United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

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The Honorable Cliff Bentz
Chairman
Subcommittee on Water, Wildlife, and Fisheries
Committee on Natural Resources
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Bentz:

Enclosed are responses to questions for the record submitted to U.S. Fish and Wildlife Service Director Martha Williams following her appearance before your Subcommittee at the May 16, 2024, oversight hearing on the Fiscal Year 2025 budget request. These responses were prepared by the U.S. Fish and Wildlife Service.

Thank you for the opportunity to respond to you on this matter.

Sincerely,

Pamela L. Barkin
Legislative Counsel
Office of Congressional and
Legislative Affairs

Enclosure

cc: The Honorable Jared Huffman
Ranking Member

Questions for the Record
House Natural Resources Committee
Subcommittee on Water, Wildlife, and Fisheries
Oversight Hearing *"Examining the President's Fiscal Year 2025 Budget Proposal for the U.S. Bureau of Reclamation and the U.S. Fish and Wildlife Service."*
May 16, 2024

Questions from Chairman Bruce Westerman

Question 1: In March, you issued a report, the 2019 National Wetlands Status and Trends report that found that 221 million acres of wetlands were destroyed between 2009 and 2019. Most of that loss was from vegetated wetlands like marshes and swamps, which shrank by 670,000 acres, an area roughly the size of Rhode Island.

That same month, the Service budget proposed a significant 35% reduction in one of the most popular and effective wetland programs in our country, one that has had strong bipartisan support and is up for reauthorization this year. That $17M reduction is more than a haircut.

Under NAWCA, that $17M cut would leverage more than $17M in additional partner contributions under the program's match requirements and we often see more than that in private support. In fact, since 1991, NAWCA grants totaling over $2 billion have leveraged almost $5.6 billion in contributions from partners. This funding has vastly exceeded match requirements, enabling the successful restoration of more than 32 million acres of wetlands and associated uplands in North America.

So, you ring the alarm that we have a problem and then purposely cut funding to address the problem. What message are you trying to send? How do you justify this troubling cut to NAWCA?

Response: The U.S. Fish and Wildlife Service (Service) is proud of its long history serving as the agency responsible for implementing the North American Wetlands Conservation Act (NAWCA). Since 1991, the Service has worked with more than 6,938 partners to fund more than 3,381 projects with over $2.15 billion in grants, which has been matched by $4.3 billion in partner funds. NAWCA plays a critical role in restoring wetlands, at a time when those ecosystems face immense challenges, to benefit birds and other wildlife while also establishing or enhancing many of the continent's most popular destinations for hunting and birding.

Funding for NAWCA comes from multiple sources, including discretionary appropriations and mandatory sources including interest earned on the Wildlife Restoration account. NAWCA earned significantly more in interest in FY 2024 and the Service estimates that NAWCA will also earn significantly more in FY 2025 due to a variety of factors. This provides additional mandatory funds to fund the program at increasing levels despite the lower request for appropriations. As a result, Congress and partners can expect to see the same level of investment in NAWCA throughout FY 2025 as in previous years. In addition, the Service's FY 2025 budget request also includes a $828,000 increase over FY 2024 for our Migratory Bird Joint Ventures, which work with local stakeholders to connect partners with NAWCA and identify potential projects and grant match opportunities. Together, the Service's budget request will improve our capacity to support the conservation of migratory birds and their habitats.

Question 2: In testimony given to this subcommittee last month, the Services Deputy Director for Policy Steve Guertin stated "my understanding is that all of our staffed refuges have at least one biologist". When pressed further, Mr. Guertin stated that he didn't believe there were any refuges without a biologist. We tried to follow up to clarify the inconsistencies in his responses through questions for the record, but we've yet to hear back from the Department. Which is it - do all staffed refuges have a biologist, or does every refuge have a biologist?

Response: The National Wildlife Refuge System (Refuge System) has employees in a variety of job series, including several series that require biological and or/natural science degrees. This includes designated wildlife biologists, refuge managers, and assistant managers that all have biological backgrounds and work together to manage refuge units or complexes.

Many units of the Refuge System are administered as complexes, which can include two or more individual refuges within a general geography. Within a refuge complex, a team of Service employees, including wildlife biologists, refuge managers, and other employees vital to ensuring ecological integrity, manage multiple national wildlife refuges within an established geographic boundary. These employees are further supported by Service biologists at both regional and headquarters levels. Thus, while every unit of the Refuge System does not have a dedicated wildlife biologist, they do all have biological support.

Question 3: The U.S. is a party to the Convention on International Trade in Endangered Species of Flora and Fauna. As you know, CITES is the international treaty that controls the international trade of threatened and endangered species. When countries attend CITES meetings and vote to uplist or downlist certain species, those decisions are to be based on sound science. In some cases, the United States has voted to not uplist a species only to return home and begin regulations to list under the ESA that very species. In other cases, the science is clear that the species is not worthy of uplisting based on CITES requirements, yet the Service has voted to uplist it. At one point, a US attendee even asked an official from the Department how these decisions are made, and the official responded by saying, "We fly by the seat of our pants". Do you agree that these decisions should be based on science and not politics? How can Service improve their decision-making process to be more transparent and base decisions on science?

