



**Billing Code 4310-55**

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 17**

**[Docket No. FWS-HQ-IA-2013-0091; 96300-1671-0000-R4]**

**RIN 1018-AX84**

**Endangered and Threatened Wildlife and Plants; Revision of the Section 4(d) Rule for the African Elephant (*Loxodonta africana*)**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), are proposing to revise the rule for the African elephant promulgated under section 4(d) of the Endangered Species Act of 1973, as amended (ESA), to increase protection for African elephants in response to the alarming rise in poaching of the species to fuel the growing illegal trade in ivory. The African elephant was listed as threatened under the ESA effective June 11, 1978, and at the same time a rule issued under section 4(d) of the ESA (a “4(d) rule”) was promulgated to regulate import and use of specimens of the species in the United States. This proposed rule would update the current 4(d) rule with measures that are appropriate for the current conservation needs of the species. We are

proposing measures that are necessary and advisable to provide for the conservation of the African elephant as well as appropriate prohibitions from section 9(a)(1) of the ESA. Among other things, we propose to incorporate into the 4(d) rule certain restrictions on the import and export of African elephant ivory contained in the African Elephant Conservation Act (AfECA) as measures necessary and advisable for the conservation of the African elephant. We are not, however, revising or reconsidering actions taken under the AfECA, including our determinations in 1988 and 1989 to impose moratoria on the import of ivory other than sport-hunted trophies from both range and intermediary countries. We are proposing to take these actions under section 4(d) of the ESA to increase protection and benefit the conservation of African elephants, without unnecessarily restricting activities that have no conservation effect or are strictly regulated under other law.

**DATES:** In preparing the final decision on this proposed rule, we will consider comments received or postmarked on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** You may submit comments by one of the following methods:

- *Electronically:* Go to the Federal eRulemaking Portal: <http://www.regulations.gov>. In the Search box, enter FWS–HQ–IA–2013–0091, which is the docket number for this rulemaking. You may submit a comment by clicking on “Comment Now!”
- *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–HQ–IA–2013–0091; Division of Policy, Performance, and Management Programs; U.S. Fish and Wildlife Service; 5275 Leesburg Pike, MS: BPHC; Falls Church, VA 22041.

We will not accept e-mail or faxes. We will post all comments on <http://www.regulations.gov>.

This generally means that we will post any personal information you provide us (see the **Public Comments** section at the end of **SUPPLEMENTARY INFORMATION** for further information about submitting comments).

**FOR FURTHER INFORMATION CONTACT:** Craig Hoover, Chief, Wildlife Trade and Conservation Branch, Division of Management Authority; U.S. Fish and Wildlife Service; 5275 Leesburg Pike, MS: IA; Falls Church, VA 22041 (telephone, (703) 358–2093).

**SUPPLEMENTARY INFORMATION:**

**Applicable Laws**

In the United States, the African elephant is primarily protected and managed under the Endangered Species Act (ESA) (16 U.S.C. 1531 *et seq.*); the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES or Convention) (27 U.S.T. 1087), as implemented in the United States through the ESA; and the African Elephant Conservation Act (AfECA) (16 U.S.C. 4201 *et seq.*).

*Endangered Species Act*

Under the ESA, species may be listed either as “threatened” or as “endangered.” When a species is listed as endangered under the ESA, certain actions are prohibited under section 9 (16 U.S.C. 1538), as specified at 50 CFR 17.21. These include prohibitions on take within the United States, within the territorial seas of the United States, or upon the high seas; import; export; sale and offer for sale in interstate or foreign commerce; and delivery, receipt, carrying, transport, or shipment in interstate or foreign commerce in the course of a commercial activity.

The ESA does not specify particular prohibitions and exceptions to those prohibitions for threatened species. Instead, under section 4(d) of the ESA, the Secretary of the Interior is given the discretion to issue such regulations as deemed necessary and advisable to provide for the

conservation of the species. The Secretary also has the discretion to prohibit by regulation with respect to any threatened species any act prohibited under section 9(a)(1) of the ESA for endangered species. Exercising this discretion under section 4(d), the Service has developed general prohibitions (50 CFR 17.31) and established a permit process for specified exceptions to those prohibitions (50 CFR 17.32) that apply to most threatened species. Permits issued under 50 CFR 17.32 must be for “Scientific purposes, or the enhancement of propagation or survival, or economic hardship, or zoological exhibition, or educational purposes, or incidental taking, or special purposes consistent with the purposes of the [ESA].”

Under section 4(d) of the ESA, the Service may also develop specific prohibitions and exceptions tailored to the particular conservation needs of a threatened species. In such cases, the Service issues a 4(d) rule that may include some of the prohibitions and authorizations set out at 50 CFR 17.31 and 17.32, but that also may be more or less restrictive than the general provisions at 50 CFR 17.31 and 17.32.

#### *Convention on International Trade in Endangered Species of Wild Fauna and Flora*

CITES entered into force in 1975, and is currently implemented by 180 countries (called Parties), including the United States. The aim of CITES is to regulate international trade in listed animal and plant species, including their parts and products, to ensure the trade is legal and does not threaten the survival of species. CITES regulates both commercial and noncommercial international trade through a system of permits and certificates that must be presented when leaving and entering a country with CITES specimens. Species are listed in one of three appendices, which provide different levels of protection. In some circumstances, different populations of a species are listed at different levels. Appendix I includes species that are threatened with extinction and are or may be affected by trade. The Convention states that

Appendix-I species must be subject to “particularly strict regulation” and trade in specimens of these species should only be authorized “in exceptional circumstances.” Appendix II includes species that are not necessarily threatened with extinction now, but may become so if international trade is not regulated. Appendix III includes species that a range country has identified as being subject to regulation within its jurisdiction and as needing cooperation of other Parties in the control of international trade.

Import and export of CITES species is prohibited unless accompanied by any required CITES documents. Documentation requirements vary depending on the appendix in which the species or population is listed and other factors. CITES documents cannot be issued until specific biological and legal findings have been made. CITES does not regulate take or domestic trade of listed species. It contributes to the conservation of listed species by regulating international trade and, in order to make the necessary findings, encouraging assessment and analysis of the population status of species in trade and the effects of international trade on wild populations to ensure that trade is legal and does not threaten the survival of the species.

#### *African Elephant Conservation Act*

The AfECA was enacted in 1988, to “perpetuate healthy populations of African elephants” by regulating the import and export of certain African elephant ivory to and from the United States. Building from and supporting existing programs under CITES, the AfECA called on the Service to establish moratoria on the import of raw and worked ivory from both African elephant range countries and intermediary countries (those that export ivory that does not originate in that country) that failed to meet certain statutory criteria. The statute also states that it does not provide authority for the Service to establish a moratorium that prohibits the import of sport-hunted trophies that meet certain standards.

In addition to authorizing establishment of the moratoria and prohibiting any import in violation of the terms of any moratorium, the AfECA prohibits: The import of raw African elephant ivory from any country that is not a range country; the import of raw or worked ivory exported from a range country in violation of that country's laws or applicable CITES programs; the import of worked ivory, other than certain personal effects, unless the exporting country has determined that the ivory was legally acquired; and the export of all raw (but not worked) African elephant ivory. While the AfECA comprehensively addresses the import of ivory into the United States, it does not address other uses of ivory or African elephant specimens other than ivory and sport-hunted trophies. The AfECA does not regulate the use of ivory within the United States and, other than the prohibition on the export of raw ivory, does not regulate export of ivory from the United States. The AfECA also does not regulate the import or export of live African elephants.

### **Regulatory Background**

Ghana first listed the African elephant in CITES Appendix III on February 26, 1976. Later that year, the CITES Parties agreed to add African elephants to Appendix II, effective February 4, 1977. In October 1989, all populations of African elephants were transferred from CITES Appendix II to Appendix I (effective in January 1990), which ended much of the previous legal commercial trade in African elephant ivory.

In 1997, based on proposals submitted by Botswana, Namibia, and Zimbabwe and the report of a Panel of Experts (which concluded, among other things, that populations in these countries were stable or increasing and that poaching pressure was low) the CITES Parties agreed to transfer the African elephant populations in these three countries to CITES Appendix II. The Appendix-II listing included an annotation that allowed noncommercial export of hunting trophies, export of live animals to appropriate and acceptable destinations, export of

hides from Zimbabwe, and noncommercial export of leather goods and some ivory carvings from Zimbabwe. It also allowed for a one-time export of raw ivory to Japan (which took place in 1999), once certain conditions had been met. All other African elephant specimens from these three countries were deemed to be specimens of a species listed in Appendix I and regulated accordingly.

The population of South Africa was transferred from CITES Appendix I to Appendix II in 2000, with an annotation that allowed trade in hunting trophies for noncommercial purposes, trade in live animals for reintroduction purposes, and trade in hides and leather goods. (At that time, the Panel of Experts reviewing South Africa's proposal concluded, among other things, that South Africa's elephant population was increasing, that there were no apparent threats to the status of the population, and that the country's anti-poaching measures were "extremely effective.") Since then, the CITES Parties have revised the Appendix-II listing annotation three times. The current annotation, in place since 2007, covers the Appendix-II populations of Botswana, Namibia, South Africa, and Zimbabwe and allows export of: Sport-hunted trophies for noncommercial purposes; live animals to appropriate and acceptable destinations; hides; hair; certain ivory carvings from Namibia and Zimbabwe for noncommercial purposes; and a one-time export of specific quantities of raw ivory, once certain conditions had been met (this export, to China and Japan, took place in 2009). As in previous versions of the annotation, all other African elephant specimens from these four populations are deemed to be specimens of species included in Appendix I and the trade in them is regulated accordingly.

The African elephant was listed as threatened under the ESA, effective June 11, 1978 (43 FR 20499, May 12, 1978). A review of the status of the species at that time showed that the African elephant was declining in many parts of its range and that habitat loss, illegal killing of

elephants for their ivory, and inadequacy of existing regulatory mechanisms were factors contributing to the decline. At the same time the African elephant was designated as a threatened species, the Service promulgated a 4(d) rule to regulate import and certain interstate commerce of the species in the United States (43 FR 20499, May 12, 1978).

The 1978 4(d) rule for the African elephant stated that the prohibitions at 50 CFR 17.31 applied to any African elephant, alive or dead, and to any part, product, or offspring thereof, with certain exceptions. Specifically, under the 1978 rule, the prohibition at 50 CFR 17.31 against importation did not apply to African elephant specimens that had originated in the wild in a country that was a Party to CITES if they had been exported or re-exported in accordance with Article IV of the Convention, and had remained in customs control in any country not party to the Convention that they transited *en route* to the United States. (At that time, the only African elephant range States that were Parties to CITES were Botswana, Ghana, Niger, Nigeria, Senegal, South Africa, and Zaire [now the Democratic Republic of the Congo].) The 1978 rule allowed for a special purpose permit to be issued in accordance with the provisions of 50 CFR 17.32 to authorize any activity otherwise prohibited with regard to the African elephant, upon submission of proof that the specimens were already in the United States on June 11, 1978, or that the specimens were imported under the exception described above.

The 4(d) rule has been amended twice in response to changes in the status of African elephants and the illegal trade in elephant ivory, and to more closely align U.S. requirements with actions taken by the CITES Parties. On July 20, 1982, the Service amended the 4(d) rule for the African elephant (47 FR 31384) to ease restrictions on domestic activities and to more closely align its requirements with provisions in CITES Resolution Conf. 3.12, *Trade in African elephant ivory*, adopted by the CITES Parties at the third meeting of the Conference of the

Parties (CoP3, 1981). The 1982 rule applied only to import and export of ivory (and not other elephant specimens) and eliminated the prohibitions under the ESA against taking, possession of unlawfully taken specimens, and certain activities for the purpose of engaging in interstate and foreign commerce, including the sale and offer for sale in interstate commerce of African elephant specimens. At that time, the Service concluded that the restrictions on interstate commerce contained in the 1978 rule were unnecessary and that the most effective means of utilizing limited resources to control ivory trade was through enforcement efforts focused on imports.

Following enactment of the AfECA (in October 1988), the Service established, on December 27, 1988, a moratorium on the import into the United States of African elephant ivory from countries that were not parties to CITES (53 FR 52242). On February 24, 1989, the Service established a second moratorium on all ivory imports into the United States from Somalia (54 FR 8008). On June 9, 1989, the Service put in place the current moratorium, which bans the import of ivory other than sport-hunted trophies from both range and intermediary countries (54 FR 24758).

The 4(d) rule was revised on August 10, 1992 (57 FR 35473), following establishment of the 1989 moratorium under the AfECA on the import of African elephant ivory into the United States, and again on June 26, 2014 (79 FR 30400, May 27, 2014), associated with the update of U.S. CITES implementing regulations. In the 2014 revision of the 4(d) rule, we removed the CITES marking requirements for African elephant sport-hunted trophies. At the same time, these marking requirements were updated and incorporated into our CITES regulations at 50 CFR 23.74. The purpose of this change was to make clear what is required under CITES (at 50 CFR part 23) for trade in sport-hunted trophies and what is required under the ESA (at 50 CFR

part 17).

### **Need for Regulatory Actions**

We have reevaluated the provisions of the 4(d) rule and considered other administrative actions in response to unprecedented increases in the illegal killing of elephants, an alarming growth in illegal trade of elephant ivory, recommendations adopted by the CITES Parties in March 2013 to help curb the illegal killing and illegal trade, issuance of Executive Order 13648 on Combating Wildlife Trafficking in July 2013, and the stated priorities in the National Strategy for Combating Wildlife Trafficking, issued by President Obama in February 2014.

#### *Illegal killing of elephants and illegal ivory trade*

The increase in poaching of elephants and the escalation of the illegal trade in ivory are described in documents made available at CoP16. See, in particular, CoP16 Doc. 53.1, *Monitoring the illegal killing of elephants* (including the Addendum); CoP16 Doc. 53.2.2, *Monitoring of illegal trade in ivory and other elephant specimens*; and *Elephants in the Dust—the African Elephant Crisis*, all available at <http://www.cites.org>. *Status of African elephant populations and levels of illegal killing and the illegal trade in ivory: A report to the African Elephant Summit, December 2013* (also available at <http://www.cites.org>) provides an update to information presented at CoP16. A further update on the status of African elephants was prepared for the 65<sup>th</sup> meeting of the CITES Standing Committee (SC65), in July 2014, and presented in Annex 1 to document SC65 Doc. 42.1, *Elephant conservation, illegal killing and ivory trade*.

CoP16 Doc. 53.1 and its Addendum (prepared by the CITES Secretariat), the December 2013 report for the African Elephant Summit (prepared by the CITES Secretariat, the International Union for Conservation of Nature (IUCN), and TRAFFIC, the Wildlife Trade

Monitoring Network), and Annex 1 to SC65 Doc. 42.1 (prepared by the IUCN/Species Survival Commission Asian and African Elephant Specialists Groups, the CITES Secretariat, the United Nations Environment Programme's World Conservation Monitoring Centre (UNEP–WCMC), and TRAFFIC) provide analyses of trends in levels of illegal killing of elephants based on data from the CITES Monitoring the Illegal Killing of Elephants (MIKE) program. MIKE is a site-based monitoring system intended to measure levels and trends in the illegal killing of elephants and to determine changes in these trends over time. Data are collected by ranger patrols and others at established MIKE sites and reported to the CITES Secretariat. The reports in CoP16 Doc. 53.1 and its Addendum contain analyses of data collected between 2002 and 2011, from more than 40 MIKE sites across Africa. The report prepared for the African Elephant Summit in December 2013 contains an updated MIKE analysis using 2012 data, and the report in the Annex to SC65 Doc. 42.1 contains a further updated MIKE analysis using data collected through 2013. The data set used for the most recent analysis (in SC65 Doc. 42.1) consists of 12,073 records of elephant carcasses found between 2002 and the end of 2013, at 53 MIKE sites in 29 countries across Africa.

MIKE data are used to evaluate relative poaching levels based on the Proportion of Illegally Killed Elephants (PIKE), which is calculated as the number of illegally killed elephants found divided by the total number of elephant carcasses encountered by patrols or other means, aggregated by year for each site. The data in these reports show a steady increase in levels of illegal killing starting in 2006, with 2011 having the highest levels of poaching since MIKE records began in 2002. In 2012 and 2013, there appears to be a gradual decline, with 2013 levels close to those recorded in 2010. Despite the decline since 2011, poaching levels overall remain alarmingly high, with nearly two-thirds of dead elephants found in 2013 deemed to have been

illegally killed. These reports state that the PIKE levels translate to 17,000 elephants killed at African MIKE sites in 2011, and 15,000 elephants killed at African MIKE sites in 2012. These numbers were estimated using models. The authors of the 2014 report prepared for SC65 note that it was not possible to derive an estimate for 2013 using the same method as in previous years because some of the required covariates for 2013 were not yet available. However, the authors provide a “preliminary and rough calculation” using a different method that estimates more than 14,000 elephants were killed at MIKE sites in 2013. The authors stress that this estimate must be treated with caution, but they state that “there are good reasons to believe that the number of elephants illegally killed in Africa in 2013 ran, as in previous years, into the tens of thousands, perhaps in the order of 20 to 22 thousand.”

A joint press release, issued by the CITES Secretariat, IUCN, and TRAFFIC International on December 2, 2013, at the opening of the African Elephant Summit in Gaborone, Botswana, asserted that the figures for MIKE sites amount to an estimated 25,000 elephants killed illegally across Africa in 2011, and 22,000 killed illegally in 2012. Others have suggested that the numbers killed continent-wide are likely even higher. The statistical model used to evaluate MIKE data estimates that the “threshold of sustainability” at MIKE sites was crossed in 2010, with poaching rates remaining above the population growth rate of 4 to 5 percent for healthy elephant populations every year since.

