IN THE UNITED STATES COURT
FOR THE DISTRICT OF COLUMBIA

CONSERVATION FORCE, et al., Plaintiffs, v. KEN SALAZAR, et al. Defendants.	**Case No. 1:10-cv-1262 (BJR)** **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT (CONSERVATION FORCE/ MARKHOR II)**

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiffs – Conservation Force, et al. – respectfully move for summary judgment on the claims remaining in this action. For the reasons set out in Plaintiffs' memorandum of points and authorities, Plaintiffs are entitled to a judgment setting aside the denials of the individual Plaintiffs' applications for permits to import their straight-horned markhor trophies into the United States, because said denials violated the Endangered Species Act; were arbitrary, capricious, and an abuse of discretion; and were issued without observance of procedures required by law. Plaintiffs also request that this Court's judgment order Defendants to either grant the permits at issue or reconsider the applications therefore in accordance with law and proper procedure, award Plaintiffs their costs of litigation and reasonable attorneys' fees, and grant Plaintiffs any equitable or other relief the Court deems just and proper.

Pursuant to LCvR 7(f), Plaintiffs further request an oral hearing on both this motion for summary judgment and the cross-motion for summary judgment scheduled to be filed by Defendants.

Respectfully Submitted,

/s/

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PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SUMMARY JUDGMENT

INTRODUCTION

The primary purpose of the permit applications at issue in this case is the conservation of Torghar markhor, the entire ecosystem of the Torghar Hills, and ultimately all threatened ecosystems that could benefit from a community-based sustainable use program like the TCP. This litigation arises from the DMA's refusal to give any measure of fair, reasoned consideration to the legitimate enhancement purposes asserted by Plaintiffs, despite a wealth of information, sound reasoning, and even prior FWS findings that support the enhancement value of the TCP and the importation of these trophies.

The remaining claims in this case challenge Defendants' denial of Plaintiffs' ESA permit applications to import their straight-horned markhor trophies into the U.S.. The Division of Management Authority (DMA), a division of the U.S. Fish and Wildlife Service's Office of International Affairs, determined there was not sufficient information to support a finding that

importing the trophies would likely enhance the propagation or survival of straight-horned markhor in Pakistan's Torghar Hills (Torghar markhor), and therefore that the Plaintiffs were not eligible for permits under the Endangered Species Act (ESA). In actuality, however, the DMA never seriously considered granting the permits because it did not consider the available information and did not request any additional information from the applicants.

The DMA was legally obligated to give fair consideration to Plaintiffs' assertion that issuing import permits for the trophies at issue would not only directly and indirectly lead to positive conservation benefits for Torghar markhor through increased revenue and support for the Torghar Conservation Project (TCP), but also for the entire subspecies and other endangered wildlife by creating an incentive for other communities to develop similar sustainable use programs. Instead, the DMA took every opportunity to avoid making any finding that might result in issuing the permits. Moreover, the DMA went further by making findings that directly contradict both its own prior findings as well as contemporaneous findings of the Division of Scientific Authority (DSA) without explanation.

When considering the permit applications, the DMA chose not to consider many sources of relevant facts and information that were readily available to it, ignoring in the process much of the best available scientific and economic data, as well as all of its own previous analyses and findings on the very same topic. Even within the relatively self-limited scope of facts and information considered by the DMA, there was still sufficient information to show that allowing the import of Plaintiffs' trophies would likely enhance the propagation and survival of the species. Rather than address the means of enhancement actually supported by the record, however, the DMA ignored these factors and contented itself with unsupported findings and conclusions that were irrelevant, illogical, or simply unsupported by the information. Had it

fairly and reasonably evaluated these applications and available information, the DMA should have found enhancement and granted the permits. The DMA's action violated both the APA and ESA.

PROCEDURAL HISTORY

Plaintiffs filed this action (*Conservation Force II*) on July 26, 2010, ECF 1, challenging the denial of the plaintiffs' permit applications, an action taken by Defendants only after Plaintiffs filed suit (*Conservation Force I*) to compel processing. Defendants responded with their first Motion to Dismiss, ECF 9. Ultimately, this Court issued an order "granting in part and denying in part Defendants' motion to dismiss Conservation Force II." ECF 16. In that order, the Court held that:

> The 16 U.S.C. § 1537(b) allegations contained in Claims I and IV are not subject to judicial review under 16 U.S.C. § 1540(g)(1)(A) or the APA and are DISMISSED. **Plaintiffs' allegations in Claims I and IV that the FWS arbitrarily and capriciously denied the import trophy permits remain.** Claim II is DISMISSED due to lack of subject-matter jurisdiction. Claim III is DISMISSED for failure to state a claim upon which relief can be granted;

Id. at 28. Emphasis added.

Defendants filed the Administrative Record (AR), and Plaintiffs filed a Motion for Limited Discovery because of the unexplained absence of a great deal of available information in the Administrative Record. ECF 21. The Court denied this motion on February 6, 2012, treating it as a motion to supplement the record as well as a motion for discovery. ECF No. 25. On the issue of supplementing the record, this Court explained that in an action challenging an agency decision, a court must "review the whole record," which is made up of "'all documents and materials that the agency directly or indirectly considered . . . and nothing more nor less.'" *Id.* at 3-4 (quoting *Maritel, Inc. v. Collins*, 422 F. Supp. 2d 188, 196 (D.D.C. 2006)). The Court reasoned that Plaintiffs failed to prove anything outside the Administrative Record produced was

"something that the decisionmaker 'directly or indirectly considered' in reaching its decision," and that the absence of information available to Defendants was an issue more relevant to the merits. *Id*. at 9.

STATEMENT OF FACTS

In addition to the four permit applicants and Sardar Naseer Tareen, a founder of the TCP and current head of the Society for Torghar Environmental Project (STEP), Plaintiffs are primarily non-profit conservation organizations. All Plaintiffs are deeply committed to the recovery and perpetuation of Torghar markhor, which is also a goal and purpose of the ESA.

The Torghar Hills population of straight-horned markhor (endangered listed) has increased substantially and steadily over more than 30 years: from less than 100 in 1980 to 700 in 1994; 1,300 in 1997; 1,600 in 2000; 2,541 in 2005; and 3,158 in 2008. AR 36 p. 505; AR 47 p. 698; 76 FR 31903 (June 2, 2011). It has become the largest markhor population of any kind in the world, AR 36 p. 500, and this remarkable recovery is solely attributed to the Torghar Conservation Project now run by STEP. AR 47 p. 695. The TCP's community-based conservation hunting strategy, a form of sustainable use, is the most celebrated and recognized development in the conservation world. Despite its success, revenue for conservation is artificially low because Americans are currently unable to import markhor trophies hunted through the TCP. The FWS has acknowledged that Americans are unwilling to pay "full price" or as much as they would if they could bring their trophies home. Moreover, hunts for less desirable subspecies of markhor, trophies of which were recently permitted into the U.S., are selling for three or more times the going price before the FWS granted the first import permit. Exhibit A p. 1 ("The price rose from $45,000 to $150,000").

The purpose of the TCP's science-based program is not hunting, but rather the conservation of the Torghar markhor, its habitat, and the other species inhabiting the Torghar Hills. AR 14 pp. 227, 230-32. The sale of trophy hunting licenses provides significant economic benefits to the local community, which incentivizes the local population to embrace wildlife and habitat conservation. AR 36 pp. 523-45. This revenue also funds the employment of local tribesmen as game guards and a range of other efforts to conserve habitat and other wildlife. 64 FR at 51500; AR 36 pp. 494-502. TCP game guards have virtually eliminated unauthorized hunting in the project area. AR 49 p. 711. The program is entirely self-sufficient, depending solely on revenues derived from trophy hunting fees from international hunters. 64 FR at 51500.