Response: The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Endangered Species Act (ESA) have different processes and different legal and biological criteria for listing species. A species may be ESA-listed, CITES-listed, both, or neither, and different protections and provisions of the ESA and CITES apply to the species accordingly. CITES focuses on the impacts of international trade to the status of a species, while the ESA focuses on all threats to the species. The two laws serve different purposes and have

complementary implementation frameworks that comprehensively address species conservation needs.

The Service does not make rash, uninformed decisions. Under Section 4 of the ESA, the Service is required to determine whether species qualify as threatened or endangered based on the best scientific and commercial data available. Proposals to list species under the ESA are then subject to public review and comment. With respect to the CITES proposals, we also utilize a thorough, science-based process, as well as a thoughtful public comment and engagement process. The Service makes decisions regarding species proposals to amend the CITES Appendices (add, remove, or transfer species in Appendix I or Appendix II) based on the best available scientific and trade information available. Species proposals are evaluated using the biological and trade criteria found in CITES Resolution Conf. 9.24 (Rev. CoP17). Further, the Service implements an open, transparent process for the public, including scientific experts, to provide input in the United States' decision-making process. Per our CITES implementing regulations (50 CFR Part 23 section 87), the Service follows a rigorous process for developing U.S. positions for a CITES Conference of the Parties (CoP) including: publishing a series of Federal Register notices and holding a public meeting prior to the CoP soliciting input on any U.S. submissions and those of other CITES Parties. In addition, the Service consults with other federal agencies, including the Department of State, National Marine Fisheries Services, Animal and Plant Health Inspection Service, and others, in developing the final U.S. position on a species proposal.

For proposals being considered prior to the U.S. delegation departing to a CoP, the Service publishes a final Federal Register notice that articulates its tentative negotiating positions on CITES CoP agenda items. The notice recognizes that during discussions and consultations with species range countries at the CoP, the U.S. delegation may receive additional information or circumstances may develop that have an impact on our tentative negotiating positions. As a result, the U.S. representatives to a CoP may find it necessary to modify, reverse, or otherwise change any of those positions when doing so is in the best interests of the United States or the conservation of the species.

In addition, at the CoP, the U.S. delegation holds daily briefings for U.S. observers attending the CoP to discuss the day's events and decisions that the U.S. delegation made on proposals and agenda items. Often at these meetings, participants provide additional input into discussions of future agenda items. The Service's goal is to make the U.S. decision-making process as open and transparent for the CITES CoP and has encouraged other Parties to do the same.

Question 4: CITES requires a notification to range states of stricter domestic measures than agreed to by CITES. Have these notifications been made to the range states that manage African Elephants or hippos? How have they been provided?

Response: Under CITES, article XIV, paragraph 1, each Party retains the right to adopt stricter

domestic measures than agreed by CITES, such as endangered and threatened species listings under the ESA, and there are no legal obligations under CITES for consultation on stricter domestic measures. CITES Resolution Conf. 6.7 recommends that each Party intending to take stricter domestic measures regarding trade in non-indigenous species included in the Appendices make every reasonable effort to notify the range States as early as possible and to consult with interested range States. While resolutions are not legally binding, as the designated CITES Management Authority and Scientific Authority for the United States, the Service makes a concerted effort to implement the CITES Resolutions because we acknowledge that they represent the interpretation and longstanding guidance of the CITES Conference of the Parties for effective implementation of the Convention.

Regarding the recent revisions to the Endangered Species Act (ESA) 4(d) rule for African elephants, which are listed as threatened under the ESA, the Service made every reasonable effort to notify range countries and meaningfully consulted with range countries that expressed a wish to confer on the matter, following the text, spirit, and intent of the Resolution during the public-comment process for the proposed rule.

The Service notified the public of the proposed revisions, and requested comments on those proposed revisions on November 17, 2022. The public comment period was originally open for 60 days and then extended for an additional 60 days to March 20, 2023.On January 5, 2023, the Service hosted a virtual public hearing on the proposed changes to the African elephant 4(d) rule. Several African elephant range countries registered to attend the meeting including Niger, Ethiopia, Cote D'Ivoire, Mozambique, Malawi, Zimbabwe, Sudan, Nigeria, Botswana, Liberia, Guinea, and Benin. Publishing a proposed rule enhanced the consultation process by giving the range countries and the public access to draft regulations and agency reasoning on which to comment. The rulemaking comment process often leads to a more robust consultation process and, as here, improves the final rule adopted by the agency.

During the public comment period, the Service offered to conduct individual African elephant range country consultations. Several range countries took the Service up on its offer, and the Service held consultations for every range country that made a request. During the open public comment period, the Service received 138,668 written comments in response to the proposed rule including comments from Botswana, Namibia, South Africa, Tanzania, Zambia, and Zimbabwe. The majority of the changes made from proposed rule to final rule were a result of substantive comments received from range countries. The Service also held bilateral consultation meetings with Tanzania, Zimbabwe, Mozambique, South Africa, and Namibia at the annual Safari Club International (SCI) conference in 2022 and 2023.