A recent study, published in the Proceedings of the National Academy of Sciences (in July 2014), reaffirmed these assertions. Wittemyer et al. (2014) used MIKE data to analyze the impacts of illegal killing on elephant populations across the African continent, using two different approaches. The results demonstrate “an over-harvest driven decline in African elephants likely began in 2010.” The authors assumed an average annual population increase in

the absence of illegal killing of 4.2 percent. They estimated that illegal killing rates averaged about 6.8 percent between 2010 and 2012, which the authors estimate corresponds to more than 33,000 elephants killed per year (based on current population estimates). They also noted that preliminary data for 2013 suggest regional and continental levels were slightly lower than for 2012, but still unsustainable.

CoP16 Doc. 53.2.2 and Annex 1 to SC65 Doc. 42.1 contain reports, prepared by TRAFFIC, on data in the CITES Elephant Trade Information System (ETIS). ETIS is a system for collecting and compiling law enforcement data on seizures and confiscations in order to monitor the pattern and scale of illegal trade in elephant specimens. TRAFFIC receives seizure and confiscation data from CITES Parties, manages and coordinates the ETIS system, and produces a comprehensive report for meetings of the CoP and updates for meetings of the Standing Committee.

The report in CoP16 Doc. 53.2.2 covers the period 1996 through 2011, and the report in SC65 Doc. 42.1 covers the period 1996 through 2012 (data for 2013 were not yet complete when the report was prepared). The data set used for the analysis presented in SC65 Doc. 42.1 includes 14,070 separate raw or worked ivory seizure records from 72 countries or territories during 1996–2012. Using 1998 as a baseline (because it is the first full year after some populations of African elephant were transferred from Appendix I to Appendix II and, at the same time, the development of monitoring systems, including ETIS, was mandated by the Parties), the reports examine trends in both the frequency of illegal ivory trade transactions and the scale of the illegal trade in ivory.

Illegal trade activity (frequency of transactions) remained at or slightly above 1998 levels up to 2006. In 2006, a gradual increase in activity began and grew with each successive year,

with a “major surge” in 2011. The authors report that the frequency of illegal ivory trade transactions in 2011 represented “a three-fold increase in illegal trade activity since 1998.”

The scale of illegal trade was assessed by evaluating the weight of ivory traded illegally. The authors caution that there is more uncertainty in evaluating the weight of ivory in illegal trade than in evaluating the frequency of illegal transactions, but the trend is clear. Like the trend in frequency of transactions, there was relative stability in the weight of ivory in illegal trade through 2007, followed by a sharp increase in the following years. The authors estimate that the quantity of illegal ivory in trade in 2011, measured by weight, was nearly three times 1998 levels, and, although 2012 data show a slight decrease compared to 2011, levels in 2012 represent a value that is about two and a half times the 1998 levels. This upward trend reflects a major increase in large consignments of ivory (over 100 kg) in illegal trade, which, the authors note, points to the increasing involvement of international criminal syndicates. In its 2014 report to SC65, TRAFFIC states that the frequency of large-scale ivory seizures has increased greatly since 2000, and that the “upward surge in the weight of ivory seized from 2009 through 2012 has been primarily driven by increased seizures in the large ivory weight class.” Although 2013 data were not complete when the report was written and, therefore, were not included in the analysis, the authors note that the 18 seizures made in 2013 for which they had data “collectively constitute the greatest quantity of ivory derived from large-scale seizure events going back to 1989.”

*Elephants in the Dust—the African Elephant Crisis* is a report commissioned by the CITES Secretariat through its MIKE program and prepared by UNEP, the CITES Secretariat, IUCN, and TRAFFIC for presentation at CoP16. This report highlights the long-term threats to African elephants posed by habitat loss due to human population growth and large-scale

conversion of land for agriculture. It also raises alarm at the added impact of the increasing poaching levels on elephant populations, not only in central Africa but also in previously secure areas of east, west, and southern Africa. Both the TRAFFIC report to CoP16 and *Elephants in the Dust* conclude that elephants are facing the most serious conservation crisis since 1989, when the African elephant was transferred from CITES Appendix II to Appendix I. The poaching of African elephants to supply international demand for ivory has reached unprecedented levels, and opportunistic poaching has been replaced by coordinated slaughter commissioned by organized networks or syndicates.

The CITES Parties have taken steps to address the growing illegal trade in ivory, including, at CoP16, calling on countries to ensure that they have comprehensive measures in place to regulate the domestic trade in raw and worked ivory. At SC65, the Standing Committee took steps to hold countries that have been identified as being significantly involved in illegal ivory trade (either as source, transit, or destination countries for illegal ivory) accountable. Identified countries that fail to take actions to resolve problems by the agreed deadlines may be subject to CITES trade sanctions.

#### *U.S. involvement in the illegal ivory trade*

Demand for ivory is driving the current poaching crisis. Although the primary markets are in Asia, particularly in China and Thailand, the United States continues to play a role as a destination and transit country for illegally traded elephant ivory. Service wildlife inspectors stationed at major U.S. ports intercept smuggled wildlife and ensure that wildlife importers and exporters comply with declaration, permit, and other requirements for international trade in elephants and other wildlife species. Over the years, seizures of unlawfully imported and exported elephant specimens at U.S. ports have ranged from whole elephant tusks and large

ivory carvings to knife handles, jewelry made from ivory or hair, and tourist souvenirs including items made from elephant feet and bones. The Service provides seizure data to TRAFFIC annually for inclusion in the CITES ETIS database. Since 1990, the annual number of seizure cases involving elephant specimens at U.S. ports has ranged from over 450 (in 1990) to 60 (in 2008); in most other years the number falls between 75 and 250 cases. In 2012, the most recent year for which we have complete data, there were about 225 seizure cases involving elephant specimens, which resulted in seizure of over 1,500 items that contained or consisted of elephant parts or products. Nearly 1,000 of those items contained or consisted of elephant ivory. (About 300 of the items were elephant hairs.)

Service special agents have investigated multiple smuggling operations involving the trafficking of elephant ivory for U.S. markets. Some examples of major investigations are provided here. In September 2012, the owner of a Philadelphia African art store was arrested and pleaded guilty to smuggling African elephant ivory into the United States. Approximately one ton of elephant ivory was seized from his store; it was the largest ivory seizure in U.S. history. According to the indictment, the art store owner paid a co-conspirator to travel to Africa to purchase raw elephant ivory and have it carved to his specifications and stained or dyed so that the carvings would appear old. He sold the carvings at his store in Philadelphia and elsewhere in the United States as “antiques.”

The arrest in Philadelphia was an outgrowth of a multi-year investigation that documented over 20 shipments of newly carved elephant ivory smuggled into the United States in air and ocean cargo from Cameroon, Ivory Coast, Nigeria, and Uganda. The smuggled ivory came into the country through New Jersey and New York, and was distributed to collectors and retailers across the United States, including to Chicago, Houston, Memphis, New York City,

Philadelphia, and Trenton. A total of 10 individuals were charged and later convicted as part of this investigation. Much of the ivory in this case was sent via parcel accompanied by fraudulent shipping and customs documents, and disguised with clay and other substances to look like musical instruments and wooden statues.

Service investigators teamed with officers from the New York Department of Environmental Conservation to probe illegal ivory sales by a New York City jeweler distributor and two Manhattan retailers. This investigation documented a booming and unauthorized trade in ivory. Prosecutions were pursued by the Attorney General for the State of New York based on violations of State laws regulating the sale of elephant ivory. The stores prosecuted paid \$50,000 in fines and forfeited over one ton of elephant ivory (which was destroyed at the Service's "ivory crush" described below). The distributor forfeited 70 pounds of elephant ivory valued at \$30,000 and paid \$10,000 in restitution.

Service special agents worked with the Thai Royal Police to secure the 2010 U.S. indictment of two businessmen (the owner of a Los Angeles area donut shop and a Thai trafficker) and four arrests in Thailand in a case that exposed transcontinental trafficking in elephant ivory. Over the course of this 5-year undercover investigation, officers showed that ivory was being smuggled from Africa into Thailand by Thai operatives who then sold it to clients in the United States and other countries. The investigation began in 2006, when Service wildlife inspectors conducting an inspection "blitz" at the international mail facility in Los Angeles intercepted a package of elephant ivory that had been mailed from Thailand to a U.S. business and labeled as toys. The U.S. defendant pleaded guilty to Federal charges.

Operation Scratchoff was a multi-year investigation, launched by the Service in New York in 2006. It documented and disrupted the illegal activities of both international smugglers

who were bringing ivory into the country from Africa and U.S. retailers involved in this black market trade. Special agents documented smuggled ivory entering the United States from Cameroon, Gabon, Ghana, Ivory Coast, Kenya, Nigeria, and Uganda. Most of the ivory smuggled by defendants in this case was shipped from Africa via mail parcel through John F. Kennedy International Airport. The shipments were accompanied by fraudulent shipping and customs documents identifying their contents as African wooden handicrafts or wooden statues. The ivory itself was painted to look like wood; covered with clay; or hidden inside wooden handicrafts, such as traditional African musical instruments. Work on this investigation resulted in the arrest and conviction of eight individuals in the United States on felony smuggling and/or Lacey Act (16 U.S.C. 3371 et seq.) charges with final sentencing in 2010 and 2011. Prison terms for five of these defendants, which included a 33-month sentence for one, totaled more than 7 years. Operation Scratchoff also led to the arrest in January 2010 of an ivory supplier in Uganda by Ugandan authorities, and the identification of additional ivory trafficking suspects.

In 2008, a Canadian citizen was sentenced to 5 years in prison and ordered to pay a \$100,000 fine for illegally smuggling ivory from Cameroon into the United States for sale here. The perpetrator operated art import and export businesses in Montreal, Canada and in Cameroon that were fronts for smuggling products made from protected wildlife species, including raw elephant ivory. She ran a sophisticated smuggling operation that utilized local artists and craftsmen in Cameroon, operatives within international shipping companies, contacts in the illegal ivory trade, her business in Canada, and partners in three countries. Two of her shipments, sent to Ohio, included fresh ivory from more than 20 recently killed elephants.

In 2006, Service special agents secured a 20-count criminal indictment against Primitive Art Works, a Chicago art gallery specializing in high-end exotic artifacts from around the world,

and its two owners for smuggling elephant ivory and products made from other protected species into the United States. The Service seized over 1,000 ivory carvings and tusks from the defendants, who were asking as much as \$50,000 a piece for these items. Both owners pleaded guilty to wildlife violations later that year.

In 2001, during Operation Loxa, Service officers in Los Angeles intercepted more than 250 pounds of smuggled African elephant ivory, the largest ivory seizure ever on the west coast of the United States. The two shipments, which were smuggled from Nigeria, were declared to customs as handcrafted furniture. The ivory included whole tusks and pieces hidden inside furniture and concealed in beaded cloth. Four individuals were arrested and indicted for conspiracy to smuggle elephant ivory into the United States. Three of them were convicted.

Service special agents have also investigated cases involving smuggling of elephant ivory out of the United States to other markets, particularly in Asia. In an investigation, known as Operation Crash, an Asian antique dealer was convicted for his role in the conspiracy to smuggle items made from elephant ivory and rhinoceros horn valued at over \$1,000,000. The investigation revealed that this individual worked in the United States as a buyer for four different Asian dealers, who were purchasing numerous ivory carvings from auction houses in the United States. After purchasing the ivory at auctions, the antique dealer smuggled the ivory (through the mail) to various locations in Hong Kong, using false declarations to avoid export controls.

In 2011, a Chinese national was intercepted at John F. Kennedy International Airport prior to boarding a plane to Shanghai, China. Service investigators found 18 elephant ivory carvings concealed in his luggage. This individual was an Asian art dealer who purchased the carvings at various U.S. auction houses during a week-long buying trip. Upon arrest, he told

agents that he wrapped the ivory carvings in tin foil to avoid x-ray detection.

At auctions in the United States, Service law enforcement officers have documented foreign buyers placing absentee bids on wildlife items, including those made from African elephant ivory. In some cases, the ivory items are smuggled directly to the foreign buyers. In many instances, however, the foreign buyers employ couriers with residences in the United States to collect the elephant ivory and smuggle it overseas on their behalf. We are concerned that foreign ivory buyers and couriers view the United States as a significant source and market for elephant ivory.

In November 2013, the Service destroyed nearly six tons of contraband African and Asian elephant ivory that had been either seized at U.S. ports or as part of law enforcement investigations over the past 25 years for violation of wildlife laws. We crushed this contraband ivory, which had been stored at the Service's National Wildlife Property Repository, to raise public awareness about the current African elephant poaching crisis and to send a clear message that the United States will not tolerate ivory trafficking and the toll it is taking on wild elephant populations. The six tons of ivory crushed in 2013 underscores the continuing U.S. role in the illegal market and the need for us to take further actions to curtail that role.

There is also a legal market for ivory within the United States. We do not have comprehensive information on the U.S. domestic ivory market. *Tackling the Ivories*, a 2004 report by Douglas Williamson for TRAFFIC North America, described the status of U.S. trade in elephant and hippopotamus ivory. At that time, the author noted that "as one of the world's largest markets for wildlife products, the [United States] has long played a significant role in the international ivory trade." He concluded that the ivory trade within the United States was not closely monitored and that its full extent was unknown. In addition to ivory available from retail

outlets, he noted that there was “significant trade conducted via the internet, with little oversight.” The domestic trade involved both raw and worked ivory. Worked ivory was readily available in the form of carvings, jewelry, piano keys, and other items. Raw ivory was bought by companies and individuals to be fashioned into specialty items including knife handles, gun grips, and pool cues. Along with legal trade, Williamson found evidence of illegal trade, including internet sellers in China that routinely shipped ivory to the United States, via express delivery service, and offered to falsely label the shipments as “bone carvings.”

In a 2006–2007 survey of selected metropolitan areas across the United States, Martin and Stiles (2008) identified retail establishments trading in worked ivory, including ivory from African elephants. In each area surveyed, the surveyors visited major flea markets, antique markets, main shopping areas for antiques and crafts, department stores, and luxury hotel gift shops. The study does not identify all establishments trading in ivory, but gives a general idea of the number of establishments and geographic scope. In the 16 areas surveyed, the authors identified a total of 652 retail outlets offering a total of more than 23,000 ivory products for sale. Of the areas surveyed, those with the most retail outlets and the greatest number of ivory products for sale were: New York City (124 retail outlets containing a total of 11,376 ivory products); San Francisco Bay area (40 retail outlets containing a total of 2,777 ivory products); and greater Los Angeles (170 retail outlets containing a total of 2,605 ivory products). Martin and Stiles estimated that as much as one-third of the items they found were imported illegally after the 1989 AfECA import moratorium.

In March and April of 2014, one of the authors of the 2008 study conducted a follow-up survey (Stiles 2015) in Los Angeles and San Francisco, California. He found a total of more than 1,250 ivory items offered for sale by 107 vendors in these two California cities, “with 777

items and 77 vendors in Los Angeles and well over 473 ivory items and 30 vendors in San Francisco.” While there were “significantly fewer vendors” offering ivory for sale, compared to the 2006-2007 survey, Stiles noted “a much higher incidence of what appears to be ivory of recent manufacture in California, roughly doubling from approximately 25% in 2006 to about half in 2014. In addition, many of the ivory items seen for sale in California advertised as antiques (i.e., more than 100 years old) appear to be more likely from recently killed elephants.”

### **Basis for Regulatory Changes and Necessary and Advisable Determination**

It is often impossible to distinguish ivory legally imported into the United States from that which has been smuggled into the country, which significantly undermines enforcement efforts and provides an opportunity for illegal ivory to be laundered through U.S. markets. In addition, U.S. citizens may be involved in the global ivory market with ivory that has never been imported into the United States. The Service has reevaluated our domestic controls, given the current poaching crisis in Africa and the associated increase in illegal trade in ivory, the recent CITES recommendations, and evidence that substantial quantities of illegal ivory are making their way into U.S. markets. We have determined that it is appropriate to take certain regulatory actions, including revision of the 4(d) rule as necessary and advisable for the conservation of the species and to include certain prohibitions from section 9(a)(1) of the ESA, to more strictly regulate U.S. trade in ivory. The proposed revisions would regulate import, export, and commercial use of African elephant ivory and sport-hunted trophies and appropriately protect live elephants within the United States, while including certain limited exceptions for items and activities that we do not believe, based on all available evidence, are contributing to the poaching of elephants in Africa, including trade in live animals, parts and products other than ivory, and certain manufactured items containing ivory that meet specific criteria.

These new restrictions would facilitate enforcement efforts within the United States and improve regulation of both domestic and foreign trade in elephant ivory by U.S. citizens. Improved domestic controls will make it more difficult to launder illegal elephant ivory through U.S. markets, which will contribute to a reduction in poaching of African elephants.

This proposed action is consistent with Executive Order 13648 on Combating Wildlife Trafficking signed by President Obama on July 1, 2013, to “address the significant effects of wildlife trafficking on the national interests of the United States.” The Executive Order calls on executive departments and agencies to take all appropriate actions within their authority to “enhance domestic efforts to combat wildlife trafficking, to assist foreign nations in building capacity to combat wildlife trafficking, and to assist in combating transnational organized crime.” Increased control of the U.S. market for elephant ivory is also among the administrative actions called for in the National Strategy for Combating Wildlife Trafficking, issued by President Obama on February 11, 2014. Director’s Order No. 210, issued by the Director of the U.S. Fish and Wildlife Service, established policy and procedures for the Service to follow in implementing the National Strategy with regard to trade in African elephant ivory and parts and products of other ESA-listed species.