The FWS has long recognized the substantial enhancement value of the TCP, having been a collaborative partner in its planning and inception. AR 4, p. 68; AR 8, p. 151; AR 49, p. 711. Moreover, the FWS has continued to support the TCP through grants and other active assistance. *See* AR 49, p. 505. The FWS has also put this support into words, most recently in an August 18, 2003 Federal Register Notice, which found the TCP's trophy hunting-based program was "successful" and had "significantly enhanced the conservation of local markhor." 68 Fed. Reg. at 49,515 ("Draft Policy") (Aug. 18, 2003). Earlier, when it considered Plaintiff Tareen's 1999 petition to downlist the straight-horned markhor, AR 14, the FWS issued a 90-day finding that similarly recognized the TCP's successful propagation of the Torghar population and protection of its habitat. AR 36, p. 505. The FWS relied on these successes as "substantial information" that the population may no longer be in danger of extinction. *Id*.; *see also* 16 U.S.C. §1532(6)(defining "endangered species"). Although these two FWS documents reveal indecision as to the most appropriate way to support and promote the TCP, with one looking to downlist the population and the other proposing instead to issue import permits on a case-by-case

basis, they both demonstrate a continued interest is supporting the TCP and willingness to encourage participation by U.S. hunters. In fact, the 2003 Draft Policy acknowledged that issuing import permits would both enhance conservation of Torghar markhor and incentivize other communities to recover their subspecies, 68 FR at 49515.

The first application for a TCP markhor import permit was submitted by Kenneth Heiber, PRT 007657, who is not a Plaintiff. *See* Exhibits B, C.[1] The second applicant was Plaintiff Hornady, who applied December 19, 2003, in reliance on the Draft Policy. Plaintiffs Barbara and Alan Sackman took their markhor in 2008 and filed their applications on June 10, 2009. Plaintiff Brenner took his in March, 2009 and filed his application June 10, 2009. No action was taken on these permits until after Plaintiffs filed suit in *Conservation Force I* to compel a decision.

The DSA (DSA) formulated a "non-detriment advice" for Plaintiff Hornady, individually, and the other Plaintiff-applicants, together, which found neither the imports nor the underlying hunts would be detrimental to the survival of straight-horned markhor. AR 47, 48.[2] The DMA simultaneously denied all four applications in response to *Conservation Force I.* The DMA issued one "Enhancement Determination" for all four permits, AR 49, and sent denial letters, AR 56-59, stating the same reasons for each denial. None of the DMA documents address individual considerations unique to particular applicants, such as the year of take, population numbers at the time of take, or differing financial contributions by the applicants. *Id.* Notably, the Enhancement Determination is not signed by anyone, let alone a DMA official with the proper delegation of authority to deny an ESA import permit. Furthermore, the DMA Biologist listed as

[1] Although the significant differences between these applications and Mr. Heiber's are timing-related, the DMA did not consider any information or facts about the Heiber application in this case.

[2] As these two documents are almost identical in substance, AR 47 will be cited to indicate both DSA advices, except any difference in substance will be specifically noted.

the author in the AR index, Mike Carpenter, had previously authored an e-mail stating "[t]here is no rational way that we can make an argument that our denial of permits will conserve the species or benefit the species in any way." ECF 21-1 p. 4.

STATUTORY AND REGULATORY FRAMEWORK

ESA Prohibitions and Permitting

16 U.S.C. § 1539(a)(1) provides that "[t]he Secretary may permit, under such terms and conditions as he shall prescribe . . . any act otherwise prohibited by section 9 for scientific purposes or **to enhance the propagation or survival of the affected species.**" Emphasis added. For each permit application submitted under § 1539, the Secretary must "publish notice in the Federal Register." Furthermore, "[e]ach notice shall invite the submission from interested parties, within thirty days after the date of the notice, [of] written data, views, or arguments with respect to the application," and any "[i]nformation received by the Secretary as a part of any application shall be available to the public as a matter of public record at every stage of the proceeding." *Id.*

The FWS has also issued regulations to implement that permitting authority. 50 C.F.R. § 13.21 governs the issuance of all permits service-wide, and provides a number of procedural and substantive rules that are relevant to this case. Subsection b provides:

> Upon receipt of a properly executed application for a permit, the Director **shall** issue the appropriate permit unless:
> (1) The applicant has been assessed a civil penalty or convicted of any criminal provision of any statute or regulation relating to the activity for which the application is filed, if such assessment or conviction evidences a lack of responsibility.
> (2) The applicant has failed to disclose material information required, or has made false statements as to any material fact, in connection with his application;
> (3) The applicant has failed to demonstrate a valid justification for the permit and a showing of responsibility;

> (4) The authorization requested potentially threatens a wildlife or plant population, or
> (5) The Director finds through further inquiry or investigation, or otherwise, that the applicant is not qualified.

Id. (emphasis added).

Subsection d allows that "[t]he issuing officer, in making a determination under this subsection, may use any information available that is relevant to the issue," and further requires that such issuing officer "**shall consider all relevant facts or information available**, and may make independent inquiry or investigation to verify information or substantiate qualifications asserted by the applicant." 50 C.F.R. 17.22(d). Emphasis added.

50 C.F.R. § 17.22 specifically implements the FWS's authority under the ESA to permit otherwise prohibited conduct with respect to endangered wildlife. Subsection a(2) sets out the following "issuance criteria" for permits for the enhancement of propagation or survival of endangered wildlife:

> Upon receiving an application completed in accordance with paragraph (a)(1) of this section, the Director **will decide** whether or not a permit should be issued. In making this decision, the Director **shall consider**, in addition to the general criteria in § 13.21(b) of this subchapter, the following factors:
> (i) Whether the purpose for which the permit is required is adequate to justify removing from the wild or otherwise changing the status of the wildlife sought to be covered by the permit;
> (ii) The probable **direct and indirect** effect which issuing the permit would have on the wild populations of the wildlife sought to be covered by the permit;
> (iii) Whether the permit, if issued, would in any way, directly or indirectly, conflict with any known program intended to enhance the survival probabilities of the population from which the wildlife sought to be covered by the permit was or would be removed;
> (iv) 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;
> (v) The opinions or **views of scientists or other persons or organizations having expertise** concerning the wildlife or other matters germane to the application; and

> (vi) Whether the expertise, facilities, or other resources available to the applicant appear adequate to successfully accomplish the objectives stated in the application.
>
> Emphasis added.

FWS Permitting Structure and CITES Permitting Regulations

16 U.S.C § 1537a designates the Secretary of the Interior as "the Management Authority and the Scientific Authority for purposes of the Convention [CITES]" but further provides that "the respective functions of each such Authority shall be carried out through the United States Fish and Wildlife Service." 16 U.S.C. §1537a(a).

50 C.F.R. § 23.6 further explains that "Under Article IX of the Treaty, each Party must designate a Management and Scientific Authority to implement CITES for that country," and that "[i]n the United States, different offices within the FWS have been designated the Scientific Authority and Management Authority." The Scientific Authority (DSA in this case) is responsible for "[p]rovid[ing] scientific advice and recommendations, including advice on biological findings for applications for certain CITES documents, registrations, and export program approvals." *Id.* The Management Authority's duty is to "[r]eview applications for CITES documents and issue or deny them based on findings required by CITES." *Id.* "When offices share activities, the Management Authority is responsible for dealing primarily with management and regulatory issues and the Scientific Authority is responsible for dealing primarily with scientific issues." *Id.*

With regard to import permits for Appendix-I wildlife like straight-horned markhor, the Office of Scientific Authority (OSA or DSA) is "[r]esponsible for formulation of non-detriment/detriment advice." Department of the Interior Department Manual, 142 DM 7(C); *see also* FWS Service Manual, 22 FW 7(C). A finding by the DSA that import of the specimen "is

for purposes that would not be detrimental to the survival of the species" is the only relevant requirement for issuance of an Appendix-I import permit under CITES. 50 C.F.R. §§ 23.35(c), 23.61(a). Pursuant to 50 C.F.R. § 23.61, the DSA is required to consider a number of factors when making a non-detriment/detriment finding, including whether "[b]iological and management information demonstrates that the proposed activity represents sustainable use;" whether "[t]he proposed activity, including the methods used to acquire the specimen, would pose no net harm to the status of the species in the wild;" whether "[t]he proposed activity would not lead to long-term declines that would place the viability of the affected population in question;" and "[i]f the proposed activity does stimulate [additional trade in the species] whether the anticipated increase in trade would lead to the decline of the species." Furthermore, "[w]hen an export quota has been set by the CoP for an Appendix-I species (as in this case), [the DSA] will consider the scientific and management basis of the quota together with the best available biological information when we make our non-detriment finding." *Id.* In this instance, the DSA made a positive finding that the issuance of the permits was not detrimental.