The Service has been petitioned to evaluate hippos for listing under the ESA. The listing determination for the hippo is on our work plan for several fiscal years in the future, so we have not yet initiated discussions with range countries other than alerting them to the upcoming work during our CITES meetings and our meetings with individual countries at the SCI Convention.

Question 5: When the Service decides to make a rulemaking on a species that does not reside in the US, the Service is supposed to consult with the countries that do manage these species--yet many times that does not happen in any meaningful way. How can the US write a rule for a species in another country, not consult with that country, and expect the rule to be effective? I know you will say that these countries may comment during the public comment period, but wouldn't it be more prudent and waste less time to put out a draft rule where consultation has already occurred with the other management authority tasked with managing these animals every day? Does the Service send any employees to range states that must manage populations for which the US is proposing restrictions under ESA?

Response: Under CITES, article XIV, paragraph 1, each Party retains the right to adopt stricter domestic measures than agreed by CITES, such as endangered and threatened species listings under the ESA, and there are no legal obligations under CITES for consultation on stricter domestic measures. CITES Resolution Conf. 6.7 recommends that each Party intending to take stricter domestic measures regarding trade in non-indigenous species included in the Appendices make every reasonable effort to notify the range States as early as possible and consult with interested range States. While resolutions are not legally binding, as the designated CITES Management Authority and Scientific Authority for the United States, the Service makes a concerted effort to implement the CITES Resolutions because we acknowledge that they represent the interpretation and longstanding guidance of the CITES Conference of the Parties for effective implementation of the Convention. Additionally, pursuant to ESA section 4(b)(5)(B), insofar as practical, and in cooperation with the Secretary of State, the Service gives notice of any proposed ESA listing to each foreign nation in which the species is believed to occur and invites the comment of such nation thereon.

In brief, the Service makes every reasonable effort to notify range countries and meaningfully consult with range countries that express a wish to confer on the matter, following the text, spirit, and intent of the Resolution, including during the public-comment process for the proposed rule. Publishing a proposed rule does not inhibit the consultation process. Rather, it enhances the consultation process by giving the range countries and the public access to draft regulations and agency reasoning on which to comment, while also following U.S. domestic requirements for rulemaking. The rulemaking comment process often leads to a more robust consultation process and improves any final rule adopted by the agency, or any decision to modify or withdraw a proposed rule.

In accordance with applicable statutory authorities, the Service sends staff internationally for a number of purposes including, but not limited to, meeting with and encouraging foreign countries to provide for the conservation of fish, wildlife, and plants including both ESA-listed species and non-ESA-listed species, law enforcement, attending CITES functions, engaging with conservation partners, and gathering information related to the status and management of ESA-

listed species.

Question 6: Has the Service consulted with foreign management authorities on the development and implementation of regulations under the Endangered Species Act? If so, please provide a list. In what format have these consultations occurred? Does the Service have designated personnel to liaise with foreign management authorities on Endangered Species Act implementation issues?

Response: The Service's Division of Management Authority (DMA) serves as the designated Management Authority for CITES and engages in consultations with foreign Management Authorities on the development and implementation of regulations under the ESA that have an international nexus. The affected Management Authorities are generally identified by analyzing previous trade data through the CITES database and the Office of Law Enforcement's Law Enforcement Management Information System. Consultations generally occur directly between the Service's DMA or Ecological Services and the foreign Management Authorities.

For example, the DMA has consulted on the revision to the ESA 4(d) rule for the African elephant during the proposed rule phase. An invitation was sent to each of the Management Authorities of African elephant range countries with an offer to hold discussions on the proposed rule. During the open comment period, the Service held in-person consultations with Tanzania, Zimbabwe, Mozambique, South Africa, and Namibia and a virtual consultation with Botswana. Several African countries were also in attendance for our public meeting on the proposed rule held on January 5, 2023. The countries of Botswana, Namibia, South Africa, Tanzania, Zambia, and Zimbabwe submitted written comments on the proposed rule. Several changes made from proposed rule to final rule were a result of substantive comments received from range countries. The final rule requires that the Service receive information from the governments of the range countries regarding the management and status of the species for the import of sport-hunted and live African elephants to the United States.

Regarding implementation of the ESA 4(d) regulations for the African elephant, the Service has already received annual certification documents from Namibia, Botswana, Zambia, Tanzania, Zimbabwe, and South Africa, and understands that other range countries may submit their documents in the near future. The Service appreciates the attention to this issue that range countries have already provided. The annual certification requirement will help us increase the efficiency of our permitting process by requesting information that we use to make our enhancement determinations.

Additionally, pursuant to ESA section 4(b)(5)(B), insofar as practical, and in cooperation with the Secretary of State, the Service gives notice of any proposed ESA listing to each foreign nation in which the species is believed to occur and invites the comment of such nation thereon.

