elephas maximus) and African Elephants (Loxodonta africana) in North American Zoos*, 11 PLoS ONE 2 (2016).

¹⁶⁹ Clubb & Mason, *supra* note 72, at 60.

¹⁷⁰ *Id.*

bonds and opportunities for learning from older group members."¹⁷¹ Translocation and disruption of social groups are associated with anxiety, stress, stereotypic behavior, persistent fear, hyper-aggression, cessation of play behavior, immunosuppression, and infant abandonment in elephants.¹⁷²

For this reason, the "generally accepted" zoological standard is to keep family groups together, allow calves to wean naturally and to provide social opportunities for *all* elephants (if they choose, male and female. The Global Federation of Animal Sanctuaries (GFAS), for example, requires that "as much as possible, female offspring are not separated from their mothers," and that juvenile males "remain with their natal herd until they are rejected by the herd or begin to show signs of sexual maturity," and then may be housed with other males.¹⁷³ The AZA requires that calves remain with their mothers until they are weaned and that male elephants have social opportunities, and it encourages zoos to keep elephants in "multigenerational groups" because "[m]uch of the behavioral repertoire of elephants is learned, rather than innate. A multi-generational group allows the transfer of species-appropriate behaviors within a herd through experience and observational learning."¹⁷⁴ Researchers in AZA zoos are also now emphasizing the importance of allowing males to develop social skills and "providing for their social needs as we would for female only herds."¹⁷⁵

As whistleblower Samuel Haddock explained, FEI forcibly separates calves from their mothers by the time they are two years old to begin their training and in most cases they will never be with their mothers again. Many of the FEI's elephants were put on the road within the first years of their lives, usually without their mothers. In addition to Shirley and Benjamin (discussed above), USDA inspection inventories show multiple additional examples:

- Sara was traveling with the Blue Unit by age three. Her mother Icky II was not.

¹⁷¹ Ex. 72, Graeme Shannon, et al., *Effects of Social Disruption in Elephants Persist Decades After Culling*, 10 *Frontiers in Zoology* 62, 65-66 (2013) (emphasis added).

¹⁷² See *id.* at 63; Ex. 73, Brian J. Greco, et al., *The Days and Nights of Zoo Elephants: Using Epidemiology to Better Understand Stereotypic Behavior of African Elephants (*Loxodonta africana*) and Asian Elephants (*Elephas maximus*) in North American Zoos*, 11 *PLoS ONE* 1, 4, 24-25 (2016); Ex. 74, Marion Garai, *The Effects of Boma Design on Stress-Related Behaviour in Juvenile Translocated African Elephants*, 18 *Pachyderm* 55 (1994); Bradshaw, *supra* note 165; Prado-Oviedo, *supra* note 168.

¹⁷³ Ex. 75, GFAS, *Standards for Elephant Sanctuaries* 35-36 (2015).

¹⁷⁴ Ex. 76, AZA, *Accreditation Standards and Related Policies* (2017).

¹⁷⁵ Prado-Oviedo, *supra* note 168, at 16.

- Sundara was traveling with the Blue Unit by age two. Her mother Sally was not.
- Asha was traveling with the Red Unit by age three. Her mother Alana was not.
- Rudy was traveling with the Red Unit by age three. Her mother Sally was not.
- Irvin was traveling with the Blue Unit by age two. His mother Alana was not.

The barn and paddock configuration at the CEC underscores that FEI's property is not set up to accommodate anything resembling a normal elephant herd structure. There are entire separate barns and paddocks designed to confine "younger elephants."¹⁷⁶

3. FEI Harasses, Harms, And Wounds Elephants By Using Cruel Training Techniques.

Elephants in GFAS sanctuaries and AZA zoos are managed using "protected contact," which is a safe and humane approach to elephant care that requires barriers between staff and elephants at all times and relies on positive reinforcement training. The fact that this is "generally accepted" as the most appropriate industry handling practice is supported by FEI's own Application, which includes an article explaining the Dublin Zoo's decision to adopt protected contact management after staff noticed the elephants becoming "increasingly more difficult to treat and handle," and keepers becoming "concern[ed] over their and the elephants' safety."¹⁷⁷ The article explains that there is a "clear positive effect that the protected contact (PC) method has on both parties," because the elephants have more choice and control over their environment, and "[i]n return, trainers are working with calmer animals."¹⁷⁸ The article concludes that "[t]he successful care of elephants with this method is unmistakable," and notes that it helps to preserve the elephants' "own natural ecology, biology, and behavior."¹⁷⁹

In contrast, FEI manage elephants through *direct contact*, i.e., elephants are routinely chained down and coerced into producing desired behavior through the threat of violence, including from bullhooks—metal weapons that resemble fireplace pokers—and electric prods. After spending more than 1,300 hours conducting a comprehensive review of FEI's elephant medical records, Dr. Ensley found that they reveal a "recurrent pattern of injuries on the left side of the elephants' bodies

¹⁷⁶ Application at 96, 103.

¹⁷⁷ *Id.* at 85.

¹⁷⁸ *Id.* at 86.