The Administrative Procedure Act (APA)

5 U.S.C. § 702 provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof," although this provision does not:

> (1) [affect] other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) [confer] authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."

"Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of

the final agency action." 5 U.S.C. § 704. Regarding the scope of judicial review under the APA, 5 U.S.C. § 706 provides:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [5 USCS §§ 556 and 557] or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

STANDARD OF REVIEW

Review of Agency Decisions under 5 U.S.C. § 706(2)(A)

A reviewing court "cannot affirm the agency's decision unless the agency has 'examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" *Conservation Force v. Salazar* ("*Wood Bison II*"), No. 10-1057, 2012 U.S. Dist. LEXIS 44297, *18 (D.D.C. March 30, 2012). Furthermore, an agency's decision or action should be set aside if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the

product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Review of Agency Decisions under 5 U.S.C. § 706(2)(D)

Because "in the area of traditional judicial preeminence, that of determining pure questions of law, Congress commanded an exacting judicial scrutiny," this Circuit has stated that "[judicial] review of an agency's procedural compliance with statutory norms is an exacting one." *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1048 (D.C. Cir. 1979). While "courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA," *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (U.S. 1990), "the clear terms of § 706(2)(D) provide that determining whether an agency fulfilled its procedural obligations is a proper subject of searching judicial review, and any agency actions that run afoul of procedural obligations found in statute or established rules are subject to invalidation." *Am. Bankers Ass'n v. NCUA*, 513 F. Supp. 2d 190, 196 (M.D. Pa. 2007).

ARGUMENT

I. The DMA failed to observe legally required procedure by not "consider[ing] all relevant facts or information available" when making its enhancement determination.

"It is an elemental principle of administrative law that agencies are bound to follow their own regulations." *Meister v. United States Dep't of Agric.*, 623 F.3d 363, 371 (6th Cir. 2010) (quoting *Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 545 (6th Cir. 2004)). In the course of processing the permit applications, the DMA blatantly ignored an important procedural requirement: that it consider the full body of relevant, available facts and information. This prejudicial error requires that the denial of the permit applications be set aside.

The regulation at issue is clear; the FWS "**shall** consider all relevant facts or information available." 50 C.F.R. 23(d) (emphasis added). Similarly, this Court has made it clear that the

AR contains "all documents and materials that the agency directly or indirectly considered and nothing more nor less." ESF 25 p. 4 (internal quotation marks and ellipses omitted). Therefore, the FWS did not consider any facts or information not contained in the AR.

A. Defendants have admitted the DMA did not consider relevant, available facts and information.

The DMA has already admitted it did not consider certain sources of facts and information. In a sworn declaration submitted to this Court, ECF No. 23-1, the DMA's Chief, Branch of Permits – Timothy J. Van Norman – acknowledged the DMA did not consider the following documents:

> 1.) Draft Policy for Enhancement-of-Survival Permits for Foreign Species Listed Under the Endangered Species Act, 68 FR 49512 (Aug. 18, 2003) ("Draft Policy").
>
> 2.) October, 25, 2002 grievance letter from John J. Jackson, III to Director Steve Williams and David T. Smith, inquiring about the stalling of the 1999 downlisting petition and the delay in processing markhor import permits. Exhibit C.
>
> 3.) An 8/13/09 e-mail from Mike Carpenter to Tim Van Norman. ECF 21-1 p. 4.
>
> 4.) All public comments to the Draft Policy provided to John J. Jackson, III in response to an October 30, 2003 FOIA request. *See* Exhibit D.
>
> 5.) The DSA Advice regarding permit application PRT 7657 by Kenneth Heiber to import a markhor trophy obtained through a TCP hunt. Exhibit B.
>
> 6.) Any other findings or determinations by the FWS or a subdivision thereof regarding the Heiber permit application (PRT 7657), such as a Section 7 jeopardy determination or an enhancement determination, along with any other sources, documents, and other information considered in connection therewith.
>
> 7.) All public comments on the Heiber permit application.

ECF 23-1 p. 3, ¶ 8; ECF 21 pp. 8-11. With regard to the groups of documents Plaintiffs cannot specifically identify – namely the Heiber application documents and public comments other than the DSA advice – their existence is proven by the fact that the Van Norman declaration denies considering without denying their existence, as it does for several other categories of documents. *Id.*

As there can be no dispute that the above documents were not considered, the only remaining issues are (1) whether they were available to the FWS while the applications were being processed – from December 18, 2004 until October 26, 2009 – and (2) whether they contain any relevant facts or information.

All of these documents were available to the FWS. The Draft Policy; Mike Carpenter e-mail; and agency findings and determinations for the Heiber permit application were all created by the FWS sometime before October 26, 2009. Surely any document created by the FWS was available to it. It also seems self-evident that any document provided by the FWS in response to a FOIA request was available; otherwise, the FWS could not have included it in the response. Similarly, the public comments to the Draft Policy and Heiber permit application must also have been available, for they were submitted directly to the FWS for consideration. Moreover, the availability of documents relied on by the FWS or subdivision when making an official determination is self-evident, for they must have been available for the FWS to review when making these determinations. Last, the Sworn Declaration of John J. Jackson, III, attached herein, proves the grievance letter was successfully transmitted to the Director of the FWS.

Not only were these sources available to the FWS, but they contained relevant facts and information which the DMA should have considered. The Draft Policy is particularly relevant, for it contains specific statements of fact and conclusions by the FWS about the TCP, STEP, and the "enhancement" effect of granting import permits for markhor trophies taken during TCP hunts. Moreover, these statements and conclusions contradict the DMA's reasoning and ultimate conclusion about these permits. As the explained in Section II.B below, the Draft Policy stated established positions of the FWS, which the DMA could not legally reject without a reasoned

explanation. Such information was thus necessarily relevant, and required consideration by the DMA.

Similarly, the e-mail from Mike Carpenter to Tim Van Norman is highly relevant, for it presents Mike Carpenter's evaluation of the applications at issue. The evaluation states: "We are supposed to be using the best available science in making our decisions and yet the decisions on the wood bison and markhor are essentially ignoring the science in favor of ???? There is no rational way that we can make an argument that our denial of permits will conserve the species or benefit the species in any way." Exhibit ECF 21-1 p. 4. The e-mail directly challenges the basis for the FWS's decision and is clearly relevant for this reason alone. Regardless of whether the FWS ultimately decided to accept the evaluation, the FWS had to consider and address this challenge.[3]

Next, many if not all of the public comments to the Draft Policy are relevant to enhancement value of these permits, especially given the DMA's rejection of positions stated in the Draft Policy. Exhibit D provides two particularly relevant examples of these public comments, which not only support the positions rejected by the DMA but also provide information directly opposing the DMA's justification. The letter by Robert Kern, explains that, based on his personal knowledge from working in the business of big game hunting for 17 years, the ability of U.S. residents to import sport-hunted trophies from sustainable use programs leads to otherwise non-existent "extensive conservation efforts." Exhibit D at FOIA p. 59. This occurs because of "the global economic fact that Americans dominate the hunting market," and "are able and willing to pay much higher fees." *Id.* The letter even discusses a specific example of the economic effect of the U.S. hunting market: when the U.S. prohibited importation of

[3] This e-mail also calls the Enhancement Determination into question by showing the person put forth as the author did not agree with its reasoning or result.

Marco Polo Argali trophies from Tajikistan during 1994-96, the market forced "the price of permits down by approximately 30%." *Id.* Furthermore, many of the comments directly address importation of TCP markhor trophies. *See, e.g. Id.* at FOIA p. 150. As shown by these examples, the public comments to the Draft Policy offered the DMA a vast source of additional, relevant information that it should have considered.