Question 7: The Secretary has talked at great lengths about including tribes and indigenous peoples in the work that they do domestically-- and tribes should be included. Why then are indigenous peoples abroad not considered in rulemakings that will impact them? Do you reach out to indigenous communities before writing a rule in a foreign country that will impact them and the animals they live with every day?

Response: Tribes and Indigenous communities, both domestically and abroad, are integral to protecting wildlife, advancing land stewardship, and solving today's conservation challenges. The Service deeply values its relationship with Indigenous communities and recognizes the important role they play in meeting common conservation goals.

We do consider input from stakeholders abroad, including Tribes and Indigenous communities, in rulemakings through public comment. Publishing a proposed rule gives stakeholders, including Tribes and Indigenous communities abroad, an opportunity to review draft regulations and other documents that provide insight into agency reasoning, as well as the opportunity to provide substantive comments before the Service issues a final rule. We frequently receive significant comments from international stakeholders that are integral for our final rulemaking process. This rulemaking public comment process often leads to a more robust consultation process and improves the final rule adopted by the agency.

Question 8: Service's e-Permit system launched in 2020 continues to fail to accept applicant information and deliver permits in a timely manner; however, permit fees are deposited quickly. Federal agencies and the regulated public are frustrated and worried when permits expire and a renewal is not delivered for months after expiration. What actions is the Service taking to rectify this problem? When will the system begin to work properly?

Response: The Service is committed to the continual improvement of ePermits and strives to act on customer feedback to improve service delivery success. Data from our latest customer satisfaction survey show 2 out of 3 respondents are satisfied with ePermits. The ePermits system is working as a modern, cloud-based, secure, system that allows the public a way to apply and pay for permits online.

The issue of delayed permit renewals could result from a number of factors and may only partially be explained by technology. Renewal applications may be delayed if permit holders have not fully complied with the requirements or conditions of the permit, for example failing to provide a report of activity under the expiring permit. Also, when an incomplete application is submitted without required information, additional follow up is required, which delays the processing and issuance of a renewal. Finally, despite the availability of a modern solution like ePermits, nearly half of all permit applicants do not use ePermits to submit applications or pay fees online. The additional time and effort required to input mailed or emailed applications and paper checks into ePermits means that some applicants may not receive their renewal before their current permit expires.

Permittees who hold renewable permits may continue the activities authorized by the expired permit until the Service acts on the application for renewal as long as the permittee submits an application at least 30 days prior to the expiration date of the permit and if all the conditions in 50 CFR 13.22 are met. Since October 2021, the ePermits system electronically notifies the permit holder of renewable permits 60 days prior to expiration of the permit. These notifications include the impending permit expiration date, information on submitting a renewal application, and the continuation of permitted activity provision found in Service regulations.

Over the next several years, the Service has requested funding to modernize its permitting processes in ePermits. The Service recently implemented its first 'automated' or 'self-service' permit in ePermits, a general eagle incidental take permit resulting from recent rulemaking. Under the new rule, applicants apply, pay fees, and receive their permit fully online and in real time, without any up-front review by a Service permit specialist. The Service will consider lessons learned from this innovation as applicable.

Question 9: Populations of double-crested cormorants are increasing and establishing new breeding colonies. However, the national take allocation of 121,504 birds established by a 2020 *Final Environmental Impact Statement for the Management of Conflicts Associated with Double-crested Cormorants* for federal, state and public entities through bird depredation permits has riot been revised to reflect the growing challenges for agencies, tribes, and farms. Is the Service aware of the growing bird populations? Is there a periodic reassessment of the Population Take Model and re-allocation to permit holders as provided within the 2020 EIS? If not, when will the Service reassess and reallocate?

Response: The Service is aware of and actively monitoring cormorant populations, including the effects of these population changes on agencies, Tribes, farms, and others. We continue to work with those affected to relieve and resolve the damage and loss experienced due to cormorants, both through close coordination with the U.S. Department of Agriculture - Wildlife Services and publicly available depredation permits. In the 2020 Final Environmental Impact Statement for the Management of Conflicts Associated with Double-crested Cormorants, the Service committed to periodic re-assessments every five-years. This process, developed in coordination with the four North American Flyway Councils, includes surveying populations, updating models, and modifying take allocations. In 2024, the Service is conducting surveys to update population estimates. After surveys are complete, the Service will initiate work to update the Potential Take Limit assessments, with updated assessments currently scheduled to be completed in 2025. At every stage in this process, the Service coordinates with federal, Tribal, and state agencies to inform their respective management actions.

Question 10: Congress authorized the Department of Interior to list species through the Endangered Species Act, Section 4(c)(1), specifying"...with respect to each such

species over what portion of its range it is endangered or threatened..." However, within the Code of Federal Regulations the majority of threatened and endangered species are listed as "wherever found." Why, how, and when did the Department decide to ignore Congressional direction?