¹⁷⁹ *Id.* at 86, 85.

in areas that are traditional cuing points," which is consistent with Ringling's own admissions that the sharp ends of the bullhook are traditionally applied to the elephants' skin in these locations.¹⁸⁰

Samuel Haddock explained:

The bullhook is designed for one purpose, and one purpose only, to inflict pain and punishment. I should know, I used to make them. I built them to where you can't break them, no matter how hard you hit the elephant. The first test is to go out to an oak tree and test drive it by whacking as hard as I could to try to break it and to try to shake the hook loose.¹⁸¹

One of the primary purposes of the bullhook is simply to *remind* elephants of the consequences of disobeying that they're only too familiar with from training as calves. As world-renowned elephant expert Dr. Joyce Poole explains:

Due to the particularly intelligent and emotional constitution of elephants, such use of the bullhook and other instruments also makes them more vulnerable to psychological wounding[W]hen an elephant is beaten, grabbed, jabbed, poked, bopped, or pulled with a bullhook, this action has negative psychological consequences both for the individual elephant receiving the negative treatment and also for nearby elephants. In other words, the routine use of the bullhook psychologically wounds an elephant whether or not she or he is being hit.¹⁸²

As a California court recently recognized, "When elephants that were trained or 'broken' with a bull hook are subsequently shown a bull hook or an object that looks like a bull hook, they (quite understandably) become afraid, and comply with requests by the trainer or keeper.....[I]f an elephant has been hurt by a bull hook in the past, the elephant will react negatively if a keeper merely shows or displays a bull hook."¹⁸³ Because of this, the judge concluded, "No one seriously disputes that the use of bull hooks . . . is abusive and inappropriate discipline."¹⁸⁴

Growing public disapproval of the use of bullhooks and other training weapons on elephants has led to the passage of bans in two states and numerous cities and towns across the country, including California; Rhode Island; Richmond, Virginia; Austin, Texas; and Los Angeles and Oakland, California. Reliant on bullhooks to intimidate elephants into parading or performing,

¹⁸⁰ Ex. 77, Pl. Proposed Findings of Fact ¶ 169, *ASPCA v. Feld Entm't Inc.*, 677 F.Supp.2d 55 (Apr. 24, 2009) (Civ. No 03-2006); *see also* Ensley Test. (a.m.), *supra* note 154, at 51-52, 55-56, 71, 83, 84.

¹⁸¹ Haddock Decl., *supra* note 55, ¶ 60.

¹⁸² Ex. 78, Expert Witness Report of Dr. Joyce Poole at 43, *ASPCA v. Feld Entm't Inc.*, 677 F.Supp.2d 55 (Mar. 18, 2008) (Civ. No. 03-2006).

¹⁸³ *Leider v. Lewis*, No. BC375234, at 37 (Cal. Super. Ct. July 23, 2012).

¹⁸⁴ *Id.* at 17.

Ringling ultimately removed elephants from touring because it was unable to exhibit them in municipalities that had adopted such legislation.¹⁸⁵

FEI also uses electric prods—aka "hot shots"—on elephants at the CEC. According to Haddock, "Gary [Jacobson] usually kept a hot shot in his pocket to use in training sessions."¹⁸⁶ Photographs of training sessions at the CEC provided by Haddock show Jacobson using electric prods on baby elephants. Jacobson has acknowledged his use of electric prods.¹⁸⁷ And according to Haddock, "Training techniques used by Gary Jacobson include a lot of man power, brute force, electricity, and a savage disposition. Raising a baby elephant at Ringling is like raising a kid in jail."¹⁸⁸

In describing the training of one elephant under Jacobson, Haddock explained, "[B]eatings were daily..... She had quite a few hook marks on her and we used quite a bit of electricity."¹⁸⁹ Another Ringling trainer testified under oath that he uses electric prods on the "younger" elephants because "sometimes you just need to get their attention more than others that the guide"—FEI's euphemistic term for the bullhook—"may not do."¹⁹⁰ Haddock noted that hot shots are kept hidden during USDA inspections of the CEC.¹⁹¹

Direct contact and the associated use of bullhooks and electric prods are not only cruel but also entirely unnecessary. Accredited elephant sanctuaries and zoos are able to care for elephants non-intrusively, with staff members—safeguarded by barriers—directing elephants through positive reinforcement. This management style, which renders bullhooks and electric prods entirely obsolete, is the industry standard.

¹⁸⁵ See e.g., Ex. 79, Alina Machado, *Circus elephant sanctuary 'like "Jurassic Park" with a happy ending,' owner says*, CNN.com (Apr. 8, 2015), <http://www.cnn.com/2015/04/08/us/florida-ringling-bros-elephant-sanctuary/> ("The ultimate decision to phase out the elephants, Feld said, is the result of the different laws regulating the use of the animals in each of the 115 cities the circus visits every year."); Ex. 80, Richard Pérez-Peña, *Elephants to Retire From Ringling Brothers Stage*, NY Times (Mar. 5, 2015), <http://www.nytimes.com/2015/03/06/us/ringling-brothers-circus-dropping-elephants-from-act.html> (quoting FEI president Kenneth Feld: "The biggest issue is, there's been a lot of legislation in different cities and different municipalities,' regulating the use and treatment of animals.").

¹⁸⁶ Haddock Decl., *supra* note 55, ¶ 19.

¹⁸⁷ See Mar. 9 Jacobson Test., *supra* note 83, at 52-54, 69-70.

¹⁸⁸ Haddock Decl., *supra* note 55, ¶ 22.

¹⁸⁹ *Id.* ¶ 52.

¹⁹⁰ Ex. 81, Trial Test. of Troy Metzler, Trial Tr. at 34–35, *ASPCA v. Feld Entm't Inc.*, 677 F.Supp.2d 55 (Mar. 12, 2009, evening) (Civ. No. 03-2006).

¹⁹¹ Haddock Decl., *supra* note 55, ¶ 32.