Finally, the grievance letter and Heiber permit materials were also relevant, for they provided not only a source of additional facts and information about the TCP and its enhancement value, but also a potential statement of the FWS's position on these permits. Although the DSA advice, at least the unredacted language, does not establish any particular position, this is unsurprising considering the DSA's role is the formulation of scientific determinations about specific situations. However, neither Plaintiffs nor the DMA can be certain the other decisional documents for the Heiber application would not have established a position the DMA could not ignore. Similarly, the grievance letter is relevant to the extent it calls the Heiber application to the FWS attention.

B. The DMA also failed to consider relevant sources cited in the AR.

Another important source of relevant information was clearly ignored by the DMA: sources referenced in the AR but not included therein. While the Van Norman declaration does not discuss them, they were clearly not considered because they are not in the AR, which comprises "all documents and materials that the agency directly or indirectly considered and nothing more nor less." ESF 25 p. 4. If the DMA felt it did not have enough information, it could easily have considered many of the sources referenced in the AR documents.

Rather than embark on an exhaustive discussion of the potentially relevant sources cited, Plaintiffs point to those most obviously relevant and available as prime examples. First, the

DMA absolutely should have considered every source referenced in the DSA's non-detriment advice, particularly considering the extent to which its determination is contradictory. As such, the DMA was required to consider the 2007 TRAFFIC Europe Report on the European Union's import policies for hunting trophies, by Knapp, A.. Exhibit E; AR 47 p. 700. This report was available for the DSA to review, so the DMA should have been able to obtain it from them. This report further contains relevant information, as it is a recent source discussing the TCP, markhor trophy imports therefrom, and the potential benefits and difficulties of permitting importation of these kinds of trophies. Exhibit E. Additionally, it contains information about recent participation in the TCP by European hunters. *Id.*

For the same reasons, the DMA was also required to consider the two other sources cited by the DSA: "Valdez, R. 2008. *Capra falconeri*. In: IUCN 2009. IUCN Red List of Threatened Species. Version 2009.1 <www.iucnredlist.org>." and "WWF-Pakistan. 1995. Projects profile, 1995. World Wide Fund for Nature Pakistan. 10 pp." AR 47 p. 700. In addition, the DMA could have considered several obviously relevant recent sources cited in the documents provided in support of the permit applications. *See* AR 36 pp. 501-02, 543-45 (citing Frisina, M.R., Woodford, M.H. & Awan, G.A.. (2006); Shafique, C.M. (2006); Rosser, A.M., Tareen, N. & Leader-Williams (2005); and Woodford, M.H., Frisina, M.R. & Awan, G.A. (2004)). The topic of all of four sources is Torghar markhor and the TCP, and each is much more recent than any of the sources relied upon by the DMA. The DMA had a responsibility to at least make a reasonable effort to investigate sources that are so directly on point to see if they contained relevant facts or information it had not yet considered.

C. This egregious procedural failure was prejudicial error that also renders the decision arbitrary and capricious.

The substantial amount of additional information the DMA was required to, but did not, consider in making its enhancement determination clearly shows the error was not harmless. Moreover, the error is particularly harmful in this case, as the DMA's ultimate reason for denying permits was "insufficient information." If the DMA truly believed the available information was not sufficient for it to determine whether issuing the permits would enhance the species, it easily could have turned to the sources described above.

In fact, it is irrational to conclude there is insufficient information to support an enhancement finding without considering all the available, relevant information. As this Court recognized in its February 26, 2012 Order, an agency's refusal to consider enough information can rise to the level of arbitrary and capricious action. ECF 25 p. 9. The DMA's failure in this case is, at minimum, arbitrary and capricious, and probably closer to willful ignorance.

II. The Decision to Deny Plaintiffs' Permit Applications was Arbitrary, Capricious, and an Abuse of Discretion.

An agency's decision or action is arbitrary and capricious if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Moreover, the United States Supreme Court has "frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner." *Id.* at 48 (citing *Atchison, T. & S. F. R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 806; *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 249 (1972); *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 443 (1965)).

> Recognizing that policymaking in a complex society must account for uncertainty, however, does not imply that it is sufficient for an agency to merely recite the terms "substantial uncertainty" as a justification for its actions. As previously noted, the agency must explain the evidence which is available, and must offer a "rational connection between the facts found and the choice made."

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 52 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

In this case, the DMA utterly failed to meet to the APA's standard for agency action. Its Enhancement Determination is essentially a farce, asserting irrelevant and illogical findings and reasons as support for its conclusion that it did not have enough information to make a decision while ignoring and not considering most information. In reality, the sources it considered contain more than enough information, if only the DMA had not completely ignored the most significant factors demonstrating enhancement value. To make matters worse, the DMA continually made findings that contradict both the DSA's non-detriment finding and well-established FWS positions. Alone, any of these reasons sufficiently warrant setting aside the agency's action.

A. The DMA failed to address the factors that most strongly support a positive enhancement determination.

The DMA's ultimately determined "there is insufficient information to determine if the issuance of the permits would contribute to the enhancement of the survival or propagation of the species under Section 10 of the ESA." AR 49 p. 715. This conclusion is obviously arbitrary and capricious, for the DMA never considered the most significant means by which issuing the permits will enhance the propagation of straight-horned markhor.

First, the DMA failed to decide whether issuing the permits would contribute indirectly to an increase in the funds generated by the TCP's hunting program, and thereby allow the TCP to expand its conservation efforts. The DMA has admitted that issuing the permits will result in

more U.S. hunters desiring to hunt markhor through the TCP, and that U.S. citizens have historically not accounted for a significant portion of hunters who participate in the TCP. AR No. 49, p. 713. Thus, it is clear that issuing these permits will effectively open the TCP hunting program to the U.S. market.

Because the TCP does not currently fill its allotted portion of the CITES export quota on a regular basis, AR 60 p. 749, the addition of a new source of potential participants will raise the likelihood of the TCP selling a greater percentage of its allotted quota of hunting licenses each year. It is fundamental that raising the demand for a fixed supply will raise the price/revenue and the FWS has always, before, recognized this. Obviously, such a result would lead to an increase in the TCP's overall revenue. While the DMA considers the potential detriment from increased participation in the TCP, which inexplicably contradicted the DSA's non-detriment finding, it does not even recognize the possibility that greater participation would result in increased funding for the TCP. The DMA's assertion that it evaluated "the overall net impact, both direct and indirect, on the markhor by allowing the importation of these sport-hunted trophies" is not even close to accurate.

Additionally, there is strong support for the conclusion that continued, steady interest by U.S. hunters will allow the TCP to charge a significantly higher fee per markhor hunting license without any corresponding drop in participation. The D.C. District has previously recognized the effect U.S. hunters can have on the market price of hunting licenses in a similar situation:

> [T]here is evidence that, when the United States previously banned imports from Tajikistan, the government did not limit sport hunting, and the killing of argali continued by virtue of hunting by non-U.S. citizens and increased poaching. The evidence further reveals that, because U.S. hunters generally pay the highest prices for hunting permits issued by the Tajikistan government, the absence of legal U.S. hunting substantially decreased the permit revenues received by the Tajikistan government. Because permit revenues were used in part for

> conservation and to convince the local population not to poach, the decreased revenues actually resulted in increasing the amount of poaching in the region.

Fund For Animals v. Norton, 295 F. Supp. 2d 1, 8 (D.D.C. July, 31 2003) (internal citations and quotation marks omitted). Moreover, the AR fully supports the fact that hunting prices will rise in a market that includes U.S. hunters. AR 8 p. 106; AR 25 p. 355; AR 27 p. 418 AR 36 p. 499; AR 60 p. 749, 768-69 Thus, issuing the permits would increase the annual revenue for the TCP for the strict quota fixed by CITES and the Pakistan authorities. The DMA again failed to even mention this inherent and widely recognized conservation benefit.

The Administrative Record clearly shows the TCP will use any increase in funding to expand and improve its conservation efforts. The TCP no longer simply funds the game guards that have wholly eliminated poaching; rather, it has branched out to habitat conservation and restoration. AR 8 p. 105; AR 14 p. 225; AR 19 p. 301; AR 36 pp. 499-500, 518, 520-22 In these ways, increasing the TCP's revenue will enhance the propagation and survival of Torghar markhor. Thus, the FWS acted arbitrarily and capriciously by ignoring the potential financial benefits to the TCP that could result from issuing the permits in this case.