Response: Section 3 of the ESA states that the term "species" includes any subspecies of fish or wildlife or plants, and any distinct population segment (DPS) of any species of vertebrate fish or wildlife which interbreeds when mature. Therefore, the ESA authorizes the listing of entities determined to be species, subspecies, or DPSs. As explained in the preamble to our 2014 Final Policy on interpretation of the phrase "Significant Portion of Its Range" in the Endangered Species Act's Definitions of "Endangered Species" and "Threatened Species," protecting only a portion of a species' range (unless it is a DPS) is inconsistent with the ESA's definition of "species." Courts have also reached this conclusion (Defenders of Wildlife v. Salazar, 729 F. Supp. 2d 1207 (D. Mont. 2010), concerning the Service's delisting of the Northern Rocky Mountain gray wolf (74 FR 15123, Apr. 12, 2009); and WildEarth Guardians v. Salazar, 2010 U.S. Dist. LEXIS 105253 (D. Ariz. Sept. 30, 2010), concerning the Service's 2008 finding on a petition to list the Gunnison's prairie dog (73 FR 6660, Feb. 5, 2008)). Therefore, the information contained in the "where listed" column of the official lists in the CFR further describes where the listed entity occurs. For species and subspecies, or DPSs, "wherever found" is the appropriate description because the listed entity is wherever it is found; but for DPSs, we can define the geographic location of the listing below the level of the entire range.

Question 11: The Endangered Species Act authorizes the United States as a party to the CITES. This authorization includes explicit language that the United States "...has pledged itself as a sovereign state in the international community..." to implement actions to control import and export of CITES listed species. However, the Department of Interior continues to list foreign species under the ESA that are also protected by CITES trade restrictions. Is the ESA listing of these species an implicit admission by the Department there is a failure by the United States to implement CITES provisions? How does an ESA listing increase protections that are globally negotiated and are essentially duplicative in preventing or restricting trade? Is CITES a failure?

Response: The criteria to list species under the ESA differ from the CITES criteria to amend the CITES Appendices (Resolution Conf. 9.24 [Rev. CoP17]). Species evaluated for listing under the ESA are impacted by many factors other than just trade, while species included in CITES Appendices are impacted by use in international trade. Therefore, foreign species listed under the ESA may include species threatened by other factors such as habitat loss and alteration.

The CITES treaty allows Parties to have stricter domestic measures to regulate trade. Inclusion of a CITES-listed species under the ESA is permissible and increases our domestic protections for these species. It requires the Service to make an "enhancement" finding for the import of

these foreign ESA-listed species in addition to the required CITES findings. An enhancement finding ensures that the permitted activity enhances the survival of the species in the wild, while the CITES findings ensure only that the specimens exported were legally acquired and non-detrimental to the survival of the species. The CITES findings do not require that the permitted activity enhance the benefits to the species' survival in the wild. Through the ESA enhancement requirement, the Service considers whether the purpose for which the permit is required would be likely to reduce the threat of extinction facing the species of wildlife sought to be covered by the permit. This presents an opportunity for the ESA and applicants to support range countries' *in situ* conservation.

Since the ESA listing requires a different finding to be made, it is supplemental to, rather than duplicative of CITES efforts. Additionally, the effectiveness of CITES is largely dependent upon the ability of Parties to implement the treaty. The Service takes our responsibilities to implement CITES on behalf of the United States seriously and has developed strong implementing regulations that are found in 50 CFR Part 23 to regulate the international trade in CITES species. The United States has also provided technical assistance and financial support to Parties in building their CITES capacity including the making of required permit findings, such as legal acquisition and non-detriment findings. Through such actions, we work to ensure that CITES can be effective and successful in its efforts.

Question 12: Recently, the U.S. Fish and Wildlife Service halted all imports or re-exports of non-human primates (NHPs), or research samples derived from NHPs imported from Cambodia, forcing American biotech companies to scramble for new sources. The Service's stated reason for suspending permits involved an enforcement action which has now been rejected in a US court by both judge and jury. Is the Service committed to re-opening trade in purpose bred Cambodian NHPs?

Response: In November 2022, the U.S. Attorney's Office for the Southern District of Florida announced an indictment against eight individuals charged with smuggling and conspiracy to violate the Lacey Act and ESA. The defendants facing these felony charges include the owner/founder of a major primate supply organization; its general manager and four employees; and two officials of the Cambodian Forestry Administration, Ministry of Agriculture, Forestry and Fisheries (MAFF).

The indictment reflects an investigation conducted by the Service and alleges that these individuals conspired to acquire wild-caught macaques and launder them through Cambodian entities for export to the U.S. and elsewhere, falsely labelled as bred in captivity. As alleged in the indictment, in order to make up for a shortage of suitable monkeys at breeding facilities in Cambodia, the co-conspirators enlisted the assistance of the CITES authority in Cambodia and the MAFF to deliver wild-caught macaques illegally taken from multiple sources, including national parks and protected areas in Cambodia. The indictment alleges that these illegally taken wild macaques were delivered to breeding facilities and in some cases they, or their offspring,

were subsequently exported under falsified CITES export permits. The November 2022 indictment by the U.S. Attorney's Office for the Southern District of Florida remains an active investigation.