This proposal is also in line with international efforts. At CoP16, in March 2013, the CITES Parties adopted a revised resolution on trade in elephant specimens (Resolution Conf. 10.10 (Rev. CoP16)), which, among other things, urges Parties with a legal domestic ivory market to ensure that they have in place “comprehensive internal legislative, regulatory, enforcement and other measures to regulate the domestic trade in raw and worked ivory.” Wittemyer et al. (2014) concluded that it is obvious that stemming the rate of illegal killing of elephants is paramount. They call for a global response, including heavy *in situ* conservation

efforts, enforcement of end-use markets, and curbing demand to reduce black market prices for ivory and “alleviate the unsustainable pressure from illegal killing on wild populations.”

In developing this proposed rule, we have also considered the provisions already in place for protection of African elephants under CITES, the AfECA, and the guidance provided in Director’s Order No. 210. Provisions for African elephants under CITES and the AfECA can help to address current threats to the species, but the ESA can reach activities that are not regulated under these other laws. For each type of activity and specimen, the available protections provided through the combination of all applicable laws are analyzed to explain why the overall proposed regulatory framework is appropriate for the conservation of this species.

#### *General provisions*

We are proposing to revise the 4(d) rule for the African elephant, in 50 CFR 17.40(e), so that all of the provisions at 50 CFR 17.31 and 17.32 would apply unless specifically indicated otherwise in the rule. Any activity that would be prohibited or exempted under 50 CFR 17.31 and any activity that would require authorization under 50 CFR 17.32 would be regulated as indicated in those sections except as provided in this proposed rule. This legal framework provides far greater protections for African elephants compared to the current rule, which regulates only certain import to and export from the United States; possession, sale, offer for sale, transport, and similar activities with any African elephant specimen illegally imported into the United States; and sale or offer for sale of any sport-hunted trophy imported into the United States in violation of a permit condition. The protections that would be offered to African elephants through this proposed rule and reasons each of the measures is appropriate for the conservation of the species are explained below.

Nothing in this rule would affect other legal requirements applicable to African elephants

and their parts and products under other laws such as the AfECA and CITES. For example, while an import into the United States that met all standards as a noncommercial transshipment under section 10(i) of the ESA would not be a violation of the ESA, it would remain a violation of the import moratorium under the AfECA. In addition, any person importing or exporting African elephants or their parts and products to or from the United States would need to comply with all applicable CITES requirements beyond what are described in this proposed rule, as well as the general wildlife import/export requirements found at 50 CFR part 14 and general permitting requirements in 50 CFR part 13. These additional requirements, when applicable, are noted in the text of the rule.

#### *Take of live elephants*

The current 4(d) rule does not regulate the taking of live African elephants. Take means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct, an ESA-protected species and therefore includes both lethal and certain non-lethal effects on protected wildlife. Under the proposed rule, the taking of any live African elephant would be prohibited within the United States, within the U.S. territorial sea, or upon the high seas (with the latter two acts possibly occurring during transport of a live elephant, such as during transport to or from the United States). Take of endangered or threatened species is not regulated under the ESA beyond these geographic areas, so this change to the 4(d) rule would not have any effect on the ability of U.S. citizens to travel to countries that allow hunting of African elephants and engage in sport hunting. However, the import of any associated sport-hunted trophy into the United States would be regulated as described below. For any African elephant held in captivity within the United States, take would not include animal husbandry practices that meet minimum standards under the Animal Welfare Act (AWA; 7 U.S.C. 2131 et

seq.), breeding procedures, and veterinary care that is not likely to result in injury to the elephant. (See the definition of “harass” at 50 CFR 17.3.) Therefore this new restriction would not affect routine procedures for care of African elephants that are held in zoos and similar facilities in the United States. This prohibition is the same as the prohibition on take of Asian elephants, which has been in place since the Asian elephant was listed under the ESA in 1976.

The proposed rule would help to ensure that elephants held in captivity receive an appropriate standard of care. Any activities that qualify as take, including those beyond the standard veterinary care, breeding procedures, and AWA care standards described in the definition of “harass,” would have to qualify for one of the purposes that allow for issuance of a threatened species permit under 50 CFR 17.32. While the taking of live African elephants held in captivity within the United States or being transported is not a threat to the species, including a prohibition against take, even for species that are not native to the United States, is a standard protection for threatened species and ensures an adequate level of care for wildlife held in captivity.

#### *Interstate and foreign commerce*

The current 4(d) rule for the African elephant does not regulate sale or offer for sale in interstate or foreign commerce or delivery, receipt, carrying, transport, or shipment in interstate or foreign commerce in the course of a commercial activity of African elephants (including live animals, parts and products, and sport-hunted trophies). The only commercial activities regulated under the current 4(d) rule are possession, sale or offer for sale, and receipt, delivery, transport, or shipment of African elephants (including parts and products) that were illegally imported into the United States and sale or offer for sale of any sport-hunted trophy imported into the United States in violation of a permit condition. These restrictions will remain in place

through the ESA section 9(c)(1) prohibition on possession of any CITES specimen that was imported or exported contrary to the Convention, prohibitions under the Lacey Act (16 U.S.C. 3371 et seq.), and ESA section 11 penalties for violations of ESA or CITES permit conditions. We propose to allow continued sale or offer for sale in interstate or foreign commerce and delivery, receipt, carrying, transport, or shipment in interstate or foreign commerce in the course of a commercial activity of live animals and African elephant parts and products other than ivory and sport-hunted trophies without a threatened species permit.

The poaching crisis is driven by demand for elephant ivory. There is no information to indicate that commercial activities involving live elephants or commercial use of elephant parts and products other than ivory has had any effect on the rates or patterns of illegal killing of elephants and the illegal trade in ivory. Live animals are occasionally removed from the wild and placed in captivity, often from populations in small management areas where there have been local over-population issues and consequent negative impacts to habitat. African elephant parts other than ivory (such as hides) that are commercialized generally become available when animals are culled for management purposes, during salvage of animals poached for their ivory, or when problem animals have to be killed. African elephants are not killed primarily for their hides or for parts other than ivory. In addition, the import and export of live African elephants and parts and products are regulated under CITES and other U.S. law. This includes import into and export from the United States for both commercial and noncommercial purposes. It is only commercial activity associated with interstate or foreign commerce not involving import or export that would not be regulated. We have no information indicating that such commercial activity is having any effect on the conservation status of African elephants. Requiring individuals to obtain a threatened species permit under 50 CFR 17.32 when the removal of a

small number of live elephants or the incidental harvest of their hides or hair has no negative impact on the species would provide no meaningful protective measures for African elephants, especially when activities that also involve import or export to or from the United States are already regulated under CITES. For these reasons, we have determined that it is not necessary to propose restrictions on commercial activities in interstate or foreign commerce with live African elephants, leather goods, and other African elephant non-ivory parts and products.

We do, however, propose to prohibit sale or offer for sale of ivory in interstate or foreign commerce and delivery, receipt, carrying, transport, or shipment of ivory in interstate or foreign commerce in the course of a commercial activity, with some exceptions, and to prohibit the same commercial activities with sport-hunted African elephant trophies. “Foreign commerce” is defined in section 3 the ESA (16 U.S.C. 1532(9)). “Commercial activity” as used in the term “in the course of a commercial activity” is also defined in section 3 the ESA and means “all activities of industry and trade, including, but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling” (16 U.S.C. 1532(2)). The Service has defined “industry or trade” at 50 CFR 17.3 to mean “the actual or intended transfer of wildlife . . . from one person to another person in the pursuit of gain or profit.” The ESA definition of “commercial activity” includes an exception for “exhibitions of commodities by museums or similar cultural or historical organizations.” “Person” is defined in the ESA to include corporations, partnerships, trusts, associations, or any other private entity along with Federal, State, local, and foreign governments, as well as individuals. Activities that would be prohibited could be authorized through a threatened species permit under 50 CFR 17.32 for scientific purposes, enhancement of propagation or survival of the species, zoological exhibition, educational purposes, or other special purposes consistent with the purposes of the

ESA. The ESA does not reach sale or offer for sale or activities in the course of a commercial activity that occur solely within the boundaries of a State (i.e., intrastate commerce).

There are a number of potential activities involving ivory or sport-hunted trophies that would not be prohibited under these ESA standards, provided the activity did not qualify as “sale” or “offer for sale.” Under our definition of “industry or trade,” commercial use of threatened specimens does not fall under the prohibition for “commercial activity” unless the transaction involves the *transfer* of the specimen from one person to another person in the pursuit of gain or profit. Activities that would involve the movement of ivory or sport-hunted trophies in interstate or foreign commerce for gain or profit where there would be no transfer of the item to another person would not be a violation of this rule. For example, a person who transported an item containing ivory across State lines for the purpose of having the item repaired would not fall under the prohibition for “commercial activity.” Not every transaction that involves the exchange of money qualifies as commercial activity under the ESA. In this case, the repair person would gain financially and the item may increase in value once repaired, but the payment of money would be to compensate the repair person for his or her labor and expenses and not involve gain or profit from the ivory item itself (unless the activity involved using additional ivory to repair the item, which would not be allowed). The donation of an item consisting of or containing ivory also would not be considered commercial activity, even if the donor qualified for a tax benefit where the tax benefit is not income. Exhibitions of ivory items or sport-hunted trophies involving gain or profit would remain exempt under the ESA definition of “commercial activity,” provided that all entities involved in the transaction qualified as “museums or similar cultural or historical organizations.” Finally, the exemption available through section 10(h) of the ESA (16 U.S.C. 1539(h)) would continue to allow

commercialization of qualifying antiques in interstate and foreign commerce. There are, however, other Federal and State restrictions that may apply to commercial activities involving ivory, including “use after import” restrictions on certain specimens that have been imported under CITES (see below).

As explained in the section **Need for Regulatory Actions**, while there has long been poaching of African elephants for their ivory and illegal trade in that ivory, since 2006, there has been an unprecedented increase in the illegal killing of African elephants, with estimates exceeding 20,000 per year in recent years. Concurrent with this increase in illegal killing there has been an alarming increase in illegal trade in ivory. Recent law enforcement efforts have demonstrated that the United States plays a role in the illegal trade and the associated illegal killing. The study by Martin and Stiles (2008) estimated that as much as one-third of the ivory found in selected metropolitan areas had been imported into the United States illegally since the 1989 AfECA moratorium. Stiles estimated, in his 2014 follow-up study, that as much as one half of the ivory for sale in two California cities during his survey had been imported illegally. All of this demonstrates the need to impose restrictions on commercializing elephant ivory within the United States. The proposed rule would restrict commercial activities with African elephant ivory consistent with the restrictions in place for endangered species and those in place for other threatened species, with a narrow exception for manufactured items containing a small (*de minimis*) quantity of ivory. Sale or offer for sale of ivory in interstate or foreign commerce and delivery, receipt, carrying, transport, or shipment of ivory in interstate or foreign commerce in the course of a commercial activity would also remain available by threatened species permit under 50 CFR 17.32, provided the person met all of the requirements of that section as well as the general permitting requirements under 50 CFR part 13.

For the same reasons that it is appropriate for the conservation of African elephants to restrict commercial activities involving ivory in interstate and foreign commerce, it is appropriate to restrict commercial activities involving sport-hunted trophies in interstate and foreign commerce. African elephant trophies contain raw or worked ivory, and in fact sometimes only the raw or worked ivory from the animal is imported into the United States as the trophy. Sport hunting is considered a noncommercial activity and CITES regulation of import and export of sport-hunted trophies reflects this approach. For example, the listing of the African elephant in CITES Appendix II for Botswana, Namibia, South Africa, and Zimbabwe is specifically annotated to note that trade in hunting trophies is for noncommercial purposes only. In Resolution Conf. 12.3 (Rev. CoP16), the CITES Parties have specified that a hunting trophy is an animal that was taken for the hunter's personal use. In addition, a CITES import permit for an African elephant trophy hunted in an Appendix I country can only be issued if the importing government finds that the specimen is not to be used for primarily commercial purposes. Reflecting these restrictions, CITES permits for African elephant sport-hunted trophies include a permit condition that the specimen can be used for noncommercial purposes only.

Consistent with these and similar restrictions for other CITES species, in the 2007 revisions to our CITES-implementing regulations, we clarified that in situations where commercial import would be prohibited under CITES, an item imported for noncommercial purposes could not be used for commercial purposes after import into the United States. Under our CITES regulations, Appendix-I specimens (except those imported under a CITES exemption document or before the species was listed in Appendix I), CITES Appendix-II specimens with an annotation that trade is for noncommercial purposes only, and CITES Appendix-II specimens without a noncommercial annotation but listed as threatened under the ESA can only be used

within the United States for noncommercial purposes (see 50 CFR 23.55). This restriction under the authority of CITES reaches intrastate as well as interstate and foreign commerce. We propose to prohibit the commercialization of sport-hunted African elephant trophies in a manner consistent with other legal standards under CITES, including the commercialization of any manufactured items that might otherwise qualify under the *de minimis* exception discussed below.

Since announcing our intentions to remove or revise the 4(d) rule, we have received input from the public, including musicians and musical instrument manufacturers, museums, antique dealers, and others who may be impacted by these proposed changes. Having considered relevant information provided by these groups, in this proposed rule we would allow for continued commercialization of African elephant ivory in interstate and foreign commerce that is not contributing to the poaching of elephants and where we believe the risk of illegal trade is low.

We propose to allow sale and offer for sale of ivory in interstate or foreign commerce along with delivery, receipt, carrying, transport, or shipment of ivory in interstate or foreign commerce in the course of a commercial activity without a threatened species permit for manufactured items containing *de minimis* amounts of ivory, provided they meet the following criteria:

- For items located in the United States, the ivory was imported into the United States prior to January 18, 1990 (the date the African elephant was listed in CITES Appendix I) or was imported into the United States under a CITES pre-Convention certificate with no limitation on its commercial use;
- For items located outside the United States, the ivory is pre-Convention (removed

from the wild prior to February 26, 1976 (the date the African elephant was first listed under CITES));

- The ivory is a fixed component or components of a larger manufactured item and is not, in its current form, the primary source of value of the item;

- The manufactured item is not made wholly or primarily of ivory;
- The total weight of the ivory component or components is less than 200 grams;
- The ivory is not raw; and
- The item was manufactured before the effective date of the final rule for this action.

We have included the phrase “in its current form” in the criterion stating that the ivory is not the primary source of value of the item, to make clear that we would consider the value added by the craftsmanship (carving, etc.) that went into the ivory component, not just the value of the ivory itself. We use the phrase “wholly or primarily” (in the next criterion) as those terms are commonly defined in the dictionary. We consider “wholly” to mean “entirely, totally, altogether” and “primarily” to mean “essentially, mostly, chiefly, principally.” We have chosen 200 grams as the weight limit because we understand that this is the approximate maximum weight of the ivory veneer on a piano with a full set of ivory keys and that this quantity would also cover most other musical instruments with ivory trim or appointments. We also understand the 200-gram limit would cover a broad range of decorative and utilitarian objects containing small amounts of ivory (insulators on old tea pots, decorative trim on baskets, and knife handles, for example).

We have intentionally crafted this exception to allow commercial activity in a very narrow class of items. While we have given careful consideration to the types of items containing African elephant ivory for which we could allow continued commercialization in

interstate and foreign commerce (because we do not believe the trade is contributing to the poaching of elephants and we believe the risk of illegal trade is low) we seek comment from the public on the specific criteria we have proposed to qualify for this *de minimis* exception. In particular, we are interested in input on criterion (iii), the ivory is a fixed component or components of a larger manufactured item and is not in its current form the primary source of value of the item and criterion (v), the manufactured item is not made wholly or primarily of ivory. We seek comment on the impact of not including these criteria in the rule and whether these criteria are clearly understandable.

Examples of items that we do not expect would qualify for the *de minimis* exception include chess sets with ivory chess pieces (both because we would not consider the pieces to be fixed components of a larger manufactured item and because the ivory would likely be the primary source of value of the chess set), an ivory carving on a wooden base (both because it would likely be primarily made of ivory and the ivory would likely be the primary source of its value), and ivory earrings or a pendant with metal fittings (again both because they would likely be primarily made of ivory and the ivory would likely be the primary source of its value). For the reasons discussed in the section *Import and export of ivory, other than sport-hunted trophies*, this *de minimis* exception would not apply to manufactured items containing ivory that were imported to or exported from the United States for law enforcement or scientific purposes or to otherwise qualifying inherited items or items in a household move that were imported or exported under one of the exceptions in this rule.

Our law enforcement experience over the last 25 years (see the *U.S. involvement in the illegal ivory trade* section) has shown that the vast majority of items in the illegal ivory trade are either raw ivory (tusks and pieces of tusks) or manufactured pieces (mostly carvings) that are

composed entirely or primarily of ivory. As described earlier, in November 2013, the Service destroyed six tons of seized ivory that represented over 25 years of law enforcement efforts to control illegal ivory trade in the United States. The six tons of contraband ivory did not include any items that would be covered by this exception. As demonstrated by the thousands of seized ivory items destroyed in the “crush,” ivory traffickers are not manufacturing items with small amounts of pre-Convention ivory or dealing in such items. Rather, because the incentive to deal in illegal ivory is economic, the trade focuses on raw ivory and large pieces of carved ivory from which the highest profits can be made. Likewise, in the case described earlier involving the Philadelphia African art dealer, which included the seizure of approximately one ton of ivory, all of the seized ivory was in the form of whole ivory carvings and did not include any items that would qualify under the proposed *de minimis* exception.

The information we have about the domestic market, including the surveys conducted by Martin and Stiles and our own investigations, indicates that trade in the types of manufactured items that would qualify for this proposed *de minimis* exception is not contributing to or driving the illegal ivory trade. Martin and Stiles identify recently made and presumably illegally imported items as figurines, netsukes, and jewelry, none of which would qualify under the criteria proposed for a *de minimis* exception.