The other likely conservation benefit from the permits would be the creation of a perceived incentive for other communities to develop or improve sustainable use programs for straight-horned markhor. Permitting would encourage other communities to trust that U.S. hunters would similarly be allowed to take home trophies from other conservation hunting-based programs, at least if they were as responsibly-managed and successful as the TCP. AR 8 pp. 105, 149; AR 14 pp. 225, 227-28; AR 36 p. 501. The FWS has always recognized this, but the DMA did not explain its contradictory treatment of the applications. *See generally*, Draft Policy, 68 FR 59512.

The DMA did not evaluate the likelihood that either of these "conservation benefits" would result from issuing the permits.

B. The DMA improperly rejected the DSA's expert opinion and, without explanation, its previous findings on the enhancement value of encouraging U.S. citizens to participate in the TCP.

It is well established that an agency abuses its discretion when it "changes course" without offering a reasoned explanation for the change.

> A "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to."

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41-42 (1983).

> Of course, it is axiomatic that agency action must either be consistent with prior action or offer a reasoned basis for its departure from precedent. Yet it is equally axiomatic that an agency is free to change its mind so long as it supplies a reasoned analysis, showing that prior policies and standards are being deliberately changed, not casually ignored.

Nat'l Cable & Telecomms. Ass'n v. FCC, 567 F.3d 659, 667 (D.C. Cir. 2009) (internal quotations marks and citations omitted).

In the 2003 Draft Policy, the FWS established set positions and findings on several important issues in this case. Therefore, to take a position contrary to the 2003 Draft Policy, the DMA should have offered a "reasoned basis" that not only supports the finding, but also explains why the previous agency position or finding is no longer valid.

As a general matter, the 2003 Draft Policy offered a "reasoned basis" for deviating from the DMA's traditional practice of issuing "routine denial[s] of applications for the import of foreign species listed as endangered if the import would cause the killing of any individual in the wild, even in those situations involving a CITES-approved export program or other substantive

conservation program." 68 Fed. Reg. at 49514. It first explains that the previous practice has hindered the U.S.'s ability to effectively promote the conservation of foreign endangered species:

> In some situations, **listing under the ESA may provide few, if any, additional benefits and may complicate the implementation of conservation initiatives under other international authorities**, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).
>
> * * *
>
> Ultimately, the incentives that the United States can employ to encourage conservation activities for foreign species in other countries are limited, and we need to consider the use of every possible means available. In practical terms, **one of the few available means for encouraging the conservation of foreign endangered species is through our decisions about whether to issue import permits.**

Id. at 49513 (emphasis added).

The 2003 Draft Policy further reasons that the current practice is not required by the ESA and actually coincides with the FWS's stated goals:

> Permits can be issued for purposes of scientific research or the enhancement of survival for endangered species . . . . The FWS goal of using the permits program to promote the long-term conservation of animals, plants, and their habitats is outlined in a recent publication, "Leaving a Lasting Legacy" (*http://permits.fws.gov*).
>
> However, **this permitting authority is not being fully used even though it is internationally recognized as one of the most effective conservation tools employed** by CITES and other multilateral international agreements.

Id. at 49513 (emphasis added). The 2003 Draft Policy further explains how the change in practice would address the problem at hand, finding that "[i]mplementing this policy could encourage proactive conservation through the use of 'enhancement of survival' findings to allow for imports that result from programs that significantly advance the conservation of a species within a given range country." *Id.* at 49513.

In support of its finding, the FWS stated:

> The benefits of an innovative conservation program should not be limited solely to species that have already met the standard for reclassification to threatened status. Based on our experience in international conservation efforts, we believe that in some limited situations, the only way for the United States to participate in programs to improve the status of an endangered species is to allow import of specimens, parts, or products from well-regulated taking programs, if the programs are designed to promote conservation of the species in the wild. By making such determinations on a case-by-case basis, we expect that issuance of such permits will facilitate further conservation efforts that could lead to reclassification of a species from endangered to threatened, or off the ESA list completely.

Id. at 49514. Furthermore, it explained:

> We now believe that in some situations we could achieve a greater conservation benefit by providing for the importation of carefully selected foreign endangered species, or threatened species lacking (or in lieu of) a Section 4(d) rule, in exchange for a substantive and comprehensive conservation plan that offsets a limited take and further promotes the conservation of the species within the range country . . . . Such an approach would help us expand the effectiveness of the ESA in meeting the growing habitat protection needs of foreign wildlife. Further, by limiting the scope of such enhancement-of-survival findings to the development and implementation of foreign species management plans by the relevant range country, we can create a real incentive for foreign nations to establish programs that conserve both wildlife and habitat through the use of this approach in the most appropriate and compelling situations.

Id. at 49514-15. Finally, the FWS specifically found that issuing enhancement permits for endangered specimens taken through legitimate sustainable use programs "would provide incentives recognizing and supporting those range countries that have demonstrated significant commitment to implementing conservation programs for endangered species." *Id.* at 49517.

These general findings in the 2003 Draft Policy contrast starkly with the DMA's finding that "there is insufficient evidence that the importation of a sport-hunted trophy from an endangered, wild population would provide the required conservation benefit to the species," and that "it is not clear how a hunting program could benefit a species that meets the criteria for listing as an endangered species under the ESA." AR No. 49, pp. 709, 714. The 2003 Draft Policy clearly establishes one significant way in which allowing the import of trophies taken

through well-managed sustainable use programs can benefit the trophy species. The issuance of import permits acts as "incentives to encourage developing countries to conserve foreign ESA-listed species and their habitats, and to promote in situ conservation efforts by applicants." 68 Fed. Reg. at 49517. The DMA's determination contradicts the FWS's long-established principles of enhancement, but does not offer even the slightest justification for doing so.

Factually, the 2003 Draft Policy finds that the population of Torghar markhor was of "adequate size and condition to sustain a small (1-2% of the population) annual trophy harvest." 68 Fed. Reg. at 49515. Thus, the DMA's "concerns" about increased takings throughout the population are entirely unfounded. The

More significant, the 2003 Draft Policy explicitly states that issuing import permits for Torghar markhor trophies taken through the TCP would create "an incentive to continue and expand the conservation program for this species." *Id.* It even went so far as to conclude that issuing such permits "could provide a significant increase in funds available for conservation and would provide a nexus to encourage continuation and expansion of the project into other areas." *Id.*

The DMA's Enhancement Determination is necessarily at odds with these conclusions. In concluding there was insufficient information to make a decision about the enhancement value of issuing the permits in this case without addressing the 2003 Draft Policy in any way, the DMA necessarily rejected the FWS's previous position on the effect of granting import permits for markhor trophies taken through the TCP. Notably, the DMA did not attempt to distinguish circumstances involved with these permit applications or otherwise explain why the Draft Policy's general conclusions about import permits for TCP-hunted markhor trophies would not apply here. Similarly, the DMA did not provide any reason, let alone a reasoned analysis, for

rejecting the FWS' earlier findings in the 2003 Draft Policy. Rather, the DMA "casually ignored" the FWS's established positions and findings in concluding there was no reason to believe importation of these trophies would enhance the propagation or survival of the species. Thus, the decision based on this conclusion is arbitrary and capricious, and must be set aside.

2. The DMA improperly rejects the scientific conclusions of the DSA's non-detriment advice.

"The Court will reject conclusory assertions of agency 'expertise' where the agency spurns unrebutted expert opinions without itself offering a credible alternative explanation." *Northern Spotted Owl v. Hodel*, 716 F. Supp. 479, 483 (W.D. Wash. 1988) (citing *American Tunaboat Ass'n v. Baldrige*, 738 F.2d 1013, 1016 (9th Cir. 1984)." In this case, the unrebutted expert opinion is the DSA's non-detriment advice. The DSA is the office specifically designated as "[r]esponsible for the formulation of non-detriment/detriment advice." Department of the Interior Department Manual, 142 DM 7. It is therefore an abuse of discretion for the DMA to directly contradict the DSA's non-detriment determination, particularly without recognizing the contradiction and expressly explaining its reasons for not to accepting the DSA's findings and conclusion within its area of scientific expertise.