Long-tailed macaques (*Macaca fascicularis)*, also known as the crab-eating macaque, are protected under the CITES and require permits in order to be imported into or re-exported from the United States. Any imports of CITES-listed species, including long-tailed macaques, must comply with all applicable federal laws and regulations, including those found at 50 CFR, Chapter 1, Subchapter B, Part 23. It is up to the importer to prove the validity of their permits, which includes the source of the species.

The Service's Office of Law Enforcement is open to discussing shipments with importers on a case-by-case basis and is accepting written proposals identifying potential protocols which may improve the government's ability to verify parentage and captive-bred status of non-human primates.

Question 13: Has the Service taken steps to expedite the processing of permits that were put on hold during the unsuccessful enforcement action, especially for time sensitive re-exports?

Response: The November 2022 indictment by the U.S. Attorney's Office for the Southern District of Florida remains an active investigation. The Service would defer to the Department of Justice as the agency primarily responsible for any ongoing criminal investigations and prosecutions.

For permits not involved in ongoing enforcement actions, the Service continues to receive and review applications, with decisions being made on a case-by-case basis.

Question 14: Going forward, is the Service reviewing its protocols for suspending vital research related permits to allow for stakeholder input and more narrowly tailored approaches that do not drive American biotech into the arms of our Chinese competitors?

Response: Following the November 2022 indictment, the Service met with numerous federal agency partners regarding the alleged trafficking of long-tailed macaques and falsification of CITES documents. The Service is committed to working with other federal agencies, foreign governments, industry, and others to ensure the sustainable and legal trade of wildlife, including long-tailed macaques. The Service's Office of Law Enforcement is accepting written proposals identifying protocols which may improve the government's ability to verify parentage and captive-bred status of non-human primates.

Question 15: In 2019, the Service revised its approach to the application of the ESA section 9 prohibitions to threatened species. Specifically, to be consistent with NMFS, FWS

rescinded its "blanket 4(d) rule" and applied the prohibitions on a species-by- species basis. This allows prohibitions to be applied as warranted and, in a manner, tailored to the conservation needs of each threatened species. In a final rule published this year, the Service reversed this decision and returned to its pre-2019 manner of implementation. Can you explain how this promotes consistent implementation of the ESA across agencies?

Response: The Service recognizes that after reinstatement of the "blanket rule" option with the continued option to craft species-specific rules, our approach to implementing section 4(d) of the ESA will again differ from the National Marine Fisheries Service's (NMFS) approach. However, efficiencies can be gained through invoking the "blanket rules" as opposed to promulgating species-specific rules in all instances, and this is particularly important based upon the sheer number of species we have listed as threatened species as compared to NMFS. Given that our agencies applied these different approaches for over 40 years, and we do not have any evidence to suggest there was confusion resulting from this difference, we do not find a risk of increased confusion of reverting to these differing approaches. Each agency makes policy choices that best further the purposes of the ESA for the species within its jurisdiction.

Question 16: Earlier this year, the Services finalized three rulemakings related to the implementation of the ESA. The finalized Section 7 consultation regulation incorporates new potential requirements for developing the Reasonable and Prudent Measures (RPMs) necessary for an action agency or entity seeking a federal permit to employ in order to minimize the impacts of incidental take. In this final rule, the Services can consider and include measures in an RPM that offset any remaining impacts of incidental take that cannot be avoided. These measures to offset impacts can be required inside or outside the action area. These are significant changes, and the Section 7 Consultation handbook needs to be updated in order for action agencies and permit seekers to understand how this new process works. When will the handbook be updated, and will that process include public notice and comment so that the regulated community - and your fellow federal agencies - can provide input on the practical impacts?

Response: The Service is actively working with NMFS on revising the Section 7 Consultation Handbook now that the regulatory revisions have been finalized. We anticipate publishing a Notification of Availability of the draft revised handbook in the Federal Register, with an opportunity for public comment. Prior to publication in the Federal Register, the draft revised handbook will go to the Office of Management and Budget where the Office of Information and Regulatory Affairs is expected to provide an opportunity for interagency review.

Question 17: There is a lot of discussion of mitigation in the new ESA implementation rules. How many species "mitigation banks" are there in the country? Are there banks for all listed species? Can you explain what an "in lieu fee" mitigation offset is? How are any of these kinds of offsets reviewed and approved by the Service?

Response: There are a total of approximately 188 conservation banks for ESA-listed fish and wildlife species located in 22 states and one U.S. territory, based on 2024 data from the Regulatory In-lieu Fee and Bank Information Tracking System (RIBITS). Based on the RIBITS data, conservation banks under the jurisdiction of the Service are estimated to cover 89 different species of amphibians, birds, fishes, invertebrates, reptiles, and mammals, the majority of which are federally listed. By these estimates, conservation banks for federally listed fish and wildlife species cover less than 5% of listed fish and wildlife species [Environmental Conservation Online System (ECOS) 2024; RIBITS 2024].