C. FEI's Facilities Are Inadequate.

In the wild, Asian elephants have home ranges in excess of 233 square miles¹⁹²—an area approximately the size of the city of Chicago—and spend nearly all of their waking hours walking, grazing, dust-bathing, swimming, and socializing.¹⁹³ GFAS-accredited sanctuaries must "replicate, in as much as possible, the elephants' wild habitat," providing animals with "sufficient space to travel a minimum of 10km (7 miles) on a daily basis while engaged in natural behaviors like foraging, feeding, exploring, socializing and the like."¹⁹⁴ They must also provide water features to allow for bathing and thermoregulation.¹⁹⁵ Indoor stalls must be at least 2,600 ft² per four adult females, and provide 860 ft² per additional animal.¹⁹⁶ Indoor bull stalls must be at least 1,200 ft² per animal.¹⁹⁷ AZA zoos also provide elephants with daily enrichment, including access to dirt piles, pools, scratching posts, and logs.¹⁹⁸

The space provided to elephants at the CEC is minuscule in contrast. The outdoor paddocks, which are flat, barren, and dry, range from 0.05 acres to 0.22 acres (with the exception of one bull paddock that is 1.03 acre).¹⁹⁹ Dimensions of "larger" paddocks are not provided.²⁰⁰ And while elephants are generally kept chained indoors—making dimensions somewhat meaningless, because chaining restricts movement so severely—the indoor stalls for elephants range from 146.6 ft² – 312.5 ft² per animal.²⁰¹ Bull stalls range from 340 – 600 ft² per animal.²⁰²

The size and complexity of an elephant's environment has a direct impact on an elephant's physical and psychological well-being, which is why responsible elephant facilities avoid chaining altogether and provide elephants with large, complex, stimulating habitats. Plainly FEI's facilities

¹⁹² See Ex. 82, Nagaragan Baskaran, et al., *Home range of elephants in the Nilgiri Biosphere Reserve, South India*, in *A Week With Elephants* 301 (J.C. Daniel and Hemant S. Datye, eds., 1995) (finding a mean home range for several populations of elephants to be 651.1 km²).

¹⁹³ See Clubb & Mason, *supra* note 72, at 15.

¹⁹⁴ GFAS, *supra* note 173, at 5-6.

¹⁹⁵ *Id.* at 12.

¹⁹⁶ *Id.* at 36.

¹⁹⁷ *Id.*

¹⁹⁸ Ex. 83, Brian J. Greco, et al., *Elephant Management in North American Zoos: Environmental Enrichment, Feeding, Exercise, and Training*, 11 PLoS ONE 12 (2016).

¹⁹⁹ Application at 102-03.

²⁰⁰ *Id.* at 103.

²⁰¹ *Id.* at 96-101.

²⁰² *Id.* at 98-100.

for these endangered animals are "inadequate," fall far short of the minimum industry standard, and do not ensure "humane and healthful conditions."

D. FEI's Research On Captive Elephants Demonstrates That The Animals In Its Custody Are Unhealthy And Reproduce Poorly.

Applicants who use animals in research "directly related to maintaining and propagating the types of wildlife sought to be covered" by the CBW registration must "provide a complete description of their research goals and methods" along with any published papers.²⁰³ FEI includes a list of papers related to "assisted reproduction in Asian elephants," as well as activities related to EEHV, the use of nonsteroidal anti-inflammatory drugs (painkillers) on Asian elephants, and tuberculosis.²⁰⁴ It does not include information about research methods.

These publications underscore several key facts: elephants reproduce poorly in captivity; when they do reproduce, calves are at high risk of dying in their first few years from an acute hemorrhagic disease; and if they manage to survive past the age of five, they're at risk of developing a chronic bacterial infection that is not easily detectable or treatable, and their musculoskeletal system is likely to painfully deteriorate because they're denied an appropriate environment and exercise.

With respect to breeding, FEI's researchers are trying to engineer elephant reproduction through human intervention—sperm collection, artificial insemination, and hormone treatments. These are not benign activities, and the fact that FEI failed to detail its research methods belies just how invasive they are. One study co-authored by FEI's Dr. Dennis Schmitt explains that for bulls, "[t]he penis [i]s stimulated to protrusion and erection by rectal massage of the pelvic portion of the urethra" through the rectal wall.²⁰⁵ Gary Jacobson also admitted in federal testimony that electric prods are used on elephants during semen collection "to keep them from going after you while you collect semen."²⁰⁶ For the female elephant, the insemination procedure may take up to two hours.²⁰⁷ Prior to insemination, feces are "removed manually and the rectum [i]s irrigated with lukewarm

²⁰³ *Id.* at 3.

²⁰⁴ *Id.* at 72-82.

²⁰⁵ Ex. 84, D.L. Schmitt & T.B. Hildebrandt, Short Communication, *Manual collection and characterization of semen from Asian elephants* (*Elephas maximus*), 53 *Animal Repro. Sci.* 309, 309 (1998).

²⁰⁶ Mar. 9 Jacobson Test., *supra* note 83, at 52.

²⁰⁷ Ex. 85, Janine L. Brown, et al., *Successful Artificial Insemination of an Asian Elephant at the National Zoological Park*, 23 *Zoo. Bio* 45, 54 (2004).

water."²⁰⁸ During the procedure, a catheter is inserted into the female's 2.5 meter-long reproductive tract, "penetrat[ing] deep into the . . . uterus."²⁰⁹ Staff monitor the procedure using an endoscopic camera inside the elephants' reproductive tract and a transrectal ultrasonography.²¹⁰ In one study, an elephant was subjected to two to three such procedures each cycle over the course of five years before she conceived.²¹¹ In another study, eight elephants were subjected to a total of 57 artificial insemination attempts, with one daily insemination for three consecutive days per series.²¹²

A Seattle Times investigation explained the procedure performed on an elephant named Chai as follows:

Because it was an unnatural and invasive procedure, keepers had to train Chai to accept artificial insemination. First, they needed her to learn how to stand still for long periods without panicking. Zookeepers chained Chai's four legs to anchors, pulling them tight so she couldn't move an inch — a technique called "short chaining."

In the next phase, zookeepers got her used to having a long, flexible hose inserted into her winding, 3-foot-long reproductive tract. Zookeepers conducted mock inseminations on Chai for about two years.

In 1992, using elephant sperm shipped by Greyhound bus from the Oregon Zoo, zookeepers performed the first artificial insemination on Chai. They had recruited a staffer who had the "longest arms," records show. The sperm was pumped through the hose.