The requirement that the ivory is either pre-Convention (removed from the wild prior to February 26, 1976) or was imported into the United States prior to 1990, and the requirement that the item must have been manufactured before the effective date of a final rule would make it unlikely that commercialization of ivory under this exception would directly contribute to the future illegal killing of elephants. Noting the types of items that make up the illegal trade, and requiring that the ivory be a fixed component of a larger manufactured item, that the ivory is not

raw, that it is not the primary source of value of the item, that the total weight of the ivory is less than 200 grams, and that the manufactured item is not made wholly or primarily of ivory would minimize the possibility of the ivory contributing to either global or U.S. illegal ivory markets or that the *de minimis* exception could be exploited as a cover for the illegal trade.

These changes will allow us to appropriately regulate the U.S. domestic market in ivory as well as U.S. participation in global markets for ivory and achieve our goal of conserving the African elephant, while allowing limited continued trade that is not contributing to the poaching of elephants. Improved domestic controls will make it more difficult to launder illegal elephant ivory through U.S. markets, which we believe will ultimately contribute to a reduction in the illegal killing of African elephants.

Since announcing our intention to revise the 4(d) rule for the African elephant and prohibit sale and offer for sale of African elephant ivory in interstate commerce, we have heard from a number of representatives of the U.S. museum community. They have expressed their concern about how prohibitions on interstate commerce will impact their ability to acquire items for museum collections. We recognize that museums can play a unique role in society by curating objects that are of historical and cultural significance. We are considering including an exception to the prohibitions on interstate commerce for museums, either through this rulemaking process or through a separate rulemaking under the ESA.. We seek comment from the public on this issue. Additionally, we seek comment on how to best define museums in this regard, given the diverse interests that they serve.

*Import and export, other than ivory and sport-hunted trophies*

Under the current 4(d) rule, African elephants and African elephant parts and products other than sport-hunted trophies and ivory (e.g., live elephants, including those with tusks, and

leather products) may be imported into or exported from the United States without a threatened species permit, provided all permit requirements of 50 CFR parts 13 (general permitting regulations) and 23 (CITES regulations) have been met. This would not change with the proposed revisions to the 4(d) rule. We would, however, add a clarification that the requirements at 50 CFR part 14 (general import, export, and transport regulations) must also be met.

As noted earlier, the import into the United States of live elephants, including those with tusks, is not regulated under the AfECA. In section 4202(2) (16 U.S.C. 4202(2)) of the statute, Congress found that it is the large illegal trade in ivory that is the major cause of decline of the species and threatens its existence. Although live elephants may have tusks, there is no information indicating that the limited import of live elephants for conservation or zoological exhibition purposes has ever negatively affected the species. Live African elephants are only occasionally imported into the United States (most live elephants held in captivity in the United States are Asian elephants). During the 5 years from 2009 to 2013, there were eight live African elephants imported into the United States (four in 2011 and four in 2013), all for zoological or educational purposes. Three of these animals were pre-Convention (removed from the wild prior to 1976); the other five were either captive born or captive bred. In addition, the AfECA's focus on regulating ivory primarily through moratoria on the import of raw and worked ivory (not elephants themselves) indicates Congress' intent to regulate ivory as a commodity, not ivory that is attached to a live elephant and therefore cannot be commercialized separate from the elephant itself. Likewise, the AfECA prohibitions all address the import or export of raw or worked "ivory," not elephants. Finally, the definition of "raw ivory" also indicates that Congress intended the term not to apply to live elephants. The term raw ivory in section 4244(10) (16 U.S.C. 4244(10)) means any "tusk, and any piece thereof, the surface of which, polished or

unpolished, is unaltered or minimally carved.” The references to pieces of tusks and the polishing or carving of tusks when read in the context of the definition and application of the term “raw ivory” in the statute indicate that the definition is speaking of tusks that are no longer attached to a live animal.

When establishing regulations for threatened species under the ESA, the Service has generally adopted restrictions on the import and export of live as well as dead animals and their parts and products, either through a 4(d) rule or through the provisions of 50 CFR 17.31. In this case, import and export of both live and dead African elephants and all parts and products are already carefully regulated under CITES. Under CITES and the U.S. regulations that implement CITES at 50 CFR part 23, the United States regulates and monitors all commercial and noncommercial trade in African elephants and any parts and products that are imported into or exported from the country. All African elephant populations are protected under CITES, with most populations listed in Appendix I and only four populations (those in Botswana, Namibia, South Africa, and Zimbabwe) listed in Appendix II. Import into and export from the United States of African elephant specimens will continue to require CITES documentation.

Under CITES, for nearly all live or dead elephants and elephant parts or products, including those from Appendix II populations, the exporting country must issue an export permit that is supported by findings that the specimen was legally acquired under national laws, that the export will not be detrimental to the survival of the species, and, for live animals, that the elephant will be shipped in a manner that minimizes the risk of injury, damage to health, or cruel treatment. The CITES export permit must be presented upon export and must also be presented to U.S. officials upon import into the United States. For nearly all Appendix-I African elephant specimens, a CITES import permit would also have to be issued by the Service after finding that

the import will be for purposes that are not detrimental to the survival of the species, that the specimen will not be used for primarily commercial purposes, and, for a live animal, that the proposed recipient is suitably equipped to house and care for the elephant. Any later re-export of African elephant specimens would require additional CITES documents.

Some limited exceptions to these permitting requirements exist. Consistent with an exception in the Convention, the Service provides an exemption from permitting requirements for personal and household effects, but only for dead specimens and not for most Appendix-I specimens. Personal and household effects must be personally owned for noncommercial purposes, and the quantity imported or exported must be necessary or appropriate for the nature of the trip or household use. The exemption is extremely limited for items containing African elephant ivory (see 50 CFR 23.15(f)). Not all CITES countries have adopted the personal and household effects exemption, so individuals who might cross an international border with an African elephant item and want to take advantage of this exemption would need to check with the Service and any country of transit in advance for documentation requirements. There is also an exemption for pre-Convention animals and parts or products, but a person who wants to transport an item under this exemption must obtain and present to government officials upon export and import a CITES pre-Convention certificate that verifies that the specimen was acquired before the Convention applied to it.

In addition to the requirements under CITES, individuals who import or export wildlife and wildlife products into or from the United States must file wildlife declaration forms with the Service's Office of Law Enforcement and must use designated ports. Individuals who are in the business of importing and exporting wildlife and wildlife products must be licensed by the Service. These requirements allow us to monitor the species and quantity of wildlife that are

imported into and exported from the United States and ensure that such trade is legal.

The need to address the increase in illegal killing and illegal trade of African elephants is linked to the economic value of and international market in ivory. There is no information indicating that the conservation status and management needs of the species are linked to the occasional import of live elephants into the United States for captive propagation programs or public education and display, or to the market in hides and other non-ivory parts or products. The Service monitors U.S. imports and exports of elephant specimens through wildlife declaration forms, and all CITES Parties are required to submit annual reports on trade in CITES species and the number and types of CITES permits and certificates issued each year. This information verifies that import and export of live African elephants and parts or products other than ivory and sport-hunted trophies is small and does not affect the conservation of the species. There is no evidence of an illegal market in live elephants or parts and products other than ivory.

In addition, as noted above, import and export of African elephant specimens would continue to be strictly regulated through the documentation procedures and required findings under CITES. Particularly relevant to the major threats facing African elephants, these CITES documents are not issued unless the importing or exporting countries find that the import or export would not be detrimental to the survival of the species, that the live animal or part or product was legally acquired, and that the specimen will not be used for primarily commercial purposes. Requiring individuals to obtain an ESA threatened species permit in addition to the required CITES documents prior to import or export of live animals and parts or products other than ivory and trophies would add no meaningful protection for the species and would be an unnecessary overlay of authorization on top of existing documentation that already ensures that the import or export is legal and not detrimental to the survival of the species. Therefore, because

the import and export of live African elephants and parts or products other than ivory and sport-hunted trophies must comply with the strict provisions of CITES and other U.S. import/export requirements and because the import or export of such animals and parts or products poses no risk to the species, we find that authorization under the ESA to import or export African elephant specimens other than sport-hunted trophies or ivory remains neither necessary nor appropriate provided that all import and export requirements under CITES and other U.S. laws have been met.

*Import and export of sport-hunted trophies*

As noted earlier, the ESA does not prohibit U.S. hunters from traveling to other countries and taking threatened species, but authorization may be required under the ESA to import the sport-hunted trophy into the United States. We are proposing to limit the number of sport-hunted African elephant trophies that may be imported into the United States to two per hunter per year. This action is intended to address a small number of circumstances in which U.S. hunters have participated in legal elephant culling operations and imported, as sport-hunted trophies, a large number of elephant tusks from animals taken as part of the cull. We propose to disallow this activity, which has resulted, in some cases, in the import of commercial quantities of ivory as sport-hunted trophies. Based on our import records, we expect this proposed change to impact fewer than 10 hunters per year.

This proposed change is consistent with the purposes of the ESA and CITES. Sport hunting is meant to be a personal, noncommercial activity. Engaging in hunting that results in acquiring quantities of ivory that exceed what would reasonably be expected for personal use and enjoyment is inconsistent with sport hunting as a noncommercial activity. Given the current conservation concerns with escalating illegal trade in ivory and the associated levels of illegal

killing to supply that trade, it is consistent with the purposes of the ESA and other provisions in this proposed rule regulating commercialization of ivory to more closely regulate activities that have resulted in the import of large quantities of raw ivory into the United States.

This provision is also consistent with Congress' intent under the AfECA. Congress included in the AfECA an exemption from the import moratorium for sport-hunted trophies legally taken in an elephant range country, but that was on the basis of finding that sport hunting does not directly or indirectly contribute to the illegal trade in African elephant ivory. The escalating illegal trade of ivory is currently driving unprecedented increases in the illegal killing of elephants. We therefore find it is necessary to use our authority under section 4(d) of the ESA to ensure that ivory imported into the United States as sport-hunted trophies is in fact the result of sport hunting and is not commercialized. Section 4241 of the AfECA (16 U.S.C. 4241) expressly states that the Service's authority under the AfECA is in addition to and does not affect the Service's legal authority under the ESA, which includes our legal authority under section 4(d). The AfECA therefore does not preclude us from using our authority under the ESA to limit the number of African elephant trophies imported by an individual hunter each year to appropriate levels. For certain species, the parties to CITES have set limits on the number of trophies that any one hunter may import in a calendar year, which currently for leopards is no more than two, for markhor is no more than one, and for black rhinoceros is no more than one. See 50 CFR 23.74(d). Taking into consideration these decisions by the parties to CITES, we similarly propose to set the limit at two African elephants per hunter per year.

We are also proposing to require issuance of a threatened species permit under 50 CFR 17.32 for import of all African elephant sport-hunted trophies. The current 4(d) rule provides conditions under which sport-hunted African elephant trophies may be imported into the United

States, one of which is that the Service has made a determination that the killing of the trophy animal would enhance the survival of the species.

For elephant trophies taken from CITES Appendix- I populations, we issue a combined CITES/ESA import permit and the ESA finding is communicated through that permit. Under the current 4(d) rule, we do not issue an import permit for trophies from Appendix-II populations and the ESA finding is communicated through public notification, including in the **Federal Register**.

For the import of sport-hunted trophies from Appendix-II populations, revision of the 4(d) rule would mean that the enhancement finding required under the current 4(d) rule would be communicated through the threatened species permitting process under 50 CFR 17.32. This change in procedure would not result in any significant burden to U.S. hunters and would not affect whether future hunters would be able to obtain trophy import permits. The standards for making enhancement findings for each African elephant range country under the current 4(d) rule are the same as the standards for making findings for import permits for sport-hunted trophies of other species classified as threatened, where such findings are required. The standards for making enhancement findings under the current 4(d) rule are also the same as the standards that would be used in the future for making enhancement findings for African elephant trophy imports through the threatened species permit process. Permits have always been required for the import of African elephant trophies from any Appendix-I country, so it is only trophies from the four Appendix-II countries that would now also require import authorization through a threatened species permit. Hunters would benefit from the consistency of having all African elephant import authorizations provided through the permitting process (we expect it would reduce confusion regarding the process for obtaining import authorization, depending on the

country) and benefit from a process that would allow them to submit relevant information through the permit application. Hunters seeking authorization to import a trophy from an Appendix-II population would also now be able to take advantage of the process for requesting reconsideration and appeal of a permit denial under 50 CFR 13.29. The Service would benefit from having a consistent process for authorizing ESA importation of African elephant sport-hunted trophies, as well as having the ability to obtain current information from hunters that is relevant to making the enhancement findings.

As provided in section 9(c)(2) (16 U.S.C. 1538(c)(2)) and our regulations at 50 CFR 17.8, the ESA provides a limited exemption for the import of some threatened species, which is frequently used by hunters to import sport-hunted trophies. Importation of threatened species that are also listed under CITES Appendix II are presumed not to be in violation of the ESA if the importation is not made in the course of a commercial activity, all CITES requirements have been met, and all general wildlife import requirements under 50 CFR part 14 have been met. This presumption can be rebutted, however, when information shows that the species' conservation and survival would benefit from the granting of ESA authorization prior to import. The Service determined that this was the case in 1997 and 2000, when the four populations of African elephants were transferred from CITES Appendix I to CITES Appendix II and we retained the requirement for ESA enhancement findings prior to the import of sport-hunted trophies. We amended the African elephant 4(d) rule in June of 2014, again maintaining the requirement for an ESA enhancement finding prior to allowing the import of African elephant sport-hunted trophies.

Our proposal to require issuance of threatened species enhancement permits under 50 CFR 17.32 for the import of any African elephant hunting trophy would change the procedure

for issuing ESA authorization but not change the requirement that an enhancement finding be made prior to import into the United States. As described in the **Need for Regulatory Actions** section, the overall conservation status of African elephants has deteriorated in the years following the transfer of the four populations of African elephants to CITES Appendix II. Extensive and well-documented information indicates that the escalating rate of illegal killing of African elephants is driven by the illegal markets for elephant ivory. This information affirms the need to continue making enhancement findings prior to allowing the import of sport-hunted trophies that consist entirely or in part of the ivory tusks from the elephant. Authorizing importation of all sport-hunted trophies through threatened species enhancement permits would allow us to more carefully evaluate trophy imports in accordance with legal standards and the conservation needs of the species. For example, the issuance of threatened species enhancement permits under 50 CFR 17.32 would mean that the standards under 50 CFR part 13 would also be in effect, such as the requirement that an applicant submit complete and accurate information during the application process and the ability of the Service to deny permits in situations where the applicant has been assessed a civil or criminal penalty under certain circumstances, failed to disclose material information, or made false statements. Therefore, we have determined that the additional safeguard of requiring the issuance of threatened species enhancement permits under 50 CFR 17.32 prior to the import of sport-hunted trophies is warranted.

In addition, the 4(d) rule would incorporate certain restrictions under the AfECA on the import and export of sport-hunted trophies. We do not have separate AfECA regulations and consider that including restrictions in the 4(d) rule that have their source in the AfECA would provide hunters and other members of the public easy access to information on all requirements that apply to activities with African elephant sport-hunted trophies. All of these provisions are

also appropriate conservation measures for the species under the ESA that ensure that hunting of African elephants by U.S. citizens is sustainable and legal under the laws of the range country and that any ivory associated with the trophy does not contribute to the illegal killing of elephants. Adopting these AfECA provisions as appropriate conservation measures for the species under section 4(d) of the ESA would also make a violation of relevant provisions of the AfECA a violation of the ESA, thus increasing protections for African elephants when a person violates the AfECA.

The AfECA provides for the import of sport-hunted African elephant trophies but only if the trophy was legally taken in an African elephant range country that has declared an ivory export quota to the CITES Secretariat. These requirements have been incorporated into the proposed 4(d) rule. Also, the AfECA provides an exemption from any moratorium for the import of African elephant sport-hunted trophies, but the exemption applies to import only, not export. The export of all raw ivory is prohibited under section 4223(2) of the AfECA (16 U.S.C. 4223(2)). We propose to incorporate into the 4(d) rule the AfECA prohibition on the export of raw ivory. Export of raw ivory would not be allowed even under an ESA threatened species permit because the AfECA prohibition would still stand; similarly, export of raw ivory that qualified as an antique under the ESA, while not regulated under the proposed 4(d) rule, would still be prohibited under the AfECA. We have also proposed minor revisions to the 4(d) rule to clarify that general wildlife import requirements under 50 CFR part 14 also apply to the import of sport-hunted trophies and to more closely align import requirements with the recommendations in CITES Resolution Conf. 10.10 (Rev. CoP16), *Trade in elephant specimens*.

The revised 4(d) rule would also allow the noncommercial export of worked ivory that was imported as part of a sport-hunted trophy provided it meets one of the exceptions we have

proposed for scientific or law enforcement purposes or as part of a musical instrument, traveling exhibition, or household move or inheritance. Worked ivory that had been imported as a sport-hunted trophy could also be exported if it qualifies as an ESA antique.

*Import and export of ivory, other than sport-hunted trophies*

Under the current 4(d) rule, import of raw or worked ivory other than sport-hunted trophies is allowed only if it is a *bona fide* antique greater than 100 years old or it is being imported following export from the United States after being registered with the Service. Under the terms of the 1989 AfECA moratorium, the import of raw and worked African elephant ivory, other than ivory from legally taken sport-hunted trophies, is prohibited from both African elephant range countries and intermediary countries (i.e., countries that export ivory that did not originate in the country).