The Service's Mitigation Policy defines an "In-lieu fee program" as a program involving the restoration, establishment, enhancement, and/or preservation of habitat through funds paid to a governmental or nonprofit natural resources management entity to satisfy compensatory mitigation requirements for impacts to specified species or habitat (modified from 33 CFR 332.2). Proposed compensatory mitigation mechanisms are reviewed to determine whether they meet the standards established in the Endangered Species Act Compensatory Mitigation Policy (501 FW 3, May 10, 2023).

Section 329 of the National Defense Authorization Act of 2021 requires the Service to develop a regulation covering conservation banking. When finalized, the regulation will contain specific operational details for Service review and approval of compensatory mitigation mechanisms.

Question 18: The new ESA Section 7 consultation rule just went into effect, and the Service has said that all consultations not yet completed will have to comply with them. How many ongoing consultations will now be delayed or have to be redone because of the new rules?

Response: We do not anticipate that any ongoing consultations will be delayed or will have to be redone as a result of the new regulations. These revisions apply prospectively. The regulatory timeframes associated with consultation under section 7 of the ESA did not change.

Question 19: In a departure from their long-standing interpretation, the final rule allows the Services to require minimization and mitigation measures as reasonable and prudent measures when authorizing incidental take of species. The relevant statutory authorization (ESA Section 7(b)(4)(C)(ii)) only allows the Services to "minimize" the impact of incidental take. The Services have never interpreted this provision as allowing for mitigation of take. What is the statutory legal authority that allows the Services to now impose "mitigation," including compensatory mitigation that would fully offset all potential impacts or require restoration/protection of habitat, when it is not clearly authorized by the ESA?

Response: The relevant language at ESA section 7(b)(4)(C)(ii) plainly states that reasonable and prudent measures (RPMs) are to include measures that minimize the "impacts" of incidental take, not just incidental take itself. Like measures that avoid or reduce incidental take, offsetting mitigation measures also "minimize" the impacts of incidental take on the species. The ESA,

similarly, does not specify the extent to which impacts are to be minimized. Accordingly, offsets may minimize the impacts of incidental take on the species through measures that counterbalance the loss of individuals taken as a result of the action subject to consultation (e.g., through restoration of habitat anticipated to result in the replacement of the individuals that were taken). The legislative history of the 1982 amendments of the ESA also confirms that Congress did not intend to preclude the Services from specifying offsets as RPMs that minimize the impacts of incidental take.

Question 20: The final rule deletes the regulatory provisions at 50 CFR 402.17. These were added in 2019 to establish when an activity is reasonably certain to occur and what consequences are caused by a proposed action for purposes of determining the effects of an action for consultation. The Services recognize that these criteria are relevant and applicable considerations. Why are the Services removing them from the regulations?

Response: The original intent of §402.17 was to clarify that the "reasonably certain to occur" standard was to apply only to activities caused by the proposed action, but that are outside the proposed action itself. This is captured in the definition of "effects of the action" and future non-Federal activities under "cumulative effects." Section 402.17 also included a sentence that based the "reasonably certain to occur" standard on "clear and substantial information," using the best scientific and commercial data available. The Services removed §402.17 for several reasons. First, removing §402.17 simplified the structural complexity of the "effects of the action" definition. Second, introduction of the phrase "clear and substantial information" created the appearance of a non-statutory additional standard that could be read to conflict with what "best scientific and commercial data available" the Services may consider. Rather than focusing on the "best available" data, the "clear and substantial information" requirement would appear to circumscribe that data to only that which meets those heightened requirements in conflict with the statutory text. Third, when read in combination with the preamble discussions in the 2019 final rule that emphasized a need for a "degree of certitude" in determining effects of the action that are reasonably certain to occur, §402.17 could be construed as narrowing the scope of what constitutes the "best available scientific and commercial data" in a manner that is inconsistent with the text of the ESA. We will also address and expand this issue in forthcoming updates to the Services' Consultation Handbook.

Question 21: The ESA Consultation Handbook that the Services rely on for guidance was last published in 1998. The Services state that they are planning to update the Handbook to provide additional guidance on the ESA section 7 process. What is the timing for the new Handbook and what public review and comment process will be provided?

Response: The Service is actively working on revising the ESA Section 7 Consultation Handbook now that the regulatory revisions have been finalized. We anticipate publishing a Notification of Availability of the draft revised handbook in the Federal Register, with an opportunity for public comment. Prior to publication in the Federal Register, the draft revised

handbook will go to the Office of Management and Budget where the Office of Information and Regulatory Affairs is expected to provide an opportunity for interagency review.

Question 22: Can you please explain how the new ESA Section 4 regulations comply with the Supreme Court's decision in Weyerhaeuser v US FWS?

Response: In the Weyerhaeuser decision, the Supreme Court held that an area is eligible for designation as critical habitat under the ESA only if it is habitat for that species. *Weyerhauser Co. v. U.S. Fish and Wildlife Serv.*, 586 U.S. 9, 19-21 (2018). We recognize the importance of the Supreme Court's ruling in Weyerhaeuser, and we designate critical habitat in a manner consistent with that ruling. Critical habitat is defined in section 3 of the ESA as: (1) the specific areas within the geographical area occupied by the species at the time it is listed on which are found those physical or biological features that are essential to the conservation of the species and that may require special management considerations or protection; and (2) specific areas outside the geographic area occupied by the species at the time it is listed upon a determination by the Secretary that such areas are essential for the conservation of the species (16 U.S.C. 1532(5)).