They repeated the procedures on Chai up to 10 times a month — sometimes twice a day, medical records show — with no success.²¹³

Over the course of four years, Chai endured 91 unsuccessful artificial insemination attempts before being shipped to another zoo in hopes that she would breed with a bull there.²¹⁴

The European Elephant Group has strongly criticized efforts by FEI's veterinarians to make artificial insemination a "priority" in the U.S. after an analysis of artificial insemination outcomes

²⁰⁸ *Id.* at 49.

²⁰⁹ Ex. 86, Nikorn Thongtip, et al., *Successful artificial insemination in the Asian elephant (Elephas maximus) using chilled and frozen-thawed semen*, 7 *Repro. Bio & Endocrinology* 75, 3 (2009); Brown, et al., *supra* note 207, at 50.

²¹⁰ *Id.*; Thongtip, et al., *supra* note 209.

²¹¹ Brown, et al., *supra* note 207, at 50.

²¹² Thongtip, et al., *supra* note 209, at 3.

²¹³ Ex. 87, Michael J. Berens, *Elephants Are Dying Out in America's Zoos*, Seattle Times, (Dec. 1, 2012), http://old.seattletimes.com/html/nationworld/2019809167_elephants02m.html.

²¹⁴ *Id.*

provided "sobering" results.²¹⁵ That analysis revealed that artificial insemination results in a male-biased sex ratio, and the rate of stillbirths following artificial insemination was three times as high as after natural mating.²¹⁶ Table 1, included in the study, provides the data:

Table 1. Number of births from 1.1.1999 - 31.1.2008 after natural mating (N.M.) and artificial insemination (A.I.) in Europe and Israel (EEP) and USA and Canada (SSP).

		<i>Loxodonta africana</i>			<i>Elephas maximus</i>			Total
		EEP	SSP	total	EEP	SSP	total	
Number of births	N.M.	49	15	64	77	43	120	184
	A.I.	3	14	17	2	2	4	21
	Total	52	29	81	79	45	124	205
Sex ratio after N.M.	Males	23	5	28	43	16	59	87
	Females	25	9	34	33	25	58	92
	Not known	1	1	2	1	2	3	5
Sex ratio after AI	Males	3	10	13	2	2	4	17
	Females	0	4	4	0	0	0	4
Stillbirths after N.M.	N	2	1	3	8	9	17	20
	%*	4.1	6.7	4.7	10.4	20.1	14.2	10.9
Stillbirths after A.I.	N	-	6	6	1	-	1	7
	%*	-	42.9	35.3	50.0	-	25.0	33.3

*Stillbirths as percentage of the value of all births in the relevant category.

The authors also point out that:

the number of females used for A.I. experiments seems to be at least 3 times higher than the number of females getting pregnant and sometimes experiments with a particular female are repeatedly carried out over periods of at least 7 years. These actions increasingly attract the interest of welfare NGOs, which often rightfully criticise the brutal training methods used to make the animals amenable for the A.I. procedures.²¹⁷

They conclude that "neither an extremely high neonate mortality nor an extremely male biased sex ratio can be favourable for preservation of the species in captivity. If an increasing reproduction rate is wanted in Asian countries of origin, attention should be concentrated on a number of more successful breeding centres without A.I."²¹⁸

There is no data on how often FEI attempts artificial insemination with each female elephant, and how many attempts have resulted in conception and birth. It's plain, however, that the

²¹⁵ Ex. 88, Fred Kurt & Joachim Endres, *Some Remarks on the Success of Artificial Insemination in Elephants*, 29 Gajah 39 (2008) (criticizing Wendy K. Kiso, et al., *Current Investigations of Asian Elephant Semen in North America*, 27 Gajah 31 (2007)).

²¹⁶ *Id.* at 39.

²¹⁷ *Id.* at 39-40.

²¹⁸ *Id.* at 40.

amount of time, money, brainpower, and resources devoted to trying to impregnate captive elephants and then trying to keep the few babies born alive (neither of which is particularly successful) could have a much greater impact on the survival of the species if it was spent on in-situ conservation efforts. Likewise, research that is not tied to helping the species in the wild cannot meet the Enhancement Requirement.²¹⁹

IV. FEI Does Not Have A Sustainable, "Genetically Viable" Population Of Elephants.

Because CBW registrations are ostensibly designed to facilitate captive breeding, FWS Form 3-200-37 requires applicants to demonstrate that their "captive population is being managed to maintain its genetic vitality."²²⁰ If the applicant does not have a sufficient number of animals to do so, then it must participate in an organized breeding program, such as an AZA Species Survival Program (SSP).²²¹

FEI's "population" of elephants has poor reproduction and survivorship despite the circus's assertions to the contrary. The fact that in 30 years of holding a CBW registration, it has produced

²¹⁹ See Proposed Rule: Captive Wildlife Regulation, 44 Fed. Reg. 30,044, 30,045 (May 23, 1979) (noting the role of "research that can lead to improved management of *wild* populations" (emphasis added)); see also Final Rule: Captive Wildlife Regulation, 44 Fed. Reg. 54,002, 54,005 (Sept. 17, 1979) ("The Service recognizes that scientific research is a purpose for which permits may be issued but also that authorization of activities for that purpose is beyond the scope of the proposed rules. Only those activities conducted to enhance propagation or survival of the affected species may be authorized by the present rule.").

²²⁰ Application at 2; see also Proposed Rule: Captive-bred Wildlife Regulation, 57 Fed. Reg. 548, 549 (Jan. 7, 1992) ("the definition of "enhance the propagation or survival" of wildlife in captivity to include a wide range of normal animal husbandry practices needed to maintain *self-sustaining and genetically viable populations* of wildlife in captivity" (emphasis added)); Proposed Rule: Captive-Bred Wildlife Regulation, 58 Fed. Reg. 32,632, 32,633 (June 11, 1993) ("Populations of species in captivity are, in large degree, removed from their natural ecosystems and have a role in survival of the species only to the extent that they maintain genetic integrity and offer the potential of restocking natural ecosystems where the species has become depleted or no longer occurs."); Final Rule: Captive-bred Wildlife Regulation, 63 Fed. Reg. 48,635 (Sept. 11, 1998) ("Populations of species in captivity are, in large degree, removed from their natural ecosystems and have a role in survival of the species only to the extent that they maintain genetic integrity and offer the potential of restocking natural ecosystems where the species has become depleted or no longer occurs.").