Under the proposed revisions to the 4(d) rule, import of ivory other than sport-hunted trophies would be prohibited, with limited, narrow exceptions including: the import of raw ivory by a government agency for law enforcement purposes or for a genuine scientific purpose that will contribute to the conservation of the African elephant; and the import of worked ivory under these same exceptions for law enforcement or scientific purposes that will contribute to the conservation of the species, or as part of a musical instrument, an item in a traveling exhibition, or as part of a household move or inheritance. The export of raw ivory would be prohibited under the proposed revisions to the 4(d) rule and the export of worked ivory would be limited to those items that qualify for the exceptions described above. Section 4(d) of the ESA does not apply to items that qualify as antiques and therefore these proposed prohibitions on import and export of ivory do not apply to ESA antiques. However, as noted previously, the prohibitions on import and export of ivory under the AfECA would still apply, regardless of the age of the item.

The proposed revisions are consistent with the 1989 AfECA moratorium, and are generally consistent with the Service's Director's Order No. 210, as amended on May 15, 2014. We have determined that these provisions are appropriate under the ESA for the conservation of the African elephant.

Restrictions on import and export are appropriate under both the AfECA and the ESA because strict regulation of the import and export of ivory are necessary to prevent U.S. citizens and others subject to the jurisdiction of the United States from engaging in activities that could contribute to the illegal killing of elephants. Nonetheless, situations where not allowing the activity could actually be detrimental to the conservation of the species, or limited circumstances where careful controls would be in place to make it likely that the activity will not contribute to illegal trade in ivory or the killing of elephants for their ivory, can be allowed. Adopting the AfECA provisions as appropriate conservation measures for the species under section 4(d) of the ESA would make a violation of the AfECA a violation of the ESA, thus increasing protections for African elephants when a person violates the AfECA. Finally, because there are no AfECA regulations in the Code of Federal Regulations, the public would benefit from having all legal requirements relating to the import and export of African elephant ivory located in one place through the 4(d) rule.

On June 9, 1989, the Service established the current moratorium on the importation of both raw and worked ivory (other than that from sport-hunted trophies) after finding that most ivory was traded outside of the CITES Ivory Trade Control System that existed at that time and that illegal and excessive taking of elephants was taking place at unsustainable levels (54 FR 24758). African elephant range countries were unable to effectively control taking of elephants and intermediary countries could not ensure that all ivory in trade originated from legal sources.

Specifically, the Service found that most ivory range countries had such low elephant populations that the countries had determined that no sustainable harvest was possible and had requested no ivory export quota for that year; that there was likely no sustainable harvest of elephants throughout most of Africa, even for those countries that had export quotas, due to declining populations; and that most African elephant range countries had significant poaching problems. For intermediary countries, the Service determined that all major intermediary countries that were parties to CITES at that time had engaged in import of raw ivory from other intermediary countries (alone a criterion for establishment of a moratorium under the AfECA) and that due to the virtual impossibility of distinguishing legal from illegal ivory, it was no longer possible for any intermediary country to ensure that it was not importing ivory from a range country in violation of the laws of that country.

In recent years, many of the conditions that supported imposing the moratorium have continued or even worsened. In particular, recent information shows that for elephant range countries, the taking of elephants is not effectively controlled and the amounts of raw ivory that are being illegally exported from these countries are undermining the conservation of elephants. For intermediary countries, recent information on the scope and extent of illegal ivory trade shows that these countries are importing (through illegal trade) raw or worked ivory that originates in range countries in violation of the laws of the range countries. However, some actions in the United States, in other countries, and through CITES, have been taken to strengthen controls on poaching and illegal trade. In January 1990, all populations of African elephants were transferred from CITES Appendix II to Appendix I, which generally ended legal commercial trade in African elephant ivory. In 1997, based on proposals submitted by Botswana, Namibia, and Zimbabwe and the report of a Panel of Experts, the CITES Parties

agreed to transfer the African elephant populations in these three countries to CITES Appendix II. The Appendix-II listing included an annotation that allowed noncommercial export of hunting trophies, export of live animals to appropriate and acceptable destinations, export of hides from Zimbabwe, and noncommercial export of leather goods and some ivory carvings from Zimbabwe. It also allowed for a one-time export of raw ivory to Japan (which took place in 1999), once certain conditions had been met. All other African elephant specimens from these three countries were deemed to be specimens of a species listed in Appendix I and regulated accordingly.

The population of South Africa was transferred from CITES Appendix I to Appendix II in 2000, with an annotation that allowed trade in hunting trophies for noncommercial purposes, trade in live animals for reintroduction purposes, and trade in hides and leather goods. Since then, the CITES Parties have revised the Appendix-II listing annotation three times. The current annotation, in place since 2007, covers the Appendix-II populations of Botswana, Namibia, South Africa, and Zimbabwe and allows export of: Sport-hunted trophies for noncommercial purposes; live animals to appropriate and acceptable destinations; hides; hair; certain ivory carvings from Namibia and Zimbabwe for noncommercial purposes; and a one-time export of specific quantities of raw ivory, once certain conditions had been met (this export, to China and Japan, took place in 2009). As in previous versions of the annotation, all other African elephant specimens from these four populations are deemed to be specimens of species included in Appendix I and the trade in them is regulated accordingly.

Most recently, the Service determined in April 2014 that import of sport-hunted trophies from Tanzania and Zimbabwe could not be allowed until new information is received, because the killing of African elephants for trophies does not meet the enhancement standard under the

current 4(d) rule. The Service understands that Botswana has closed its sport-hunting program on government land for 2014 (although hunting on private concessions continues) and is not currently allowing exports. South Africa and Namibia continue to have well-managed elephant conservation programs; the Service's findings remain in place that the killing of trophy animals from these countries for import into the United States enhances the survival of the species.

All of this information, along with the recent levels of illegal killing and illegal trade as described in the section **Need for Regulatory Actions**, indicates that the circumstances facing African elephants and involving ivory in both range countries and intermediary countries support adoption of these restrictions for the species under the ESA. The threats facing the species call for all appropriate actions to restrict the import of African elephant ivory where that import is likely to contribute to commercializing elephant ivory. We believe that it is appropriate to allow certain limited exceptions to these import restrictions under the 4(d) rule, however, where import either would be beneficial to law enforcement or the conservation of the species, or where import of certain worked ivory meets strict criteria and is regulated in such a manner that it does not contribute to the illegal trade in ivory and poses no risk to elephant populations.

We propose to allow the import of raw or worked ivory into the United States or the export of worked ivory from the United States when it would be directly beneficial for law enforcement efforts. Under this exception, raw or worked ivory could be imported into the United States and worked ivory could be exported from the United States only by an employee or agent of a Federal, State, or tribal government agency for law enforcement purposes. Specimens from protected species are frequently used as evidence to prosecute violations of law in the United States, and this may require the import of ivory from other countries. Likewise, there may be situations where worked ivory would need to be exported from the United States by

a Federal, State, or tribal agency to assist with a law enforcement action in another country. Not having this exception would hinder the Service's ability to enforce Federal laws such as the AfECA, the ESA, and the Lacey Act that protect African elephants and other wildlife. It could also hinder other Federal agencies, States, and tribes from effective enforcement of their laws. Not including this exception would be contrary to the AfECA's policy to assist in the conservation and protection of the African elephant by supporting the conservation programs of African countries and the CITES Secretariat, which represents the interests of all parties to CITES including the United States. The limitation that ivory could only be imported or exported by an employee or agent of a Federal, State, or tribal government would ensure that the exception is invoked only in appropriate circumstances. Any ivory imported or exported under this exception would be strictly for noncommercial law enforcement purposes, and therefore could not subsequently be sold or offered for sale in interstate or foreign commerce or delivered, received, carried, transported, or shipped in interstate or foreign commerce in the course of a commercial activity, even if it qualified under the *de minimis* exception. The limited applicability of this exception to noncommercial import or export by government officials for law enforcement purposes indicates that no ESA threatened species permit should be required. Such a permit would provide no protection for the species and would inhibit law enforcement officials' ability to respond quickly to enforcement needs involving the import or export of African elephant ivory.

We also propose to allow the import or export of ivory when it would contribute to the conservation of African elephants. Under this exception, either raw or worked African elephant ivory could be imported into the United States and worked ivory could be exported from the United States for genuine scientific purposes that would benefit elephant conservation. For

example, researchers in the United States have developed techniques to determine the origin of ivory, and the import of ivory samples is essential to this work. In such instances, prohibition of import would hinder science that could assist in protecting the species from poaching or illegal trade in ivory, or could result in valuable information that addresses other threats to the species. Similarly, the export of worked African elephant ivory could assist both U.S. scientists that are located outside the United States and scientists from other countries in their work to conserve the species. We believe that allowing under the 4(d) rule import and export of ivory in these circumstances is necessary and appropriate for the conservation of the African elephant; it is also consistent with the AfECA's purpose to "perpetuate healthy populations of African elephants." Any ivory imported or exported under this exception would be strictly for genuine scientific purposes, and could not subsequently be sold or offered for sale in interstate or foreign commerce or delivered, received, carried, transported, or shipped in interstate or foreign commerce in the course of a commercial activity, even if it qualified under the *de minimis* exception. The requirement to obtain a threatened species permit under 50 CFR 17.32 prior to import or export would ensure that the activity meets the standard of being for a genuine scientific purpose and that the science will actually contribute to the conservation of African elephants.

We are also proposing to allow the noncommercial import or export of carefully regulated items containing worked elephant ivory that are appropriate exceptions to the import moratorium and appropriate provisions under the 4(d) rule. None of these exceptions allows the import or export of raw ivory. The exceptions are for qualifying musical instruments, items in certain travelling exhibitions, and qualifying items that are part of an inheritance or household move.

Under all three of these exceptions, the importer or exporter would need to show that the African elephant ivory in the item was legally acquired and removed from the wild prior to February 26, 1976 (the date the African elephant was first listed under CITES). This does not necessarily mean that the current owner of an item containing ivory, a musical instrument, for example, acquired the instrument or the ivory in the instrument prior to February 1976. It means that there is sufficient information to show that the ivory was harvested (taken from the wild) prior to February 26, 1976, even though the instrument may not have been manufactured until after that date. It also means that there is sufficient information to show that the ivory was harvested in compliance with all applicable laws of the range country and that any subsequent import and export of the ivory and the instrument containing the ivory was legal under CITES and other applicable laws (understanding that the instrument may have changed hands many times before being acquired by the current owner).

These requirements would ensure that any item imported or exported under one of these three exceptions originated from elephants that were legally taken prior to the date that African elephants were first protected under CITES, the ESA, and the AfECA and therefore before contemporary laws and programs were developed to address current threats to the species. The ivory would have originated from elephants taken prior to development of the conservation programs of African countries and the CITES Secretariat referenced in section 4203 of the AfECA that the AfECA was enacted to support. This would also mean that any ivory imported or exported under the exceptions originated before U.S. citizens and other individuals subject to the jurisdiction of the United States were first regulated under these laws. The showing that the ivory was legally acquired would ensure that the ivory contained in the item was not previously part of the global market in illegal ivory. Thus these requirements would minimize the chances

that the worked ivory in items imported or exported under these three exceptions contributed to the killing of elephants that the AfECA and listing under the ESA and CITES were designed to address or that the owner or others who may have owned the ivory played a role in the taking of the elephant in contravention of U.S. laws to protect the species.

Under all three of these exceptions, the importer or exporter would have to obtain the appropriate CITES document showing that the import or export is in full compliance with CITES requirements. The requirement to obtain appropriate CITES documents would ensure that each item imported or exported under one of these three exceptions qualifies under CITES' strict standards and that all such import and export will be monitored and reported to the CITES Secretariat in each Party's annual report. Any musical instrument or item in a traveling exhibition would also have to be securely marked or uniquely identified so that authorities at U.S. and foreign ports can verify that the item presented for import or export is actually the specimen for which the CITES document was issued. While items imported or exported under a CITES pre-Convention certificate (as part of a household move or inheritance) do not specifically need to be marked or identified, port authorities would verify that the description and quantity of any items presented for import or export match what is described in the CITES document. All of this would ensure that each import or export of items under these exceptions is verified and monitored, which ensures that all such import and export remains legal.

A CITES musical instrument certificate or equivalent CITES document would be issued for the import and export of personally owned instruments containing African elephant ivory to facilitate the frequent, noncommercial, cross-border movement of instruments that are being used for noncommercial purposes. Noncommercial purposes could include personal use, performance, display, or competition where the musician is financially compensated for his or

her participation, but does not include financial gain through activities such as sale or lease of the instrument itself. Under the terms for obtaining a CITES musical instrument certificate (contained in CITES Resolution Conf. 16.8, *Frequent cross-border non-commercial movements of musical instruments*), the individual seeking a certificate would need to demonstrate that the CITES specimens contained in the instrument, in this case African elephant ivory, were acquired (removed from the wild) prior to February 26, 1976 (the date that African elephants were first listed under CITES). In addition, the country issuing the certificate would need to find that the elephant ivory used to manufacture the instrument was legally acquired under CITES. The issuing country would also include as a condition on the certificate a statement that the ivory covered by the certificate is for noncommercial use only and may not be sold, traded, or otherwise disposed of outside the certificate holder's country of usual residence. This restriction would also be included as a prohibition in the 4(d) rule, although musical instruments containing ivory that are owned by individuals whose residence is the United States could be sold or offered for sale in interstate or foreign commerce or delivered, received, carried, transported, or shipped in interstate or foreign commerce in the course of a commercial activity once the instrument was returned to the United States if the instrument qualified under the *de minimis* exception. Musical instrument certificates are used like passports. Upon each export and import, the original certificate is presented to the appropriate border control officer, who inspects the certificate, verifies that the certificate corresponds to the instrument presented for import, and validates the certificate to document the history of each cross-border movement. All of these requirements would limit use of the exception to personally owned musical instruments containing legally acquired, pre-Convention ivory, and ensure that any instrument entering the United States would be used for noncommercial purposes only, and that an instrument would not be commercialized

while traveling under the authorization of the CITES certificate. These requirements provide adequate assurances that any import or export of such instruments would not contribute to either the illegal trade in elephant ivory or the illegal killing of elephants.

A CITES traveling exhibition certificate would be issued for the import and export of items consisting of or containing African elephant ivory to facilitate the frequent cross-border movement of items that are part of an orchestra, museum, or similar exhibition registered in the country in which the traveling exhibition is based. Under the terms for obtaining the CITES certificate (contained in CITES Resolution 12.3 (Rev. CoP16), *Permits and certificates* and in our regulations at 50 CFR 23.49), the ivory in the traveling exhibition must be pre-Convention ivory (i.e., it was acquired prior to February 26, 1976, the date that African elephants were first listed under CITES). Similar to the musical instrument certificate, the country issuing the certificate would need to find that any item containing elephant ivory was legally acquired under CITES and would be returned to the country in which the exhibition is based. The country issuing the certificate would also include the condition that the ivory covered by the certificate may not be sold or otherwise transferred in any country other than the country in which the exhibition is based and registered. This restriction would also be included as a prohibition in the 4(d) rule, although exhibition items containing ivory that are owned by persons who are based in the United States could be sold or offered for sale in interstate or foreign commerce or delivered, received, carried, transported, or shipped in interstate or foreign commerce in the course of a commercial activity if the item qualified under the *de minimis* exception and the exhibition was back in the United States. Like musical instrument certificates, traveling exhibition certificates are used like passports. Upon each import or export, the original certificate is presented to the appropriate border control officer, who inspects the certificate, verifies that the certificate

corresponds to the item presented for import, and validates the certificate to document the history of each cross-border movement. Similar to the strict regulation of musical instruments, these requirements would limit use of the exception to items consisting of or containing African elephant ivory legally acquired prior to February 26, 1976, and ensure that the item would not be commercialized while outside the country in which the exhibition is based while traveling under the authorization of the CITES certificate. These requirements provide adequate assurances that any import or export of these items would not contribute to either the illegal trade in elephant ivory or the illegal killing of elephants.

Items imported or exported as part of an inheritance or a household move under the final exception would need to be for personal use only and accompanied by a valid CITES pre-Convention certificate. To qualify for a pre-Convention certificate, the importer or exporter of an item containing African elephant ivory would need to present sufficient information to show that the ivory was removed from the wild prior to February 26, 1976. There must also be sufficient information to show that the ivory was harvested in compliance with all applicable laws of the range country and that any subsequent import and export of the ivory and the instrument containing the ivory was legal under CITES and other applicable laws. For any item imported or exported as an inheritance, the importer or exporter would also need to show that the item was received through an inheritance. For any item imported or exported as part of a household move, the importer or exporter would need to show that they own the item, that it was legally acquired, and that they are moving it for personal use. Any such items would need to be imported or exported within 1 year of changing residence from one country to another and the shipment would need to contain only ivory items purchased, inherited, or otherwise acquired prior to the change in residence. Finally, the type and quantity of ivory items imported or

exported under this exception would need to be appropriate for a household move. Because any ivory imported or exported under this exception would be solely for personal use, any such ivory could not subsequently be sold or offered for sale in interstate or foreign commerce or delivered, received, carried, transported, or shipped in interstate or foreign commerce in the course of a commercial activity, even if it qualified under the *de minimis* exception.

All of these requirements would help to ensure that any imports or exports under these proposed exceptions did not contribute to past poaching and smuggling, did not contribute to the recent increase in illegal killing of elephants and illegal trade of ivory, and would be in compliance with AfECA requirements. In addition, the requirements that items under most of the exceptions must be imported or exported for personal or noncommercial use only, the limits on sale or other disposal of musical instruments and exhibition items while the item is traveling under the CITES certificate, the requirement that inherited items must be documented as acquired through an inheritance and not purchase, the requirement that household move items are limited to the number and type that would reasonably be expected for a person's move of their household, the requirement that household move items must be imported or exported within 1 year of a documented change of residence, and the prohibition on commercialization of inherited or household move items even if they qualify under the *de minimis* exception would minimize the chances of these exceptions being used as a means to commercialize ivory.