Both the statutory text of the ESA and the Supreme Court in Weyerhaeuser provide consistent direction that an area must be habitat for the species in order for it to be designated as critical habitat under the ESA. The Weyerhaeuser decision did not address what should or should not qualify as "habitat"; thus, it in no way established any requirements regarding presence of essential features or habitability of the area. The regulation revisions do not alter the need for the Services to make the statutorily required finding that an unoccupied area is essential for the conservation of the listed species to designate it as critical habitat and comply with the Supreme Court's ruling that the unoccupied area must also be habitat for the species. Whether an unoccupied area constitutes habitat and is essential for the conservation of a species will be case- and fact-specific and must be based on the best scientific data available for the listed species.

Question 23: In the 2024 final rule, the Services removed the more robust and detailed procedures for the designation of unoccupied areas as critical habitat that had been implemented in 2019. That 2019 final rule provided important standards detailing when property could be designated as critical habitat because it is essential to the conservation of species that do not currently occur on those lands or waters. How do the Services intend to designate unoccupied critical habitat going forward given their prior difficulties applying the relevant ESA statutory criteria and when there is no agreed upon regulatory definition of what is "habitat" for a species?

Response: The U.S. Fish and Wildlife Service and National Marine Fisheries Service (Services) have consistently designated critical habitat pursuant to the statutory and regulatory criteria absent a regulatory definition of "habitat." The Supreme Court's ruling in Weyerhaeuser did not require promulgation of a definition of "habitat" and did not address what should or should not

qualify as "habitat." Thus, it in no way established any requirements regarding presence of essential features or habitability of the area. . In order to encompass the diverse taxa under the Services' jurisdiction as well as both prongs of the statutory definition of "critical habitat" (i.e., occupied and unoccupied critical habitat), the regulatory definition of f habitat in the 2019 regulations was broad and generic. After reconsidering this regulatory definition, we determined that a generic definition of the general term "habitat" would not facilitate or provide any meaningful value to the process of designating critical habitat. Any similar definition could also not serve to indicate with any precision or certainty whether any particular unoccupied area qualifies as habitat for a given species. Such a determination requires application of the best available science with respect to the particular species. Therefore, we find that application of the best available data regarding a listed species' habitats and adhering to the statutory and regulatory requirements, as well as being guided by case law, is the best path to fulfilling our statutory responsibilities to designate critical habitat under the ESA.

As described in the 2024 final rule, the 2019 regulations imposed requirements that go beyond the statutory standards requiring a science-based finding that an unoccupied area is "essential for the conservation" of the listed species. We recognize that some consider these now-removed criteria to have provided the Service with reasonable guidance for determining whether certain areas qualify as being "essential for conservation"; however, we have not found that to be the case. We find that the criteria could undermine our duty to designate areas that otherwise meet the definition of critical habitat and are essential to support the conservation of the species. In addition, instead of providing a useful interpretation of the ESA, those criteria created the perception that, rather than abide by the statutory requirement to base critical habitat designations on the best scientific data available, the Service would need to provide some heightened level of certainty with respect to those data and the areas being designated. Imposing a "reasonable certainty" standard is also unnecessary in light of the best-available-data standard of the ESA, because this standard already prohibits the Service from basing their decisions on speculation. Further, when we revised this regulation in 2019, we confounded the criteria for defining occupied and unoccupied critical habitat by requiring a standard for unoccupied areas that the statute clearly did not include, and thereby eroded the clear statutory distinction between those two types of areas (i.e., occupied and unoccupied areas at the time of listing). The 2024 revisions realign our regulations with the statutory standards for defining and designating unoccupied critical habitat.

Question 24: The courts have said that it is the five criteria in ESA Section 4(a)(l) that dictate the status of the species and whether it should be listed, delisted, or downlisted. The courts have also said that recovery plans and recovery criteria are not binding and do not have to be satisfied before a species is delisted. The final rule adds a "recovery" component to delisting/downlisting considerations. Can you explain how the Services intend to apply this new standard given that it seems contrary to the statute and case law?

Response: Recovering endangered and threatened species is one of the primary goals of the

ESA, and a recovered status (i.e., when a species no longer meets the definition of an endangered or a threatened species) is a valid circumstance in which a species should be delisted. Thus, we find that including recovery as an express example of when delisting is warranted is not only appropriate but entirely consistent with the ESA. Including the specific reference to recovery has both purpose and meaning. The regulations are consistent with the ESA and existing case law, and in no way requires that recovery plan criteria be satisfied before the species may be delisted. The regulations also explicitly link the concept of recovery to the ESA's definitions of endangered species and threatened species, the section 4(a)(1) factors in the ESA, and the requirement to base the status review on the best scientific and commercial data.