²²¹ Application at 2; see also Proposed Rule: Captive-Bred Wildlife Regulation, 58 Fed. Reg. 32,632, 32,636 (June 11, 1993) ("In order to qualify for a CBW registration, persons or institutions would have to be participants in an approved responsible cooperative breeding program for the taxon concerned.").

just a handful of second-generation captive-bred elephants who survived past infancy demonstrates that its breeding program is not sustainable. Nor is it "genetically viable." Consider the following:

- Only two of FEI's bulls have actually bred, and their genes are extensively represented among FEI's "breeding herd."
 - Charlie has sired eight of FEI's captive-bred elephants,²²² and is grand-sire to one.²²³
 - Vance has sired three of FEI's captive elephants,²²⁴ and is grand-sire to all three of FEI's second-generation captive-bred calves.²²⁵
 - Barack, Piper, and Mable, FEI's much-lauded second generation of captive-bred elephants, are all related. Vance is grand-sire to all three. Piper and Mable are also full siblings.
 - Barack is related to both bulls, who each sired one of his parents.
- Only seven females in FEI's population have reproduced.²²⁶ Four of those elephants are "geriatric" by FEI's standards, meaning over 40 years old.²²⁷

With such a small gene pool, it's plain that FEI does not have a captive population that is or can be managed to "maintain its genetic vitality." Nor is the population "self-sustaining," as emphasized by FEI's insistence on the need for invasive sperm collection and artificial insemination procedures. Authorizing FEI to continue holding a CBW registration will merely facilitate in the company in profiting from breeding even more closely-related individuals. This will do nothing to "enhance" the propagation or survival of the species, as FWS recognized when it wrote that captive animals "have a role in the survival of the species only to the extent that they maintain genetic integrity."²²⁸

Although FEI is allowed to participate on the fringe of the AZA's Asian elephant SSP program, the AZA itself acknowledges that its breeding program is also unsustainable. As the Application explains, the AZA characterizes the Asian elephant SSP as a "Yellow" program,

²²² Irvin, PT, April, Aree, Sara, Osgood, Gunther, Angelica.

²²³ Barack.

²²⁴ Kelly, Shirley, Bonnie.

²²⁵ Barack, Piper, and Mable.

²²⁶ Shirley, Angelica, Bonnie, Alana, Icky II, Emma, and Sally.

²²⁷ Alana, Icky II, Emma, and Sally. *See* Application at 7 (discussing "geriatric" elephants).

²²⁸ Advanced Notice of Proposed Rulemaking: Captive Wildlife Regulation, 43 Fed. Reg. 16,144, 16,144 (Apr. 14, 1978).

meaning that it is not sustainable based on genetic and population viability analyses.²²⁹ The population of Asian elephants held in US facilities is aging, dying off, and not reproducing.²³⁰

Consider the following:

- PETA carefully tracks captive elephants, and is aware of only 222 Asian elephants currently living in captivity in the United States—by comparison, the AZA's 2014 Asian elephant studbook listed 252, and the 2010 Asian elephant studbook listed 269. This suggests that the captive population of elephants has declined by 17 percent in less than a decade, even when accounting for captive births.
- At least 70 elephants in the current population are held by non-AZA facilities where reproduction is exceedingly rare if it's allowed at all.
- Only 40 percent of the current population (89 individuals) is under the age of 40. Thirteen of these individuals are located in non-AZA facilities other than FEI, where reproduction is exceedingly rare if it's allowed at all.

As an investigative report by *The Seattle Times* found, "the decades-long effort" to breed elephants in captivity "is failing, exacerbated by substandard conditions and denial of mounting scientific evidence that most elephants do not thrive in captivity."²³¹

Hence, although FEI has held a CBW registration for 30 years, its ability to make deals with AZA zoos to buy, sell, and trade captive-bred individuals has not made a meaningful difference in the overall population of elephants. In fact, the Application fails to articulate FEI's reason for seeking a CBW registration, such as an explanation of how the "proposed activities are going to facilitate captive breeding for conservation purposes," including FEI's "**long-term goals and intended disposition of any progeny**" (emphasis original)²³²—information that is required to provide but failed to do so.

In truth, FEI's breeding program never has been and never will be about conservation. As discussed above, FEI breeds elephants to perpetuate their existence *in captivity*, with no intention of or potential for releasing them into their native ecosystems. Its business is first and foremost to

²²⁹ Application at 10.

²³⁰ See generally Ex. 89, Georgia J. Mason & Jake S. Veasey, *What Do Population-Level Welfare Indices Suggest About the Well-Being of Zoo Elephants?*, 29 *Zoo. Biol.* 256 (2010); Ex. 90, Ros Clubb, et al., *Brevia, Compromised Survivorship in Zoo Elephants*, 322 *Science* 1649 (2008).

²³¹ Berens, *supra* note 213.

²³² Application at 2. Although FEI mentions "at least two" agreements where elephants will be made available to other facilities for breeding, it fails to provide any further information. *Id.* at 11.

generate a profit through commercial entertainment. A memorandum authored by a senior vice president at FEI even explained that the company's associations with conservation groups is primarily a marketing ploy, intended to improve public perceptions of its animal care and to provide a "stamp of approval" useful in "the continuing debate with animal rights activists."²³³ Now that the Ringling Bros. circus is closed, FWS must look especially closely at the motivations behind this request. Most likely, FEI is doing what closed businesses do: trying to liquidate "inventory" without losing too much money. By issuing FEI a CBW registration, FWS would simply be excusing "takes" of animals while facilitating commercial trade in endangered animals—with no benefit to the species.