Because of the strict requirements that must be met to be eligible for import or export of any item under these three exceptions, we are proposing that no additional threatened species permit would be required under 50 CFR 17.32. The requirements to obtain the relevant CITES document, the findings that must be made before the CITES document can be issued, and the requirement to present the item along with all required CITES and general wildlife import/export

documents to Federal officials upon import or export would ensure that each import or export is legal and adequately monitored. Presentation of the items and documents upon import or export would also provide Federal officials the opportunity to make sure that all other requirements have been met. Requiring individuals to obtain an ESA threatened species permit in addition to the required CITES documents prior to import or export of items under these limited exceptions would be an unnecessary overlay of documents on top of existing CITES documentation that ensures that such import or export is not contributing to the illegal killing of elephants.

All of these exceptions are identical or similar to the exceptions to the AfECA import moratorium that were provided as a matter of law enforcement discretion through Director's Order No. 210, as amended on May 15, 2014. The only substantive change is that the Director's Order contained an additional standard that any musical instrument, item in a traveling exhibition, item in a household move, or inherited item containing ivory could not be imported if it had been transferred from one person to another person for financial gain or profit since February 25, 2014 (the date of the original Director's Order). We have determined that this restriction is not needed because with this proposed rule it would be a violation of the ESA for any person to sell or offer for sale ivory or sport-hunted trophies in interstate or foreign commerce or to deliver, receive, carry, transport, or ship ivory or sport-hunted trophies in interstate or foreign commerce in the course of a commercial activity except for certain manufactured items that would qualify under the *de minimis* exception. Therefore any U.S. citizen or other person subject to the jurisdiction of the United States who commercialized an item containing ivory or a sport-hunted trophy in violation of these prohibitions would be in violation of this rule regardless of whether this additional restriction were in place.

Under the current 4(d) rule, worked ivory may be exported in accordance with the

requirements in 50 CFR parts 13 and 23, and raw ivory may not be exported from the United States for commercial purposes under any circumstances. Under the AfECA, the export of all raw ivory is prohibited. We propose to revise the 4(d) rule to prohibit export of raw ivory, consistent with the AfECA prohibition, with the exception of antiques. For the same reasons discussed above, we also propose to prohibit export of worked ivory, other than antiques, except in the same limited circumstances and for the same limited purposes allowed for import: By a government agency for law enforcement purposes, for a genuine scientific purpose that will contribute to the conservation of the African elephant, as part of a qualifying musical instrument, as a qualifying item in a traveling exhibition, or as a qualifying item that is part of a household move or inheritance.

In developing this proposed rule, we have given very careful consideration to the types of circumstances and purposes for which we could allow exceptions to the prohibitions on import and export of African elephant ivory. However, we seek information and comment regarding the need for and advisability of finalizing a rule that includes a broader exception to those prohibitions for the noncommercial import or export of worked ivory in circumstances that are not covered by the exceptions for musical instrument, traveling exhibitions, household moves or inheritances, or genuine scientific purposes. In particular, we seek information from individuals who may wish to engage in noncommercial import or export of worked African elephant ivory that would be prohibited by this proposed rule. We are also interested in the potential impacts of these prohibitions on segments of the trade not covered by these exceptions.

Information regarding the illegal killing of elephants and the alarming growth in illegal trade in elephant ivory shows that all appropriate actions are needed to restrict the export of raw and worked African elephant ivory where that export is likely to contribute to commercializing

elephant ivory. It is appropriate, however, to allow certain limited exceptions to the export prohibition where export either would be beneficial to law enforcement or the conservation of the species, or where export of certain articles of worked ivory meet strict criteria and are regulated in such a manner that their export would not contribute to the illegal trade in ivory and pose no risk to elephant populations. Export of worked African elephant ivory would also be available by threatened species permit under 50 CFR 17.32, provided the person met all of the requirements of that section as well as the general permitting requirements under 50 CFR part 13.

As noted previously, Section 4(d) of the ESA does not apply to items that qualify as antiques. While the prohibitions on import and export of ivory proposed here thus do not apply to ESA antiques, the prohibitions on import and export of ivory under AfECA would still apply, regardless of the age of the item. In addition, certain worked ivory items that qualify under the ESA section 9(b)(1) “pre-Act” exemption (see below) could also be exported (see below). No ESA permit would be required for any worked ivory that qualified under any of these provisions, but it would still need to be accompanied by any required CITES document and meet all requirements under the Service’s general wildlife import/export regulations.

#### *Qualifying Pre-Act specimens*

The ESA provides an exemption in section 9(b)(1) from any prohibitions contained in a 4(d) rule for specimens of threatened species “held in captivity or in a controlled environment” on the date the ESA entered into effect (December 28, 1973) or the date the final rule listing the species under the ESA was published in the **Federal Register** (which for the African elephant was May 12, 1978), whichever is later. The exemption applies only if “such holding and any subsequent holding or use of the fish or wildlife was not in the course of a commercial activity.”

As noted above in *Interstate and foreign commerce*, activities with threatened species do not qualify as “commercial activity” unless the activity involves the transfer of the specimen from one person to another person in the pursuit of gain or profit. Therefore, the exemption would apply unless commercial activity with an African elephant specimen (including ivory) on or after May 12, 1978, involved the transfer of the specimen from one person to another person in pursuit of gain or profit. (See the discussion on activities that occur “in the course of a commercial activity” under *Interstate and foreign commerce*, above.)

Persons wishing to engage in activities that otherwise would be prohibited under this 4(d) rule would have the burden of showing that their activities qualify for this “pre-Act” exemption. The statutory exemption would not change with revision of the 4(d) rule, but it is also important to remember that nothing in the ESA provides that an exemption under that law modifies or supersedes provisions in other applicable statutes such as the AfECA. (See *Antique specimens*, below, for a full discussion on the relationship between ESA exemptions and AfECA restrictions.) Therefore, activities prohibited under the AfECA remain prohibited, even if the ESA “pre-Act” exemption applies.

The pre-Act exemption would apply to the following examples if the activity met all requirements of the ESA: The prohibition against take for qualifying live elephants that were held in captivity on May 12, 1978; the prohibition on the export of worked ivory that was held in a controlled environment on May 12, 1978; and the requirement to get a threatened species permit for the export of worked ivory to be used for genuine scientific purposes for ivory that was held in a controlled environment on May 12, 1978, provided that in each case the holding and any subsequent holding or use of the live animal or specimen since 1978 did not include transfer from one person to another person in the pursuit of gain or profit.

In addition, if the holding as of May 12, 1978, or any subsequent holding or use included a transfer from one person to another person in the pursuit of gain or profit, the exemption would still be available if the activities qualified as exhibition of commodities by a museum or similar cultural or historical organization. All import and export requirements under CITES and the general wildlife import/export regulations at 50 CFR part 14 would still need to be met. Section 9(b)(1) of the ESA provides an exemption from ESA threatened-species prohibitions only, not from requirements that arise under CITES and the general import/export requirements under the ESA.

#### *Antique specimens*

Section 10(h) of the ESA provides an exemption for antique articles that are: (a) Not less than 100 years of age; (b) composed in whole or in part of any endangered species or threatened species; (c) have not been repaired or modified with any part of any such species on or after the date of the enactment of the ESA; and (d) are entered at a port designated for ESA antiques. Any person who is conducting activities with a qualifying ESA antique is exempt from, among other things, any restrictions provided in a 4(d) rule for that species, including restrictions on import; export; sale or offer for sale in interstate or foreign commerce; and delivery, receipt, carrying, transport, or shipment in interstate or foreign commerce and in the course of a commercial activity. The taking prohibition would not apply to dead specimens such as antiques. Anyone wishing to engage in activities under this antiques exception must be able to demonstrate that the item meets the requirements of the ESA.

Items that qualify as antiques under the ESA are not subject to the prohibitions in the proposed 4(d) rule. The ESA antiques exemption does not apply, however, to prohibitions imposed under the AfECA on the import of raw and worked African elephant ivory into the

United States and the export of raw ivory from the United States. As with the ESA section 9(b)(1) “pre-Act” exemption, nothing in the ESA provides that an exemption under that law modifies or supersedes provisions in other applicable statutes such as the AfECA. The provisions in the AfECA regarding the import and certain export of African elephant ivory were specifically enacted to address conservation concerns with African elephants and were enacted later in time than the earlier, more general ESA exemption applicable to all endangered and threatened species, so the later, more specific restrictions on import and export in the AfECA take precedence over the earlier, more general exemption in the ESA. As noted previously, section 4241 of the AfECA (16 U.S.C. 4241) specifies that the authority of the Service under the AfECA is in addition to and does not affect the authority of the Service under the ESA.

A qualifying ESA antique containing African elephant ivory could thus only be imported if it also qualified for one of the exceptions from enforcement of the AfECA moratorium created by Director’s Order No. 210: antique raw or worked ivory for law enforcement purposes, antique raw or worked ivory for scientific purposes, antique worked ivory that is part of a musical instrument, antique worked ivory in a traveling exhibition, antique worked ivory that is part of a household move, or antique worked ivory that was inherited. As noted previously, we believe these exceptions are consistent with Congressional intent in enacting the AfECA, which focused on the harm caused by poaching to supply the illegal trade in ivory. An antique sport-hunted trophy could not qualify for import because it would not be able to meet the requirements under the AfECA that it was taken from an elephant range country with an elephant quota declared to the CITES Secretariat (which did not exist 100 years ago). Because the prohibition on the export of all raw ivory is under the AfECA, the ESA antique exemption also could not be used to export antique raw ivory.

For qualifying ESA antiques containing African elephant ivory that could be imported as described above and antiques containing African elephant ivory that meet all of the requirements under section 10(h) of the ESA and were imported before the AfECA import moratorium was put in place in 1989, whether those antiques could be commercialized in interstate or foreign commerce would depend on whether restrictions are based on the ESA or CITES. Any restrictions that are based on CITES or laws other than the ESA would remain in place.

As discussed earlier, one of the requirements to qualify for the ESA antiques exemption is that the antique must have been imported into the United States through a port designated for the import of ESA antiques. These ports were first designated on September 22, 1982. Therefore, under the terms of the ESA, no item that contains parts of any endangered or threatened species (including African elephant ivory) can qualify under the ESA antiques exemption unless it was imported into the United States through one of the designated ESA antiques ports on some date after September 22, 1982.

On February 25, 2014 (as amended on May 15, 2014), the Service issued Director's Order No. 210, which, among other things, provides direction to Service employees on implementation and enforcement of the ESA antiques exemption. Appendix A to Director's Order No. 210 reiterates the four statutory requirements for an item to qualify as an ESA antique and states that, as a matter of law enforcement discretion, the prohibitions under the ESA would not be enforced for antiques that meet the requirements of being at least 100 years old; being composed of an endangered or threatened species; and not having been repaired or modified with any part of an endangered or threatened species since December 28, 1973, but were imported prior to September 22, 1982, or were created in the United States and never imported and therefore do not meet the requirement of having been imported at a designated ESA antiques

port. This Director's Order remains in place. The Service will apply its law enforcement discretion regarding otherwise qualifying antiques that were imported prior to September 22, 1982, or were produced in the United States and never imported, allowing them to be exported, sold or offered for sale in interstate or foreign commerce, and delivered, received, carried, transported, or shipped in interstate or foreign commerce in the course of a commercial activity, provided all other legal requirements are met. Appendix A of the Director's Order also contains guidance on documentation needed and other information for conducting activities with ESA antiques. Director's Order No. 210, as amended on May 15, 2014, including Appendix A can be found at <http://www.fws.gov/policy/do210.html>.

As described in Director's Order No. 210, the person claiming the benefit of the ESA antiques exemption must provide evidence to demonstrate that the item qualifies as an ESA antique. This evidence may include a qualified appraisal, documents that provide detailed provenance, and/or scientific testing. Since issuance of the Director's Order, we have heard from some people who are concerned about what the Service might require in terms of documentation or authentication of their antique items. We want to be clear that establishing provenance does not necessarily require destructive testing; there may be other ways to establish provenance, such as a qualified appraisal or another method that documents the age by establishing the origin of the item. We have listed scientific testing (in the Appendix to Director's Order No. 210) as an option for people who may want to make use of it in certain circumstance for certain items. However, this is only one option, in a suite of possible options. The provenance may be determined through a detailed history of the item, including but not limited to family photos, ethnographic fieldwork, or other information that authenticates the item and assigns the work to a known period of time or, where possible, to a known artist. Scientific

testing could be necessary if there is no other way to establish the provenance of an item.

In addition, we want to be clear that we do not require scientific testing of the ivory components in a manufactured antique item. Where a person can demonstrate that an item, for example a table with ivory inlays, is older than 100 years, and that the table has not been repaired or modified with ivory (or any other threatened or endangered species) since December 28, 1973, the Service considers the age criteria in Section 10(h) to be met. We would not require testing of the ivory itself to determine its age. Of course, to qualify for the ESA antiques exemption a person must demonstrate that all four of the criteria in Section 10(h) of the ESA have been met.

We also want to clarify that these documentation requirements are not new. The ESA itself places the burden of proof on the person claiming the benefit of the exemption (Sec. 10(g)) and the Service has required documentation for antique items since the 1970s. This documentation requirement is also not unique to African elephant ivory; it applies to specimens of any species listed under the ESA when a person is claiming the benefit of this exemption from prohibitions. Over the years, the Service has provided information regarding acceptable documentation for establishing age and provenance; most recently, in the Appendix to Director's Order No. 210. Our CITES regulations at 50 CFR 23.34 also provide information on the kinds of records a person can use to show the origin of a specimen. We seek comment from the public on whether additional guidance is needed in the regulatory code regarding implementation of the ESA antiques exemption.

#### *Determination*

Section 4(d) of the ESA states that the “Secretary shall issue such regulations as [s]he deems necessary and advisable to provide for the conservation” of species listed as threatened. Additionally, section 4(d) of the ESA provides that the Secretary “may by regulation prohibit

with respect to any threatened species any act prohibited under section 9(a)(1).” Thus regulations promulgated under section 4(d) of the ESA provide the Secretary, as delegated to the Service, discretion to select appropriate provisions for threatened species, including prohibitions, exceptions, and required authorizations. Some of the ESA prohibitions and exceptions from section 9(a)(1) of the ESA and from 50 CFR 17.31 and 17.32 may be appropriate for the species and be incorporated into a 4(d) rule. However, the 4(d) rule may also include other provisions that take into account other applicable laws and are tailored to the specific conservation needs of the listed species, and therefore may be more or less restrictive than the general provisions for threatened species. As noted by Congress when the ESA was initially enacted, “once an animal is on the threatened list, the Secretary has an almost infinite number of options available to [her] with regard to the permitted activities for those species. [She] may, for example, permit taking, but not importation of such species, or [she] may choose to forbid both taking and importation but allow the transportation of such species,” as long as the measures will “serve to conserve, protect, or restore the species concerned in accordance with the purposes of the [ESA]” (H.R. Rep. No. 412, 93<sup>rd</sup> Cong., 1<sup>st</sup> Sess. 1973).

This proposed rule includes appropriate provisions that are necessary and advisable to provide for the conservation of the African elephant, while also including appropriate prohibitions from Section 9(a)(1) of the ESA. The primary threat to the African elephant is poaching of elephants for their tusks and the associated illegal trade in both raw and worked ivory. To restrict this illegal trade, the proposed provisions under this rule prohibit the import of African elephant ivory, with certain narrow exceptions, restrict the import of sport-hunted trophies, and prohibit the export of raw ivory. The rule provides two exceptions from the prohibition on import of ivory that would directly benefit law enforcement efforts that involve

African elephants and science that would contribute to the conservation of the species. The rule provides three additional exceptions, which apply to the noncommercial import or export of worked ivory only, for qualifying musical instruments, items in a traveling exhibition, inherited items, and items that are part of a household move. Any worked ivory imported or exported under these exceptions would need to meet strict criteria under both CITES and this rule, resulting in restrictions that safeguard against import or export of ivory that could contribute to the illegal trade in ivory or pose a risk to elephant populations. The import and export of ivory is also subject to applicable restrictions under the AfECA, except to the extent allowed under Director's Order No. 210, as amended on May 15, 2014. Our information indicates that these strict controls on the import and export of African elephant ivory will help to ensure that U.S. participation in the ivory trade will not contribute to the illegal killing of elephants.

For the same reasons that the import and export of raw and worked ivory need to be carefully regulated, the import and export of African elephant sport-hunted trophies must be regulated in a manner that would ensure that the import and export does not contribute to the illegal trade of ivory. The proposed rule would require that the import of all sport-hunted trophies, regardless of the CITES status of the source population, be authorized through the issuance of a threatened species permit under 50 CFR 17.32. Authorizing importation through threatened species enhancement permits would allow us to more carefully evaluate trophy imports in accordance with legal requirements and the conservation needs of the species. The limitation of two trophies per hunter per year would ensure that the importation of African elephant trophies is actually the result of personal, noncommercial sport hunting and would prevent the importation of commercial quantities of ivory.

Perhaps the biggest change from the current 4(d) rule would be new restrictions on the

commercialization of ivory in interstate and foreign commerce. The proposed rule would prohibit the sale or offer for sale of ivory and sport-hunted trophies in interstate or foreign commerce and the delivery, receipt, carrying, transport, or shipment of ivory and sport-hunted trophies in interstate or foreign commerce in the course of a commercial activity. Exceptions would be available for qualifying antiques and for certain items manufactured before the date of the final rule for this rulemaking that contain less than 200 grams of ivory and meet other conditions, while certain commercial activities could also be authorized through a threatened species permit under 50 CFR 17.32. However, the *de minimis* exception and threatened species permits would not be available for sport-hunted trophies and ivory items that were imported as part of a household move or inheritance. We have determined that items meeting the *de minimis* exception, including the requirements that the ivory be a fixed component of a larger manufactured item, that the ivory is not raw, that the ivory is not the primary source of value of the item, that the total weight of the ivory is less than 200 grams, and that the manufactured item is not made wholly or primarily of ivory, would minimize the possibility of the ivory contributing to either the global or U.S. markets in illegal ivory.