In this case both the Enhancement Determination and the denial letters improperly contradict the DSA's determination that issuing the permits at issue would not likely be "detrimental to the survival of the species." AR No. 47, p. 699. As discussed more fully in section II(C) below, both documents include findings suggesting a significant possibility that issuing permits will adversely affect the survival of straight-horned markhor. *See* AR 49, 56. The DMA's reasoning also specifically contradicts the DSA's analysis, for the DSA explicitly addresses whether issuing the permits might "encourage the removal of additional straight-horned markhor from the wild," and even considered whether its potential effect on the

sustainability of TCP "harvest levels." AR 47 pp. 698-99. These potential consequences ultimately did not persuade the DSA that issuing the permits would likely be detrimental to the survival of straight-horned markhor as a species. Therefore, the DMA cannot simply reach a different conclusion; even if it had the authority to reject the DSA's expert opinion, the DMA would have to provide a rationale sufficient to indicate the DMA's opinion is equally reliable.

Because the DMA never even attempts to justify its rejection of the DSA's advice, no weight may be given to any DMA finding suggesting that issuing the import permits will be detrimental to straight-horned markhor. This result is further supported by the fact that the denial letters actually recognize that "the Division of Scientific Authority was able to determine that the import is not for purposes that are detrimental to the species, or in this case, subspecies." AR 56 p. 732. The DMA cannot rationally both approve of the DSA's non-detriment finding and simultaneously find that issuing the permits might be detrimental.

C. The FWS's explanation of its decision does not rise to the level of "reasoned analysis" and has no rational connection to or basis in the Administrative Record.

Simply put, the DMA's explanation of its determination makes no sense, particularly when considered against the Administrative Record. The scattershot array of findings and conclusory statements are entirely inadequate attempts to justify a result that has no true basis in fact or sound reasoning. When examined point by point, the reasoning FWS offered in support of their decision clearly shows the permit denials were arbitrary, capricious, and an abuse of discretion.

The Enhancement Determination begins with the conclusion, stating:

> [The individual Plaintiffs'] permits can not [sic] be issued at this time because we are unable to find that the importation of these trophies would enhance the survival or propagation of the straight-horned markhor . . . . In general, the DMA finds that there is insufficient evidence that the importation of a sport-hunted

> trophy from an endangered, wild population would provide the required conservation benefit to the species."

AR No. 49, p. 709. Interestingly, the DMA does not simply find insufficient evidence that importation of sport-hunted trophies would provide a conservation benefit in this case. Rather, its finding applies more generally, apparently stating the FWS's opinion that importation of sport-hunted trophies of endangered species taken from a wild population can never provide a "conservation benefit." Even if the use of this general language was not intended as a statement of any broader policy, it certainly demonstrates the FWS's overarching lack of concern for the facts specific to these applications.

The Enhancement determination continues by setting out its version of the facts related to the "[p]opulation status of markhor (*Capra falconeri*) in Torghar at the time the hunts occurred." Its description of events and circumstances after 1999 is noticeably absent. Though the Administrative Record contains at least two sources of post-1999 information about the status of Torghar markhor, including the DSA's non-detriment finding at AR No. 47, p. 698, the FWS failed to even mention the existence of such information, let alone provide a reason for not accepting it as fact. For example, the DSA found that by 2005 the number of Torghar markhor had reached approximately 2,500, which is almost double the latest population estimate noted in the DMA determination. This information is especially relevant, for the higher population total supports the DSA's conclusion that, even under the most conservative scientific models, the current hunting quota will not adversely affect the continued growth of the population or its genetic diversity. AR No. 47, p. 699 (DSA non-detriment finding that most conservative study says harvesting 1-2% of the total population is safe). Considering the hunts at issue occurred between 2004 and 2009, it was arbitrary and capricious for the DMA to use the earlier status of the markhor without even addressing the most recent information it considered. In fact, no

distinction was made between the 2004 and 2009 hunts because the applications were not individually considered – an error in itself.

Similarly, the DMA determination section labeled "[m]anagement program at the time of harvest" inexplicably fails to address any information about TCP after 1999, even though the FWS claims it considered at least three sources with more current information. *See* AR 36, 47. Such information was clearly relevant, showing, for example, that the TCP took on additional conservation efforts during this time, primarily concerning habitat preservation and improvement. *Id*. In its Enhancement Determination, the FWS simply ignores the existence of this information, failing to accept or reject it, let alone give reasons for doing so.

The DMA admits that sport-hunting of markhor in Pakistan has the effect of "establishing a sustainable offtake and encouraging native communities to participate in the management of the species." *Id.* It even acknowledges the TCP as a successful conservation program that has "provided benefits to the species in the Torghar region and that, by all accounts, the markhor population has increased over the past 30 years." *Id.*

It then makes a contrary determination. Thus, the FWS's first analytical conclusion is entirely arbitrary, for it fails to address the factor at issue. Whereas the first factor contemplates an evaluation of the purpose for which the permit is required, the FWS proceeds directly to a determination of whether that purpose is likely to be achieved, an issue obviously included in the second factor, the "direct and indirect effect" on the species likely result from issuing the permits. 50 C.F.R. § 17.22(a)(2)(ii).

At the very least, the FWS's analysis of the first factor should have determined whether enhancement of the propagation or survival of the species justifies allowing the import of the

trophies at issue. While the FWS admittedly has discretion to interpret the requirements of its own regulations, it cannot completely ignore the plain meaning of the text.

The only part of the analysis that even approaches the relevant issue is the last sentence, which declares in a conclusory manner, "in the case of these trophy import applications, this office has determined that the purpose for which the permit is required is not adequate to justify removing these specimens from the wild." AR No. 49, p. 713. Without reaching the absence of any factual basis for the conclusion, this statement clearly cannot be afforded any merit because it fails to recognize that removing the specimens from the wild has no part in these applications. Not only is the taking of foreign endangered species not prohibited by the ESA, but the individual Plaintiffs had already removed these specimens from the wild by the time the DMA reached its decision. Essentially, the FWS made a finding on the issue of whether the purpose of a permit justifies doing something that has already happened, which is nonsensical and therefore arbitrary, capricious, or an abuse of discretion.

The rest of the DMA's discussion of the first criterion is entirely irrelevant to the question supposedly being considered: whether the purpose at issue, enhancing the conservation of the species, justifies allowing importation of the trophies at issue. Equally, the findings made do not support the DMA's overall decision that there is insufficient evidence that importing the trophies at issue will enhance markhor conservation.

The Enhancement Determination finds that "it is unclear if the limited participation by U.S. hunters has or would contribute to [the population] increase [in the Torghar region]," and that "[i]t is certainly not possible to say that 'but for the participation of these U.S. hunters, the TCP would fail.'" *Id.* at p. 712. These reasons do not withstand even the most basic scrutiny. Past "limited participation" in the TCP by U.S. hunters clearly does not support the DMA's

conclusion of insufficient evidence regarding enhancement. Past U.S. participation is not a reliable indication of likely future participation if U.S. hunters could reasonably expect the U.S. to allow them to bring their trophies home. In fact, removing this deterrent to participation of U.S. citizens in the TCP is one of the primary ways that granting Plaintiffs' permits would enhance the propagation and survival of the species. The likelihood of markhor conservation benefitting from limited participation by U.S. hunters in the future has no bearing on enhancement value of granting the import permits. As a purpose of granting the permits would be to encourage greater participation by U.S. citizens, this finding actually adds support to Plaintiffs' position. If the DMA is not sure that the current level of TCP participation by U.S. hunters will help increase the population, it should encourage greater participation by issuing import permits to the hunters who have already participated.

Similarly, the issue of whether the current level of U.S. hunters participating in the TCP is necessary to sustain the TCP does not affect the likely enhancement value of granting the permits at issue. Because the FWS has never issued a permit to import a Torghar markhor trophy taken during a TCP hunt, any past participation is clearly not contingent on the added encouragement created by a history of such permits being issued. At best, this finding addresses a straw man, namely the possibility that granting the permits could enhance the survival of the species by helping to prevent the TCP from failing, which even the FWS agrees would threaten the species' survival to some extent. Realistically, the purpose of issuing permits would be both to maintain the current level of participation by U.S. hunters and also to increase it to increase the revenue.