V. FEI's Pay-To-Play Donations Are Irrelevant To This Application.

FEI frontloads the Application with information about money that it has previously spent on various elephant-related projects in the United States and Asia. For example, over the course of 18 years, FEI claims to have given \$600,000 to the International Elephant Foundation (IEF), an organization that FEI co-founded and that actively works against regulatory measures to protect captive elephants in the United States such as bans on the use of wild animals in entertainment and tuberculosis eradication efforts. IEF has always drawn one or more members of its board (and often its executive officers) from FEI—currently, FEI's Tom Albert (who signed the Application), and Dr. Dennis Schmitt are on IEF's board.²³⁴

Notably, FEI has only donated between \$1,000 and \$4,999 to IEF in 2017, suggesting that its "commitment" to IEF's activities has waned dramatically.²³⁵ Nevertheless, 30 pages of the Application are devoted to every project IEF supported in Asia, Africa, and the United States from 1999-2015.²³⁶ These pages do not explain how IEF was actually involved in each project or how much money it spent on each project. They also fail to explain whether and how FEI was actually involved in any of these projects.

²³³ Ex. 91, Memorandum from Andy Ireland, Senior Vice President, FEI, to Stuart Snyder, President and COO, FEI (Nov. 10, 1997).

²³⁴ See Ex. 92, IEF, *Board of Directors*, <https://elephantconservation.org/about-ief/board-of-directors/> (last visited Aug. 7, 2017).

²³⁵ See Ex. 93, IEF, *Donor Acknowledgement*, <https://elephantconservation.org/fundraising/donor-acknowledgement/> (last visited Aug. 7, 2017). In contrast, FEI donated at least \$25,000 each year from 2011-2016. See *id.*

²³⁶ Application at 17-48.

Another 13 pages of the Application is devoted to FEI's past financial support of projects in Sri Lanka. FEI does not include any concrete plans to support in-situ elephant conservation going forward, with the exception of one mention in a May 2016 letter to a Sri Lankan government official stating that FEI will donate "USD 5000 every year . . . to be spent *on the welfare of the staff*" at Elephant Transit Home.²³⁷

FEI's previous payments to these organizations are irrelevant to the permit it seeks. CBW registrants are supposed to meet the Enhancement Requirement by establishing viable, sustainable captive breeding programs. FEI has failed to do so, and cannot make up for it by simply buying its way around the Enhancement Requirement—especially when its payments were made in the past and do not represent a future commitment.

ESA permits are available only "for scientific purposes or to *enhance the propagation or survival of the affected species*" ("Enhancement Requirement").²³⁸ It is the applicant's obligation to provide information that meets the Enhancement Requirement during the application process for *each* of the affected species²³⁹ and to demonstrate how the *underlying activities for which the permits are being sought* enhance the propagation or survival of the affected species. The Enhancement Requirement was proposed and implemented originally "to permit otherwise prohibited acts" only when the *underlying acts themselves* are undertaken "to enhance the propagation or survival of the affected species."²⁴⁰

Senator John Tunney of California, who proposed the Enhancement Requirement, stated that it "would permit otherwise prohibited acts when *they* are undertaken to enhance the propagation or survival of the affected species."²⁴¹ 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."²⁴² Indeed, the sole example of an enhancement activity provided in the statute—"acts necessary for the establishment and maintenance of experimental populations"—

²³⁷ *Id.* at 56 (emphasis added).

²³⁸ 16 U.S.C. § 1539(a)(1)(A) (emphasis added).

²³⁹ *See* 16 U.S.C. § 1539(a)(1)(A) (authorizing permits "for scientific purposes or to enhance the propagation or survival *of the affected species*" (emphasis added)).

²⁴⁰ Ex. 94, Cong. Research Serv., 97th Cong., *A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, and 1980* 358 (1982).

²⁴¹ *Id.*

²⁴² *Id.* at 396.

underscores that there must be a nexus between the otherwise prohibited activity and the enhancement.²⁴³

FWS has defied Congress's stated intent to "to limit substantially the number of exemptions that may be granted under the Act" by allowing exhibitors pay for the privileges authorized by an ESA permit simply by making donations that are wholly collateral to the activity for which the permit is sought and thus provide no actual benefit or enhancement to the protected species. The agency attempted to formally adopt this "Pay-to-Play" policy fourteen years ago, but the effort failed following strong backlash from conservationists who pointed out that the policy was unlawful.²⁴⁴ Without a formal policy in place, the agency pressed forward with Pay-to-Play informally, guiding circuses to make payments in exchange for permits allowing them to import and export endangered animals for commercial exhibition.²⁴⁵ FWS has even explained that although the sale of endangered animals for commercial exhibition is "unlikely" to "provide a direct benefit to the species," the agency would authorize such a sale "if the parties involved in the transaction are

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

²⁴⁴ *See* Notice: Draft Policy for Enhancement-of-Survival Permits for Foreign Species Listed Under the Endangered Species Act, 68 Fed. Reg. 49,512-02 (Aug. 8, 2003).