The proposed rule, however, would continue to allow certain activities that pose no risk to African elephants. Live elephants and elephant parts or products other than ivory and sport-hunted trophies could continue to be imported into or exported from the United States, sold or offered for sale in interstate or foreign commerce, and delivered, received, carried, transported, or shipped in interstate or foreign commerce in the course of a commercial activity, provided all other requirements under CITES and the Service's general import/export regulations were met. CITES requirements, including findings that must be made before documents can be issued, would continue to ensure that all import and export of live animals and parts or products other

than ivory and sport-hunted trophies remain legal and non-detrimental to the survival of the species. There is no information that indicates that import, export, or commercialization of live elephants or non-ivory parts and products as currently regulated under CITES has any negative effect on African elephants or is contributing in any way to the current crisis involving the killing of elephants for their ivory. The new restriction on the taking of live elephants held in captivity within the United States or during transport would help to ensure that animals in captivity receive an appropriate standard of care.

In addition to this proposed rule being necessary and advisable to provide for the conservation of the species and including appropriate prohibitions from section 9(a)(1) of the ESA, it also is consistent with other efforts to improve elephant conservation. With this rule, the United States would ensure that we have in place comprehensive internal regulatory and enforcement measures to regulate domestic trade in raw and worked ivory, as called for at the 16th meeting of the Conference of the Parties to CITES in March 2013 (see Resolution Conf. 10.10 (Rev. CoP16)). More broadly, the proposed rule would respond to the President's Executive Order of July 1, 2013, calling for all Federal agencies to take action to combat wildlife trafficking in all wildlife and to reduce demand for illegally traded wildlife, both at home and abroad. All of the proposed revisions to the African elephant 4(d) rule would allow us to better regulate the U.S. domestic market and U.S. participation in the global market for African elephant ivory, which we believe will lead to a reduction of the illegal killing of elephants for their ivory.

### **Table 1. How would proposed changes to the African Elephant 4(d) rule affect trade in African elephant ivory?**

This table is only for guidance on proposed revisions to the existing Endangered Species Act 4(d) rule for the African elephant. Please see the proposed rule text for details. All imports and exports must be accompanied by appropriate CITES documents and meet other FWS import/export requirements.

	<b>What activities are currently allowed/prohibited?</b>	<b>What are the proposed changes?</b>
	<p>In 2014, the Service revised Director's Order No. 210 (effective May 15, 2014) and U.S. CITES implementing regulations [50 CFR part 23] (effective June 26, 2014).</p> <p>Both of these actions created new rules for trade in elephant ivory.</p>	<p>This column describes the contents of the proposed rule in general terms. Please refer to the proposed rule text for details. These provisions will not go into effect until we have considered input received during the public comment period and published a final rule in the Federal Register.</p>
<b>Import</b>	<p><b><u>Commercial</u></b> What's allowed:</p> <ul style="list-style-type: none"> <li>• No commercial imports allowed.</li> </ul> <p><b><u>Noncommercial</u></b> What's allowed:</p> <ul style="list-style-type: none"> <li>• Sport-hunted trophies (no limit).</li> <li>• Law enforcement and bona fide scientific specimens.</li> <li>• Worked elephant ivory that was legally acquired and removed from the wild prior to February 26, 1976 and has not been sold since February 25, 2014 and is either: <ul style="list-style-type: none"> <li>○ Part of a household move or inheritance (see Director's Order No. 210 for details);</li> <li>○ Part of a musical instrument (see Director's Order No. 210 for details); or</li> <li>○ Part of a traveling exhibition (see Director's Order No.</li> </ul> </li> </ul>	<p><b><u>Commercial</u></b> The proposed rule does not include any changes for commercial imports.</p> <p><b><u>Noncommercial</u></b> The proposed rule includes the following changes for noncommercial imports:</p> <ul style="list-style-type: none"> <li>• Limits sport-hunted trophies to two per hunter per year.</li> <li>• Removes the requirement that worked elephant ivory has not been sold since February 25, 2014. All other requirements for worked elephant ivory (listed in the previous column) must be met.</li> </ul>

	<p>210 for details).</p> <p><b>What's prohibited:</b></p> <ul style="list-style-type: none"> <li>• Worked ivory that does not meet the conditions described above.</li> <li>• Raw ivory (except for sport-hunted trophies).</li> </ul>	
<p><b>Export</b></p>	<p><b><u>Commercial</u></b></p> <p><b>What's allowed:</b></p> <ul style="list-style-type: none"> <li>• CITES pre-Convention worked ivory, including antiques.</li> </ul> <p><b>What's prohibited:</b></p> <ul style="list-style-type: none"> <li>• Raw ivory.</li> </ul> <p><b><u>Noncommercial</u></b></p> <p><b>What's allowed:</b></p> <ul style="list-style-type: none"> <li>• Worked ivory.</li> </ul> <p><b>What's prohibited:</b></p> <ul style="list-style-type: none"> <li>• Raw ivory.</li> </ul>	<p><b><u>Commercial</u></b></p> <p>The proposed rule would <b>further restrict</b> commercial exports to only those items that meet the criteria of the ESA antiques exemption.*</p> <p>Raw ivory remains prohibited regardless of age.</p> <p><b><u>Noncommercial</u></b></p> <p>The proposed rule would <b>further restrict</b> noncommercial exports to the following categories:</p> <ul style="list-style-type: none"> <li>• Only those items that meet the criteria of the ESA antiques exemption.*</li> <li>• Worked elephant ivory that was legally acquired and removed from the wild prior to February 26, 1976, and is either: <ul style="list-style-type: none"> <li>○ Part of a household move or inheritance;</li> <li>○ Part of a musical instrument; or</li> <li>○ Part of a traveling exhibition.</li> </ul> </li> <li>• Worked ivory that qualifies as pre-Act</li> <li>• Law enforcement and <i>bona fide</i></li> </ul>

		<p>scientific specimens.</p> <p>Raw ivory remains prohibited regardless of age.</p>
<b>Foreign commerce</b>	There are no restrictions on foreign commerce.	<p>The proposed rule includes the following changes for foreign commerce:</p> <ul style="list-style-type: none"> <li>• <b>Restricts</b> foreign commerce to: <ul style="list-style-type: none"> <li>○ items that meet the criteria of the ESA antiques exemption,* and</li> <li>○ certain manufactured items that contain a small (<i>de minimis</i>) amount of ivory.</li> </ul> </li> <li>• <b>Prohibits</b> foreign commerce in: <ul style="list-style-type: none"> <li>○ sport-hunted trophies, and</li> <li>○ ivory imported/exported as part of a household move or inheritance.</li> </ul> </li> </ul>
<b>Sales across state lines<sup>†</sup> (interstate commerce)</b>	<p><b>What's allowed:</b></p> <ul style="list-style-type: none"> <li>• Ivory lawfully imported prior to the date the African elephant was listed in CITES Appendix I (January 18, 1990) – [seller must demonstrate].</li> <li>• Ivory imported under a CITES pre-Convention certificate – [seller must demonstrate].</li> </ul>	<p>The proposed rule includes the following changes for interstate commerce:</p> <ul style="list-style-type: none"> <li>• <b>Further restricts</b> interstate commerce to only: <ul style="list-style-type: none"> <li>○ items that meet the criteria of the ESA antiques exemption,* and</li> <li>○ certain manufactured items that contain a small (<i>de minimis</i>) amount of ivory. **</li> </ul> </li> <li>• <b>Prohibits</b> interstate commerce in: <ul style="list-style-type: none"> <li>○ ivory imported under the exceptions for household move or inheritance, or for law enforcement or genuine</li> </ul> </li> </ul>

		<ul style="list-style-type: none"> <li>○ scientific purposes, and</li> <li>○ sport-hunted trophies.</li> </ul>
<b>Sales within a state (intrastate commerce)</b>	<p>What's allowed:</p> <ul style="list-style-type: none"> <li>• Ivory lawfully imported prior to the date the African elephant was listed in CITES Appendix I (January 18, 1990) – [seller must demonstrate].</li> <li>• Ivory imported under a CITES pre-Convention certificate – [seller must demonstrate].</li> </ul>	The proposed rule does not include any changes for intrastate commerce.
<b>Noncommercial movement<sup>†</sup> within the United States</b>	Noncommercial use, including interstate and intrastate movement within the United States, of legally acquired ivory is allowed.	The proposed rule does not include any changes for noncommercial movement within the United States.
<b>Personal possession</b>	Possession and noncommercial use of legally acquired ivory is allowed.	The proposed rule does not include any changes for personal possession.

<sup>†</sup> See preamble discussion in the section titled *Interstate and foreign commerce*.

\*To qualify for the ESA antique exemption an item must meet all of the following criteria [seller/importer/exporter must demonstrate]:

- A. It is 100 years or older.
- B. It is composed in whole or in part of an ESA-listed species;
- C. It has not been repaired or modified with any such species after December 27, 1973; and
- D. It is being or was imported through an endangered species “antique port.”

Under Director’s Order No. 210, as a matter of enforcement discretion, items imported prior to September 22, 1982, and items created in the United States and never imported must comply with elements A, B, and C above, but not element D.

\*\* To qualify for the *de minimis* exception, manufactured items must meet all of the following criteria:

- (i) If the item is located within the United States, the ivory was imported into the United States prior to January 18, 1990, or was imported into the United States under a Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) pre-Convention certificate with no limitation on its commercial use;
- (ii) If the item is located outside the United States, the ivory was removed from the wild prior to February 26, 1976;
- (iii) The ivory is a fixed component or components of a larger manufactured item and is not in its current form the primary source of the value of the item;
- (iv) The ivory is not raw;
- (v) The manufactured item is not made wholly or primarily of ivory;
- (vi) The total weight of the ivory component or components is less than 200 grams; and
- (vii) The item was manufactured before the effective date of the final rule].

For a discussion of the *de minimis* exception see the section of the preamble titled *Interstate and foreign commerce*;

for details of the *de minimis* exception see paragraph (e)(3) in the rule text at the end of this document.

## **Required Determinations**

*Regulatory Planning and Review:* Executive Order 12866 provides that the Office of Information and Regulatory Affairs in the Office of Management and Budget will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is significant because it may raise novel legal or policy issues. Executive Order 13563 reaffirms the principles of Executive Order 12866 while calling for improvements in the Nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The Executive Order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

A brief assessment to identify the economic costs and benefits associated with this proposed rule follows. The Service has prepared an economic analysis, as part of our review under the National Environmental Policy Act (NEPA), which we will make available for review and comment (see the paragraph in this **Required Determinations** section on the *National Environmental Policy Act*). The proposed rule would revise the 4(d) rule, which regulates trade of African elephants (*Loxodonta africana*), including African elephant parts and products. We are proposing to revise the 4(d) rule to more strictly control U.S. trade in African elephant ivory. Revision of the 4(d) rule as proposed would mean that African elephants are subject to some of

the standard provisions for species classified as threatened under the ESA. This means that the taking of live elephants and (with certain exceptions) import, export, and commercial activities in interstate or foreign commerce of African elephant parts and products containing ivory would generally be prohibited without a permit issued under 50 CFR 17.32 for “Scientific purposes, or the enhancement of propagation or survival, or economic hardship, or zoological exhibition, or educational purposes, or incidental taking, or special purposes consistent with the purposes of the [ESA].” There are specific exceptions for certain activities with specimens containing *de minimis* quantities of ivory; ivory items that meet certain requirements for musical instruments, traveling exhibitions, inherited items, and items that are part of a household move; ivory imported or exported for scientific purposes or law enforcement; certain live elephants; and ivory items that qualify as “pre-Act” or as antiques under the ESA.

This rule would regulate only African elephants and African elephant ivory. Asian elephants and parts or products from Asian elephants, including ivory, are regulated separately under the ESA. Ivory from other species such as walrus is also regulated separately under the Marine Mammal Protection Act (16 U.S.C. 1361 et seq.). Ivory from extinct species such as mammoths is not regulated under statutes implemented by the Service.

Impacted markets include those involving U.S. citizens or other persons subject to the jurisdiction of the United States that buy, sell, or otherwise commercialize African elephant ivory products across State lines and those that buy, sell, or otherwise commercialize such specimens in international trade. Examples of products in trade containing African elephant ivory include cue sticks, pool balls, knife handles, gun grips, furniture inlay, jewelry, artwork, and musical instrument parts.

The market for African elephant products, including ivory, is not large enough to have

major data collections or reporting requirements, which results in a limited amount of available data for economic analysis. Some import and export data are available from the Service's Office of Law Enforcement and Division of Management Authority, and from reports produced by other organizations. On the whole, the available data provide a general overview of the African elephant ivory market. Using this information, we can make reasonable assumptions to approximate the potential economic impact of revision of the 4(d) rule for the African elephant. With this proposed rule, we solicit public input on impacts to sales, percentage of revenue impacted, and the number of businesses affected, particularly with regard to interstate and foreign commerce, for which we have the least amount of information, to help quantify these costs and benefits. Please see the **Public Comments** section at the end of **SUPPLEMENTARY INFORMATION** for further information about submitting comments.

*Imports.* There has been a moratorium on the import of African elephant ivory other than sport-hunted trophies, established under the AfECA and in place since 1989. In recent years, the Service has allowed, as a matter of law enforcement discretion, the import of certain antique African elephant ivory. Director's Order No. 210, issued in February 2014, clarified that we will no longer allow any commercial import of African elephant ivory, regardless of its age. We are proposing to reflect this provision of Director's Order No. 210 in the 4(d) rule (except for antiques, which are exempt from this 4(d) rule, but remain subject to the AfECA moratorium). Import of live African elephants and non-ivory African elephant parts and products would continue to be allowed under the proposed revisions, provided the requirements at 50 CFR parts 13, 14, and 23 are met. Import of African elephant sport-hunted trophies would be limited to two trophies per hunter per year. This may impact about seven hunters, representing about 3 percent to 4 percent of hunters, annually.

*Exports.* Under the current 4(d) rule, raw ivory may not be exported from the United States for commercial purposes under any circumstances. In addition, export of raw ivory from the United States is prohibited under the AfECA. Therefore, the revisions to the 4(d) rule would have no impact on exports of raw ivory. Revision of the 4(d) rule as proposed would mean that export of worked African elephant ivory would be prohibited without an ESA permit issued under 50 CFR 17.32, except for specimens that qualify as “pre-Act” or as ESA antiques and certain musical instruments; items in a traveling exhibition; items that are part of a household move or inheritance; items exported for scientific purposes; and items exported for law enforcement purposes that meet specific conditions and, therefore, may be exported without an ESA permit. Export of live African elephants and non-ivory products made from African elephants would continue to be allowed provided the requirements at 50 CFR parts 13, 14, and 23 are met.

From 2007 to 2011, the total declared value of worked African elephant ivory exported from the United States varied widely from \$32.1 million to \$175.7 million. The declared value of items containing African elephant ivory that were less than 100 years old (and, therefore, could not qualify as ESA antiques) ranged from \$607,000 to \$3.7 million annually during the same time period. As this rule would no longer permit the commercial export of non-antique ivory, we expect based on the information currently available that, on average, commercial export of worked ivory would decrease by about 2 percent annually.

*Domestic and Foreign Commerce.* The proposed rule would prohibit certain commercial activities such as sale in interstate or foreign commerce of African elephant ivory and delivery, receipt, carrying, transport, or shipment of ivory in interstate or foreign commerce in the course of a commercial activity (except for qualifying ESA antiques and certain manufactured items

containing *de minimis* amounts of ivory) without an ESA permit issued under 50 CFR 17.32. Otherwise, commercial activities in interstate and foreign commerce with live African elephants and African elephant parts and products other than ivory would continue to be allowed under the proposed revisions to the 4(d) rule. While revisions to the 4(d) rule would generally result in prohibitions on sale or offer for sale in interstate or foreign commerce as well as prohibitions on delivery, receipt, carrying, transport, or shipment in interstate or foreign commerce in the course of a commercial activity of both raw and worked African elephant ivory, it would not have an impact on intrastate commerce. Businesses would not be prohibited by the 4(d) rule from selling raw or worked ivory within the State in which they are located. (There are, however, restrictions under our CITES regulations at 50 CFR 23.55 for intrastate sale of elephant ivory.) As noted earlier, available data provide only a general overview of the African elephant ivory market. Assuming that the domestic market is similar to the export market, then non-antique worked ivory domestic sales would also decrease about 2 percent annually under the proposed rule. We request information from the public about the potential impact to the domestic market. Because we are proposing to allow domestic and foreign commerce commercial activities with certain items containing *de minimis* amounts of ivory, and many of these items would be precluded from export, it is possible that an even smaller percentage of the domestic market would be impacted compared to the export market. Certain commercial activities such as sale in interstate or foreign commerce with raw ivory and non-antique worked ivory, with the exception of those items containing *de minimis* amounts of worked ivory mentioned above, would no longer be permitted.

Revising the 4(d) rule for African elephant, as proposed here, would improve domestic regulation of the U.S. market as well as foreign markets where commercial activities involving elephant ivory are conducted by U.S. citizens and facilitate enforcement efforts within the United

States. We are proposing to take this action to increase protection for African elephants in response to the alarming rise in poaching of African elephants, which is fueling the rapidly expanding illegal trade in ivory. As noted in the preamble to this proposed rule, the United States continues to play a role as a destination and transit country for illegally traded elephant ivory. Increased control of the U.S. domestic market and foreign markets where commercial activities involving elephant ivory are conducted by U.S. citizens would benefit the conservation of the African elephant.