Furthermore, none of these reasons are relevant to the other avowed purposes of granting the permits: increasing revenue for conservation by raising the market value of each hunt and

encouraging development of similar programs in other regions. For the same reasons discussed above, the DMA reasons have no bearing on whether granting the permits will promote the development of new conservation programs and the improvement of existing ones by demonstrating that the U.S. will facilitate its citizens' participation in properly managed, effective sustainable use programs.

Additionally, the history of limited U.S. participation has no relevancy on whether issuing the permits, by increasing U.S. hunters' confidence in the likelihood of bringing their trophies home, will make U.S. hunters willing to pay more to hunt markhor through the TCP, consequently drive up the market value of TCP hunting licenses, and ultimately result in greater revenue for the TCP to put towards conserving the markhor and their habitat. The same reasoning applies to the finding that past U.S. participation has not been essential to the TCP's survival; this does not contradict the anticipated increase in conservation revenue resulting from issuance of the permits. To the extent the FWS's statement can be taken as a prediction that continued limited participation by U.S. hunters will not contribute to future increases in markhor population totals, it offers no factual support or other reason for inferring that continued limited participation by U.S. hunters will somehow prevent the anticipated increase in market value of the hunts once the permits are granted.

The DMA Enhancement Determination also finds that "[w]hile it appears that the TCP is still functioning, concerns that the instability of the Torghar regions of Pakistan could lead to the collapse of the program or a denegation [sic] of the program's effectiveness." AR No. 49, p. 712. Initially, to whatever extent this finding supports the DMA's negative enhancement determination, it is completely without factual support and contrary to the DSA non-detriment advice. The FWS offers no citation or other facts to explain or support both the alleged concern

about "instability" in the Torghar Hills or the resulting inference that such instability could adversely affect the TCP. Furthermore, nothing in the administrative record indicates the Torghar Hills are in danger of experiencing any sort of "instability" that would threaten the continued effectiveness of the TCP. Such was not relevant to the particular permits in the past, 2004 and 2009, and only emphasizes the need for the increase in revenue from U.S. hunter participation.

Even if the DMA's instability concerns had a legitimate factual basis, they do not actually support the DMA's decision. The possibility of the TCP failing or losing effectiveness does not eliminate the possibility that granting the permits at issue will enhance markhor conservation or survival. Assuming the future failure of the TCP as a result of regional instability, this finding does not rule out the possibility of conservation benefits from increased TCP participation and revenue accruing before said failure. Moreover, with greater U.S. participation and increased revenue, the TCP may even be able to endure any challenges created by regional instability. If the FWS's instability concerns were rational, this concern actually raises another potential reason why issuing the permits would enhance the species' survival.

Next, the Enhancement Determination states "[I]t is not clear what impact authorizing the importation of these trophies would have on the future management of the species and whether the TCP would have the authority or capacity to manage the increase demand by U.S. hunters for this species." AR No. 49, p. 712. First, this statement is based on the underlying premise that granting the permits at issue will create "increase[d] demand by U.S. hunters for this species," and thereby confirms one of the most basic underlying premises supporting all three enhancement purposes: that granting these four permits will generally improve U.S. hunters' confidence in their own ability to import a markhor trophy taken through the TCP. From this

premise, however, the DMA "questions" whether STEP and the TCP would have the "authority or capacity" to adequately deal with U.S. hunters' increased interest in the TCP.

Although this concern is very vague, it appears the DMA is concerned that granting the permits will somehow prevent the TCP from continuing to responsibly manage the hunting program after three decades of success. While Plaintiffs recognize that such a consequence would clearly be relevant to the enhancement value of issuing these permits, there is no rational basis given for finding any significant possibility that increased desire by U.S. hunters to hunt markhor in the TCP will cause STEP to begin managing the species in a detrimental manner. It also contradicts the DSA non-detriment advice. This anticipated increase in interest from U.S. hunters is entirely based on U.S. hunters' understanding that they will be able to obtain permits to import the trophies of the markhor they take. Therefore, these newly interested hunters will only be interested in hunting TCP markhor as long as the TCP is managed sustainably and continues to promote the conservation of the local wildlife. Otherwise, the FWS would not be able permit importation of their trophies under either CITES or the ESA. Based on the very nature of the demand contemplated by the FWS, its concerns are entirely irrational. Future permits are issued and even noticed in the Federal Register before issuance, on a permit-by-permit basis.

Furthermore, the DMA's finding is wholly irrational to the extent it relies on the premise that granting these permits would lead to hunters taking Torghar markhor without official permission from the TCP. First, because the greater prospects for importing trophies is the only cause of the increased interest, there is very little chance that a newly interested hunter would be willing to take a Torghar markhor in a manner that would so clearly eliminate any chance she could bring the trophy back to the U.S.. Even if the FWS could legitimately anticipate that

granting these permits might somehow encourage some hunters to poach Torghar markhor, the record and history clearly shows that the TCP is fully capable of effectively preventing poaching. Even in its Enhancement Determination, the DMA contradictorily recognizes that the TCP has been able to effect "a complete cessation of uncontrolled, unlimited hunting" in the protected area for approximately thirty years. AR No. 49, p. 710. Considering this history of success, the DMA may not rationally find any significant likelihood that the TCP will suddenly be unable to prevent unlicensed hunting without providing evidence demonstrating how or why the TCP's success would not continue.

The second issuance criterion is "the probable direct and indirect effect which issuing the permit would have on the wild populations of the wildlife sought to be covered by the permit." 50 C.F.R. § 17.22(a)(2)(ii). The DMA conclusions are neither rational nor supported by the facts concerning the criteria.

The analysis of the second criterion begins by formally finding that issuing the permits will likely cause more U.S. hunters to become interested in participating in the TCP. AR No. 49, p. 713. From there, the DMA infers that "one probable direct effect of issuing these permits would be the increase in lethal take of specimens from wild populations through sport-hunting activities by U.S. hunters." *Id*. This is not rational because the harvest quota remains the same.

From this, the DMA inexplicably proceeds directly to an evaluation the impact of an increased rate of total takings from the Torghar population of markhor, finding "[i]t is not clear what impact the anticipated increase in takes would have on the population [of Torghar markhor]." AR No. 49, p. 713. The FWS's evaluation treats the possibility of increased total takes as if it were a necessary result of more U.S. hunters participating in the TCP. *Id.* The FWS apparently failed to recognize the possibility that more U.S. hunters could take Torghar markhor

without increasing the rate of takings overall. The DMA did not give any justification for finding this outcome to be more likely than not.

The DMA's analysis of this possible consequence is both improper and without rational basis, at least to the extent it suggests the increase in takes would be a detriment to the survival of the sub-species. Interestingly, the denial letters go further, stating that "given the status of the subspecies, we are concerned that an increase in demand could lead to an unsustainable increase in offtake." AR No. 56 p. 733. As a preliminary matter, this unsupported change in position contrary to the DSA finding of non-detriment reveals the arbitrary and capricious nature of the DMA's decision. Curiously, the denial letters were created the day after the DMA Enhancement Determination.

Additionally, the Administrative Record is replete with facts and information demonstrating that greater interest in hunting the markhor will not cause the level of taking to become unsustainable. First, there are an abundance of legal and organizational factors that will prevent the TCP from allowing hunters to take markhor at levels above the portion of the CITES quota allotted to the TCP. AR 8 p. 11, 127-28, 147-48; AR 25 p. 359 ; AR 60 p. 758-60, 763-62. Thus, the FWS cannot rationally conclude that increased U.S. interest in hunting Torghar markhor will cause the TCP to allow hunters to take more than the portion of the CITES quota allotted to the TCP by the Pakistani government.