²⁴⁵ *See, e.g.*, Ex. 95, Email from Anna Barry, FWS, to Harriet, TZ Prods. (Jan. 6, 2014, 4:50 PM) (advising the Tarzan Zerbini Circus that it could meet the Enhancement Requirement by donating money to "in situ conservation work in the species' range states," and providing information on how to document the circus's donation as well as examples of donations for this purpose); Ex. 96, Fax from Anna Barry, FWS, to John F. Cuneo, Jr., Hawthorn Corp. (Mar. 12, 2012) ("To meet the requirements under the ESA you need to be able to demonstrate how your proposed activities directly relate to the survival of this species in the wild. Many of our applicants achieve this goal by donating to a well-established conservation program in the range state."); Ex. 97, Fax from Anna Barry, FWS, to John F. Cuneo, Jr., Hawthorn Corp. (Oct. 19, 2011) ("Contribut[ing] money to an organization that participates in in-situ work in the range state for tigers" is "[a]n [e]xample of an activity applicants participate in to show enhancement."); Ex. 98, Fax from Anna Barry, FWS, to John F. Cuneo, Jr., Hawthorn Corp. (Oct. 14, 2011) (recommending that Hawthorn meet the Enhancement Requirement by "undertak[ing] activities that will benefit the survival of the tigers in the wild," such as "[p]articipati[ng] [in] in situ conservation work in the species range states" through a commitment "financial and otherwise"); Ex. 99, Email from Anna Barry, FWS, to Anton & Ferdinand Fercos-Hantig (Feb. 8, 2012, 3:23 PM) (listing projects that would meet the Enhancement Requirement, including "[d]onat[ing] money to organizations working to help protect tigers," "making contribution towards anti-poaching costs or compensation of livestock kill," making "contribution towards fuel and field expenditures, salaries, camera-trap surveys," and making "contribution towards research involving ecological and biomedical information").

carrying out activities that enhance the propagation or survival of the species," such as a zoo that "provide[s] support (e.g., via the solicitation of donations from visitors) to carry out in-situ conservation efforts in the [species'] native range."²⁴⁶

That the ESA requires a direct connection between the otherwise prohibited activity and the enhancement is explicitly supported by the CBW registration scheme. FWS may only issue a CBW registration to engage in otherwise prohibited activities with non-native endangered wildlife bred in captivity in the United States if "[t]he purpose of *such activity* is to enhance the propagation or survival of the affected species."²⁴⁷ It is plainly irrelevant whether the purpose of *other* activities for which a permit is *not* required—such as the elephant conservation efforts of an organization in Sri Lanka—is to enhance propagation or survival of the species. Furthermore, 50 C.F.R. § 17.22, which governs enhancement permits generally, requires that applicants provide a "full statement of the reasons why the applicant is justified in obtaining a permit including the details of *the activities sought to be authorized by the permit*."²⁴⁸ If donating money to a conservation organization can justify issuance of a Section 10 permit, there is no reason why the FWS should require applicants to detail the "activities sought to be authorized by the permit" to show why they are "justified in obtaining [the] permit."

As a federal judge recently noted, "[t]he plain language of Section 10(a) does not say" that the Enhancement Requirement can be "satisfied upon nothing more than the permittee's promise to donate money to an unrelated conservation effort," and "FWS's broad interpretation appears to thwart the dynamic of environmental protection that Congress plainly intended when it mandated that *no* export of endangered species be allowed unless the agency permits such export *pursuant to certain specified circumstances*."²⁴⁹ FWS's Pay-to-Play policy, the judge continued:

²⁴⁶ Final Rule: U.S. Captive-Bred Inter-subspecific Crossed or Generic Tigers, 81 Fed. Reg. 19,923, 19,927 (Apr. 6, 2016); *see also id.* ("The Service prefers a clear, ongoing commitment of several years on the part of the applicant to provide in-situ conservation or research support. This ongoing commitment could be fulfilled by a group of institutions working together to maximize their resources for the benefit of tigers in the wild."); Final Rule: Listing All Chimpanzees as Endangered Species, 80 Fed. Reg. 34,500, 34,517 (June 16, 2015) ("Enhancement may be direct, such as developing a vaccination to be administered to chimpanzees in the wild (in situ), or indirect such as contributions that are made to in situ conservation.").

²⁴⁷ 50 C.F.R. § 17.21(g) (emphasis added).

²⁴⁸ *Id.* § 17.22(a)(1)(vii) (emphasis added).

²⁴⁹ *New England Anti-Vivisection Soc'y v. FWS*, 208 F. Supp. 3d 142, 176 (D.D.C. 2016) (citing 16 U.S.C. §§ 1538, 1539(a)).

essentially . . . read[s] those circumstances out of the statute, such that Section 10(a)'s enhancement-finding requirement actually places no meaningful constraints on FWS's ability to authorize prohibited activities, because, as a practical matter, the agency can always condition the granting of a permit on the permittee's undertaking some *other* act that advances scientific knowledge or benefits the species, regardless of the intentions of the permittee with respect to the particular animals it seeks to access and/or the permittee's avowed lack of interest in furthering the species as a whole.²⁵⁰

FWS's elimination of the Enhancement Requirement through Pay-to-Play has been criticized by U.S. Representative Brendan Boyle for "undermining our collective, global efforts to help preserve animal species," and for being inconsistent with the ESA, which clearly requires that "the action the permit holder seeks to take must in and of itself benefit the species in some way."²⁵¹

FEI's attempts to justify this Application using prior Pay-to-Play payments are irrelevant to FWS's permitting decision, and using them as a basis for granting registration would violate the strict limits on FWS's permitting authority set forth in the ESA and thus would be unlawful.²⁵²

VI. FWS's CBW Registration Scheme Is Unlawful.

If, despite the abundant reasons to deny the Application, FWS grants FEI a CBW registration, such permit must be limited to a term of one year. The ESA authorizes the FWS to permit "*any act* otherwise prohibited by section 1538 of this title . . . to enhance the propagation or survival of the affected species."²⁵³ The plain language of Section 10(a)(1)(a) ("any act") contemplates a single, identifiable performance of taking, delivering, receiving, carrying,

²⁵⁰ *Id.* at 176-77. The judge further added:

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

Id. at 177.

²⁵¹ Ex. 100, Letter from Brendan Boyle, Member of Congress, to Daniel Ashe, Director, FWS, 2, 1 (June 24, 2016).