*Regulatory Flexibility Act:* Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions) (5 U.S.C. 601 *et seq.*). However, no regulatory flexibility analysis is required if the head of an agency certifies that the rule would not have a significant economic impact on a substantial number of small entities. Thus, for a regulatory flexibility analysis to be required, impacts must exceed a threshold for “significant impact” and a threshold for a “substantial number of small entities.” See 5 U.S.C. 605(b). SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule would not have a significant economic impact on a substantial number of small entities.

The U.S. Small Business Administration (SBA) defines a small business as one with annual revenue or employment that meets or is below an established size standard. To assess the effects of the rule on small entities, we focus on businesses that buy or sell elephant ivory.

Businesses produce a variety of products from elephant ivory including cue sticks, pool balls, knife handles, gun grips, furniture inlay, jewelry, and instrument parts. Depending on the type of product produced, these businesses could be included in a number of different industries, including (1) Musical Instrument Manufacturing (North American Industry Classification System (NAICS) 339992), where small businesses have less than \$10.0 million revenue; (2) Sporting and Recreational Goods and Supplies Merchant Wholesalers (NAICS 423910), where small businesses have fewer than 100 employees; (3) All Other Miscellaneous Wood Product Manufacturing (NAICS 321999), where small businesses have fewer than 500 employees; (4) Metal Kitchen Cookware, Utensil, Cutlery, and Flatware (except Precious) Manufacturing (NAICS 332215), where small businesses have fewer than 500 employees; (5) Jewelry and Silverware Manufacturing, (NAICS 339910), where small businesses have fewer than 500 employees; (6) Used Merchandise Stores (NAICS 453310), where small businesses have less than \$7.5 million in revenue; and (7) Art Dealers (NAICS 453920), where small businesses have less than \$7.5 million in revenue. Table 2 describes the number of businesses within each industry and the estimated percentage of small businesses. The U.S. Economic Census does not capture the detail necessary to determine the number of small businesses that are engaged in commerce with African elephant ivory products within these industries. Based on the distribution of small businesses with these industries as shown in Table 2, we expect that the majority of the entities involved with trade in African elephant ivory would be considered small as defined by the SBA.

Table 2. Distribution of Businesses within Affected Industries

NAICS Code	Description	Number of Businesses	Percentage of Small Businesses
339992	Musical instrument manufacturing	597	73%

423910	Sporting and recreational goods and supplies merchant wholesalers	5,953	97%
321999	All other miscellaneous wood product manufacturing	1,763	100%
332215	Metal kitchen cookware, utensil, cutlery, and flatware (except precious) manufacturing	188	99%
339910	Jewelry and silverware manufacturing	2,119	100%
453310	Used merchandise stores	19,793	74%
453920	Art dealers	4,937	95%

Source: U.S. Census Bureau, 2012 County Business Patterns.

The impact on individual businesses is dependent on the percentage of interstate and export sales that involve non-antique African elephant ivory that would not fall under the *de minimis* exception. That is, the impact depends on where businesses are located, where their customers are located, and the kinds of items containing ivory that they sell. Information on business profiles to determine the percent of revenues affected by the rule is currently unavailable. Overall, we estimate that worked ivory exports would decrease about \$2.1 million annually, which represents about 2 percent of the total declared value of worked ivory exported from 2007 to 2011. We also expect that domestic sales would decrease by about 2 percent annually. Because we are proposing to allow domestic commercial activities with certain items containing *de minimis* amounts of ivory, and many of these items would be precluded from export, it is possible that an even smaller percentage of the domestic market would be impacted compared to the export market.

Based on the available information, we do not expect these changes to have a substantial impact on small entities within the five affected industries listed above. We, therefore, certify that this proposed rule would not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). A Regulatory Flexibility Analysis is not required. Accordingly, a Small Entity Compliance Guide is not required.

This proposed rule would create no substantial fee or paperwork changes in the permitting process. The regulatory changes would require issuance of ESA permits for import of sport-hunted African elephant trophies. We estimate that we would issue 300 ESA permits per year for these sport-hunted trophies, with a fee of \$100 per permit. These changes are not major in scope and would create only a modest financial or paperwork burden on the affected members of the general public. The authority to regulate activities involving ESA-listed species already exists under the ESA and is carried out through regulations contained in 50 CFR part 17.

*Small Business Regulatory Enforcement Fairness Act:* This proposed rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

a. Would not have an annual effect on the economy of \$100 million or more. This proposed rule revises the 4(d) rule for African elephant, which makes the African elephant subject to the same of the provisions applied to other threatened species not covered by a 4(d) rule, with certain exceptions. This proposed rule would not have a negative effect on this part of the economy. It would affect all importers, exporters, re-exporters, and domestic and certain traders in foreign commerce of African elephant ivory equally, and the impacts would be evenly spread among all businesses, whether large or small. There is not a disproportionate impact for small or large businesses.

b. Would not cause a major increase in costs or prices for consumers; individual industries; Federal, State, tribal, or local government agencies; or geographic regions.

c. Would not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

*Unfunded Mandates Reform Act:* Under the Unfunded Mandates Reform Act (2 U.S.C.

1501 *et seq.*):

a. This proposed rule would not significantly or uniquely affect small governments. A Small Government Agency Plan is not required. The proposed rule imposes no unfunded mandates. Therefore, this proposed rule would have no effect on small governments' responsibilities.

b. This proposed rule would not produce a Federal requirement of \$100 million or greater in any year and is not a "significant regulatory action" under the Unfunded Mandates Reform Act.

*Takings:* Under Executive Order 12630, this proposed rule does not have significant takings implications. While certain activities that were previously unregulated would now be regulated, possession and other activities with African elephant ivory such as sale in intrastate commerce would remain unregulated. A takings implication assessment is not required.

*Federalism:* These proposed revisions to part 17 do not contain significant Federalism implications. A federalism summary impact statement under Executive Order 13132 is not required.

*Civil Justice Reform:* Under Executive Order 12988, the Office of the Solicitor has determined that this proposed rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

*Paperwork Reduction Act:* This proposed rule does not contain new collections of information that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). OMB has reviewed and approved the information collection requirements associated with applications and reporting for CITES and ESA permits and assigned OMB Control No. 1018-0093, which expires May 31, 2017. We

may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

*National Environmental Policy Act (NEPA):* This proposed rule is being analyzed under the criteria of the National Environmental Policy Act, the Department of the Interior procedures for compliance with NEPA (Departmental Manual (DM) and 43 CFR part 46), and Council on Environmental Quality regulations for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508). We have prepared a draft environmental assessment to determine whether this rule will have a significant impact on the quality of the human environment under the National Environmental Policy Act of 1969. The draft environmental assessment is available online at <http://www.regulations.gov> at Docket Number FWS–HQ–IA–2013–0091.

*Government-to-Government Relationship with Tribes:* The Department of the Interior strives to strengthen its government-to-government relationship with Indian tribes through a commitment to consultation with Indian tribes and recognition of their right to self-governance and tribal sovereignty. We have evaluated this rule under the Department's consultation policy and under the criteria in Executive Order 13175 and have determined that it has no substantial direct effects on federally recognized Indian tribes and that consultation under the Department's tribal consultation policy is not required. Individual tribal members must meet the same regulatory requirements as other individuals who trade in African elephants, including African elephant parts and products.

*Energy Supply, Distribution, or Use:* Executive Order 13211 pertains to regulations that significantly affect energy supply, distribution, or use. This proposed rule would revise the current regulations in 50 CFR part 17 regarding trade in African elephants and African elephant parts and products. This proposed rule would not significantly affect energy supplies,

distribution, and use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

*Clarity of the Rule:* We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

- (a) Be logically organized;
- (b) Use the active voice to address readers directly;
- (c) Use clear language rather than jargon;
- (d) Be divided into short sections and sentences; and
- (e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, please send us comments by one of the methods listed under **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

### **Public Comments**

We are seeking comments on the impact of the provisions in this proposed rule on the affected public. You may submit your comments and materials concerning this proposed rule by one of the methods listed under **ADDRESSES**. We will not accept comments sent by e-mail or fax or to an address not listed under **ADDRESSES**.

We will post your entire comment—including your personal identifying information—on <http://www.regulations.gov>. If you provide personal identifying information in your written comments, you may request at the top of your document that we withhold this information from

public review. However, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on <http://www.regulations.gov>, or by appointment, between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays, at the U.S. Fish and Wildlife Service; Division of Management Authority; 5275 Leesburg Pike; Falls Church, VA 22041; telephone, (703) 358-2093.

### **References Cited**

A list of references cited is available online at <http://www.regulations.gov> at Docket Number FWS–HQ–IA–2013–0091.

### **List of Subjects in 50 CFR Part 17**

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

### **Proposed Regulation Promulgation**

For the reasons given in the preamble, we propose to amend title 50, chapter I, subchapter B of the Code of Federal Regulations as follows:

### **PART 17—[AMENDED]**

1. The authority citation for part 17 continues to read as follows:

**Authority:** 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

2. Section 17.40 is amended by revising paragraph (e) to read as follows:

#### **§ 17.40 Special rules—mammals.**

\* \* \* \* \*

(e) African elephant (*Loxodonta africana*). This paragraph (e) applies to any specimen of the species *Loxodonta africana* whether live or dead, including any part or product thereof. Except as provided in paragraphs (e)(2) through (9) of this section, all of the prohibitions and exceptions in §§ 17.31 and 17.32 apply to the African elephant. Persons seeking to benefit from the exceptions provided in this paragraph (e) must demonstrate that they meet the criteria to qualify for the exceptions.

(1) *Definitions*. In this paragraph (e), *antique* means any item that meets all four criteria under section 10(h) of the Endangered Species Act (16 U.S.C. 1539(h)). *Ivory* means any African elephant tusk and any piece of an African elephant tusk. *Raw ivory* means any African elephant tusk, and any piece thereof, the surface of which, polished or unpolished, is unaltered or minimally carved. *Worked ivory* means any African elephant tusk, and any piece thereof, that is not raw ivory.

(2) *Live animals and parts and products other than ivory and sport-hunted trophies*. Live African elephants and African elephant parts and products other than ivory and sport-hunted trophies may be imported into or exported from the United States; sold or offered for sale in interstate or foreign commerce; and delivered, received, carried, transported, or shipped in interstate or foreign commerce in the course of a commercial activity without a threatened species permit issued under § 17.32, provided the requirements in 50 CFR parts 13, 14, and 23 have been met.

(3) *Interstate and foreign commerce of ivory*. Except for antiques and certain manufactured items containing *de minimis* quantities of ivory, sale or offer for sale of ivory in interstate or foreign commerce and delivery, receipt, carrying, transport, or shipment of ivory in interstate or foreign commerce in the course of a commercial activity is prohibited. Except as

provided in paragraphs (e)(5)(iii) and (e)(6) through (8) of this section, manufactured items containing *de minimis* quantities of ivory may be sold or offered for sale in interstate or foreign commerce and delivered, received, carried, transported, or shipped in interstate or foreign commerce in the course of a commercial activity without a threatened species permit issued under § 17.32, provided they meet all of the following criteria:

(i) If the item is located within the United States, the ivory was imported into the United States prior to January 18, 1990, or was imported into the United States under a Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) pre-Convention certificate with no limitation on its commercial use;

(ii) If the item is located outside the United States, the ivory was removed from the wild prior to February 26, 1976;

(iii) The ivory is a fixed component or components of a larger manufactured item and is not in its current form the primary source of the value of the item;

(iv) The ivory is not raw;

(v) The manufactured item is not made wholly or primarily of ivory;

(vi) The total weight of the ivory component or components is less than 200 grams; and

(vii) The item was manufactured before [EFFECTIVE DATE OF THE FINAL RULE].

(4) *Import/export of raw ivory.* Except as provided in paragraphs (e)(6) through (9) of this section, raw ivory may not be imported into or exported from the United States.

(5) *Import/export of worked ivory.* Except as provided in paragraphs (e)(6) through (9) of this section, worked ivory may not be imported into or exported from the United States unless it is contained in a musical instrument, or is part of a traveling exhibition, household move, or inheritance, and meets the following criteria:

(i) *Musical instrument.* Musical instruments that contain worked ivory may be imported into and exported from the United States without a threatened species permit issued under § 17.32 provided:

(A) The ivory was legally acquired prior to February 26, 1976;

(B) The instrument containing worked ivory is accompanied by a valid CITES musical instrument certificate or equivalent CITES document;

(C) The instrument is securely marked or uniquely identified so that authorities can verify that the certificate corresponds to the musical instrument in question; and

(D) The instrument is not sold, traded, or otherwise disposed of while outside the certificate holder's country of usual residence.

(ii) *Traveling exhibition.* Worked ivory that is part of a traveling exhibition may be imported into and exported from the United States without a threatened species permit issued under § 17.32 provided:

(A) The ivory was legally acquired prior to February 26, 1976;

(B) The item containing worked ivory is accompanied by a valid CITES traveling exhibition certificate (See the requirements for traveling exhibition certificates at 50 CFR 23.49);

(C) The item containing ivory is securely marked or uniquely identified so that authorities can verify that the certificate corresponds to the item in question; and

(D) The item containing worked ivory is not sold, traded, or otherwise disposed of while outside the certificate holder's country of usual residence.

(iii) *Household move or inheritance.* Worked ivory may be imported into or exported from the United States without a threatened species permit issued under § 17.32 for personal use as part of a household move or as part of an inheritance if the ivory was legally acquired prior to

February 26, 1976, and the item is accompanied by a valid CITES pre-Convention certificate. It is unlawful to sell or offer for sale in interstate or foreign commerce or to deliver, receive, carry, transport, or ship in interstate or foreign commerce and in the course of a commercial activity any African elephant ivory imported into the United States as part of a household move or inheritance. The exception in paragraph (e)(3) of this section regarding manufactured items containing *de minimis* quantities of ivory does not apply to items imported or exported under this paragraph (e)(5)(iii) as part of a household move or inheritance.

(6) *Sport-hunted trophies.* (i) African elephant sport-hunted trophies may be imported into the United States provided:

(A) The trophy was legally taken in an African elephant range country that declared an ivory export quota to the CITES Secretariat for the year in which the trophy animal was killed;

(B) A determination is made that the killing of the trophy animal will enhance the survival of the species and the trophy is accompanied by a threatened species permit issued under § 17.32;

(C) The trophy is legibly marked in accordance with 50 CFR part 23;

(D) The requirements in 50 CFR parts 13, 14, and 23 have been met; and

(E) No more than two African elephant sport-hunted trophies are imported by any hunter in a calendar year.

(ii) It is unlawful to sell or offer for sale in interstate or foreign commerce or to deliver, receive, carry, transport, or ship in interstate or foreign commerce and in the course of a commercial activity any sport-hunted African elephant trophy. The exception in paragraph (e)(3) of this section regarding manufactured items containing *de minimis* quantities of ivory does not apply to ivory imported or exported under this paragraph (e)(6) as part of a sport-hunted

trophy.

(iii) Except as provided in paragraph (e)(9) of this section, raw ivory that was imported as part of a sport-hunted trophy may not be exported from the United States. Except as provided in paragraphs (e)(5), (7), (8), and (9) of this section, worked ivory imported as a sport-hunted trophy may not be exported from the United States. Parts of a sport-hunted trophy other than ivory may be exported from the United States without a threatened species permit issued under § 17.32 of this part, provided the requirements of 50 CFR parts 13, 14, and 23 have been met.

(7) *Import/export of ivory for law enforcement purposes.* Raw or worked ivory may be imported into and worked ivory may be exported from the United States by an employee or agent of a Federal, State, or tribal government agency for law enforcement purposes, without a threatened species permit issued under § 17.32, provided the requirements of 50 CFR parts 13, 14, and 23 have been met. It is unlawful to sell or offer for sale in interstate or foreign commerce and to deliver, receive, carry, transport, or ship in interstate or foreign commerce and in the course of a commercial activity any African elephant ivory that was imported into or exported from the United States for law enforcement purposes. The exception in paragraph (e)(3) of this section regarding manufactured items containing *de minimis* quantities of ivory does not apply to ivory imported or exported under this paragraph (e)(7) for law enforcement purposes.

(8) *Import/export of ivory for genuine scientific purposes.* (i) Raw or worked ivory may be imported into and worked ivory may be exported from the United States for genuine scientific purposes that will contribute to the conservation of the African elephant, provided:

(A) It is accompanied by a threatened species permit issued under § 17.32; and

(B) The requirements of 50 CFR parts 13, 14, and 23 have been met.

(ii) It is unlawful to sell or offer for sale in interstate or foreign commerce and to deliver,

receive, carry, transport, or ship in interstate or foreign commerce and in the course of a commercial activity any African elephant ivory that was imported into or exported from the United States for genuine scientific purposes. The exception in paragraph (e)(3) of this section regarding manufactured items containing *de minimis* quantities of ivory does not apply to ivory imported or exported under this paragraph (e)(8) for genuine scientific purposes.

(9) *Antique ivory.* Antiques (as defined in paragraph (e)(1) of this section) are not subject to the provisions of this rule. Antiques containing or consisting of ivory may therefore be imported into or exported from the United States without a threatened species permit issued under § 17.32, provided the requirements of 50 CFR parts 13, 14, and 23 have been met. Also, the provisions and prohibitions under the African Elephant Conservation Act (16 U.S.C. 4201 *et seq.*) apply, regardless of the age of the item. Antiques that consist of or contain raw or worked ivory may similarly be sold or offered for sale in interstate or foreign commerce and delivered, received, carried, transported, or shipped in interstate or foreign commerce in the course of a commercial activity without a threatened species permit issued under § 17.32.

\* \* \* \* \*

**Michael Bean,**

*Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.*

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