²⁵² See 5 U.S.C. § 706(2)(C) (authorizing a court to set aside permits issued "in excess of statutory jurisdiction, authority, or limitations").

²⁵³ 16 U.S.C. § 1539(a)(1)(a) (emphasis added).

transporting, or shipping—and does not allow for a blanket authorization to permit unlimited otherwise prohibited activities over the course of half a decade, which is precisely what FWS allows when it issues a CBW registration covering a five-year period, without specifying any particular, limited activity for which permission is granted.

FWS's own general permit regulation—entitled "[p]ermits are specific"—provides:

The authorizations on the face of a permit that set forth *specific* times, dates, places, methods of taking or carrying out the permitted activities[;] . . . describe *certain circumscribed transactions*; or otherwise allow a *specifically limited* matter, are to be strictly interpreted and will not be interpreted to permit similar or related matters outside the scope of strict construction.²⁵⁴

In promulgating this rule, the FWS explained that "[s]uch specific conditions are needed to allow the Service to tailor individual permit authorizations to the applicant's particular qualifications, and to ensure the continued conservation of the affected species."²⁵⁵ Issuing general registrations authorizing any number of otherwise-prohibited activities for a half-decade is wholly inconsistent with the policy that permits be "specifically limited" and cover only "circumscribed transactions."

Moreover, the ESA mandates that FWS "shall publish notice in the Federal Register of *each application* for an exemption or permit," that each such notice "shall invite the submission from interested parties . . . of written data, views, or arguments with respect to the application," and that "[i]nformation received by the [FWS] as a part of any application *shall be available to the public as a matter of public record at every stage of the proceeding*."²⁵⁶ The comment period may *only* be waived "in an emergency situation where the health or life of an endangered animal is threatened and no reasonable alternative is available to the applicant."²⁵⁷ The U.S. Court of Appeals for the D.C. Circuit has made it abundantly clear that this requirement is mandatory, and that if an agency fails to abide by this statutory requirement, any related permit issuance is unlawful.²⁵⁸

In turn, before issuing a permit, the FWS "shall consider . . . [t]he opinions or views of scientists or other persons or organizations having expertise concerning the wildlife or other matters

²⁵⁴ 50 C.F.R. § 13.42 (emphases added).

²⁵⁵ Revisions to General Permit Procedures, 70 Fed. Reg. 18,311, 18,314 (Apr. 11, 2005).

²⁵⁶ 16 U.S.C. § 1539(c) (emphasis added).

²⁵⁷ *Id.* § 1539(c); accord 50 C.F.R. § 17.22.

²⁵⁸ See *Gerber v. Norton*, 294 F.3d 173, 179-80, 186 (D.C. Cir. 2002) (finding that because the FWS issued a Section 10 permit without complying with the requirements of Section 10(c), the permit was issued "without observance of procedure required by law" in violation of the Administrative Procedure Act).

germane to the application."²⁵⁹ Likewise, Section 7 of the ESA requires all federal agencies to "insure that any action authorized . . . by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species."²⁶⁰ And under the ESA's implementing regulations, FWS is required to consider "[t]he probable direct and indirect effect which issuing the permit would have on the wild populations of the wildlife sought to be covered by the permit."²⁶¹ The ESA provides that no permit may be issued unless it has been determined that "if granted and exercised" the permit "will not operate to the disadvantage of such endangered species, and . . . will be consistent with the purposes and policy" of the ESA,²⁶² and that a permit can be issued only if it "is not likely to jeopardize the continued existence of any endangered species."²⁶³ FWS is required to deny the Application if "the authorization requested *potentially* threatens a wildlife . . . population."²⁶⁴

The CBW registration scheme unlawfully obviates the need for registrants to apply for ESA exemptions on an act-by-act basis and bypasses an act-by-act assessment by FWS, including the required non-detriment finding, in favor of a blanket permission to engage in any and all activities related to captive breeding over a multi-year span.²⁶⁵ In so doing, the scheme also deprives the public, including PETA, of notice and the opportunity to comment on information to which it is entitled to "as a matter of public record at every stage of the proceeding."²⁶⁶

Should FWS issue FEI a CBW registration, it must only do so after making the required non-detriment finding and the permit must only authorize certain circumscribed transactions over a limited time period (such as a term of one year) in order to meet the ESA's requirement that permits

²⁵⁹ 50 C.F.R. § 17.22(a)(2)(v).

²⁶⁰ 16 U.S.C. § 1536(a)(2).

²⁶¹ 50 C.F.R. § 17.22 (a)(2)(ii).

²⁶² 16 U.S.C. § 1539(d).

²⁶³ *Id.* § 1536(a)(2); *see also* 50 C.F.R. § 17.3 (for an activity to qualify as "enhancement" for permitting purposes it must "be shown that such activities would not be detrimental to the survival of wild or captive populations of the affected species.").

²⁶⁴ 50 C.F.R. § 13.21(b)(4) (emphasis added).

²⁶⁵ In the final rule establishing the CBW registration scheme, FWS published blanket "findings" in the absence of any actual permit application, writing—about the regulations—that "the Service has found that this exception was applied for in good faith . . . , that it will not operate to the disadvantage of Endangered or Threatened species, and that it will be consistent with the purposes of the policy set forth in . . . the Act." Final Rule: Captive Wildlife Regulation, 44 Fed. Reg. 54,002, 54,002, 54,005 (Sept. 17, 1979).

²⁶⁶ 16 U.S.C. § 1539(c).

be specific and narrowly drawn, to protect the public's right to information and to comment, and to ensure that FWS is evaluating whether FEI's actions meet the Enhancement Requirement and are not detrimental to the species.

VII. Conclusion And Request For Notice Of Issuance

For all of the reasons detailed above, PETA urges FWS to deny FEI's Application for the requested CBW registration. 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), at least ten days prior to the issuance of the permits via e-mail to RMathews@petaf.org or telephone to 202-680-8276.