Thus, the only feasible scenario in which issuance of these permits lead to increased takings of Torghar markhor would simply involve the TCP consistently being able to sell hunting licenses equal to its allotted portion of the CITES quota. Under these circumstances, the DMA has no rational basis for concern about an "unsustainable increase in offtake." There is no basis for the FWS to believe this TCP yearly quota will ever exceed 1-2% of the total population of

Torghar markhor, and every source in the Administrative Record that discusses sustainable take levels agrees this level of taking will not adversely affect the population in terms of either size or genetic diversity. AR 47. (One percent would be 25 but the quota is only 3 per year.) The FWS's suggestion that issuing the permits would result in over-hunting is so contrary to the facts and accepted biological science that it is grossly irrational.

In the denial letters, the DMA makes another, related finding that "one probable direct effect of issuing a permit would be the increase [sic] pressure on the Pakistani government to authorize the lethal take of this endangered subspecies from wild populations in Pakistan through sport-hunting activities by U.S. hunters." AR 56, et al. Not only is the statement itself entirely unsupported, it is also completely irrational. The Pakistani government already authorizes U.S. hunters to hunt straight-horned markhor through the various officially recognized community-based sustainable use programs. Each of the individual Plaintiffs' import permit applications contains documentation proving the Pakistani government authorized them to hunt Torghar markhor. AR Nos. 28, 36, 37, 38. Therefore, it does not make sense to find that anything might create pressure on the Pakistani government to do something it already does. Moreover, the Administrative Record clearly demonstrates that the Pakistani government only authorizes hunting of straight-horned markhor within the quota set by CITES. See AR 47.

The Enhancement Determination analysis also includes a minimal discussion of the potential financial effects of granting the permits, which primarily consists of the DMA's finding that "the issuance or denial of these import permits would not have a direct financial effect on management program [sic] for the species." AR No. 49, p. 713. In support of this finding, the DMA states that "U.S. hunters, through the hunting program, do not appear to have contributed significantly to the TCP markhor program (the Service is unaware if individual hunters have

contributed significantly to the TCP markhor program without conducting hunts)." *Id*. To the contrary, the DMA did not consider the applications individually or request additional information from the applicants. Moreover, the DMA's decision to address only the possible direct financial effects was arbitrary at best. U.S. hunters' past financial contributions to the TCP clearly do not have any bearing on the enhancement value of issuing these permits, except to highlight the potential increases in funding for the TCP's conservation efforts. Similarly, the DMA categorically refused to consider whether granting the permits might have indirect financial effects that would enhance the propagation or survival of the markhor.

In analyzing the second criterion, the DMA should have carefully examined the facts and information before it and considered whether that information supported the assertion that issuing these permits were likely to either result in greater funding for expanded and improved conservation efforts by the TCP or create a significant incentive for other communities to improve or establish sustainable use programs using the TCP as a model. Instead, the DMA did not discuss any specific information in the Administrative Record but simply decides "there is insufficient information to demonstrate that issuance of these permits . . . provides a 'conservation' benefit to the markhor such that these otherwise prohibited activities under the ESA would contribute to bringing the species to the point in [sic] which the ESA's protective measures are not [sic] longer necessary." AR No. 49, p. 713. In light of the wealth of information contained in the Administrative Record, this conclusory statement is wholly unsupported and irrational.

Finally, the DMA firmly established the arbitrary nature of its Enhancement Determination by evaluating "whether the population pressures on the species at the time the hunts occur [sic] were significant enough to warrant lethal take." *Id.* at 713-714. First this

consideration is completely irrelevant to the conduct at issue, the importation of the individual Plaintiffs' trophies under the ESA, or whether it should be permitted for the purpose of enhancing the propagation or survival of the markhor. As important, this issue is obviously a straw man, for population pressures have never been raised as a justification for the TCP's conservation-hunting program. That is not the scientific design of a successful program. There was no legitimate reason for the DMA to discuss this issue.

Another telling example of the DMA's arbitrary and capricious reasoning in the Enhancement Determination occurs in its discussion of the fifth issuance criterion, "the opinions or views of scientists or other persons or organizations having expertise concerning the wildlife or other matters germane to the application." *Id.* at p. 714. In the course of acknowledging that the TCP's hunting program is officially authorized by the Pakistani government, the DMA stated "these specimens were legally taken under Canadian law." *Id.* Since Canadian law clearly has no relevance to the importation of Torghar markhor trophies into the U.S., it appears the DMA confused the two species. Considering the DMA also accidentally sent the individual Plaintiffs versions of the denial letters that included references to "wood bison" instead of "markhor," the DMA's confusion may have stemmed from the fact that, at approximately the same time as it denied the applications in this case, the DMA was also considering somewhat similar import permit applications for trophies of Canadian wood bison. *Wood Bison II*, No. 10-1057, 2012 U.S. Dist. LEXIS 44297, at *7-8, (noting that in 2009, the FWS denied four applications to import sport-hunted trophies of Canadian wood bison in response to litigation by the applicants and Plaintiff Conservation Force); *see also* Mike Carpenter e-mail (discussing both the Wood Bison and Markhor permit applications).

This confusion may explain, without excusing, some of the irrelevant analysis in the Enhancement determination. The discussion of population pressures would certainly make more sense in the context of the Wood Bison permit applications, as those hunting programs were partially justified for reasons of population control. *Wood Bison II*, at *16-17, 20. Notably, the DMA also found, with respect to the wood bison permits, that "no information demonstrating that population pressures on [those] ecosystems 'cannot otherwise be relieved.'" *Id.* at * 32 (finding this aspect of the DMA's reasoning "went askew"). Confusion between the two sets of applications may also be why the DMA refers to "management" goals, plans, and programs throughout the Enhancement Determination, when "conservation" or "recovery" would be a more appropriate description of the efforts regarding the markhor.

Finally, this confusion seems to inform the DMA's discussion of its historical position on hunting programs during its analysis of the fifth criterion:

> The Service has repeatedly stated that well-managed hunting programs, for species that can withstand controlled off-takes, have a role in the management of wildlife. However, it is not clear how a hunting program could benefit a species that meets the criteria for listing as an endangered species under the ESA.

AR No. 49, p. 714. Whether or not these statements were meant to address the concurrent wood bison applications, they demonstrate that the DMA was not sufficiently able, or willing, to understand and address the issues relevant to the permit applications in this case. It could not be clearer that the scientifically based conservation hunting strategy has succeeded for those decades and the infusion of more revenue would directly and indirectly further the program.

CONCLUSION

There can be no dispute that the science-based "conservation hunting" in the TCP is a "powerful conservation tool" that enhances the survival of the Torghar markhor as a population.

The FWS helped formulate and initiate the project from its inception and had continued to support the TCP over its 30-year history, at least until the DMA made its Enhancement Determination for these permit applications. Every document reviewing the TCP recognizes it has substantially benefitted the population, even the DMA's enhancement determination. Without more, supporting and encouraging the TCP's ongoing role in conserving Torghar Markhor is a purpose that is likely to enhance the propagation or survival of straight-horned markhor. However, the DMA summarily disregarded this fundamental, conservation-related purpose.

Further, there is no doubt that importation of the trophies at issue would provide additional conservation benefits to straight-horned markhor and other endangered species. Doing so will open up the U.S. market and likely allow the TCP to maximize its revenue by selling hunting licenses at their full market value, and possibly even selling out its allotted quota more often. The TCP can then use its increased revenue to further improve and expand its conservation efforts. As seen by the number of communities that have already expressed interest in developing programs modeled after the TCP, granting these permits will also create an even greater incentive for other communities to follow this renowned example of how to set up and successfully manage a community-based sustainable use conservation program. For decades, these conservation benefits have been widely understood by the conservation community, as well as the FWS. The DMA did not even recognize these benefits as possible effects of issuing the permits. Worse, by denying these permits, the DMA continues to deprive the Torghar markhor and other foreign wildlife of the conservation benefits that should have begun to accrue in 1999, at the latest.

Furthermore, the DMA's determination disregards the FWS' previously established positions and findings without explanation, instead making unfounded conclusions based on irrelevant, illogical, and factually incorrect findings. The DMA did not even comply with the permitting procedures required by FWS regulation, for it did not consider a substantial amount of relevant, available facts and information. In short, the DMA utterly failed to "articulate a satisfactory explanation for its action" or make any "rational connection between the facts found and the choice made." *Wood Bison II*, at *18. Its action should therefore be set aside as arbitrary, capricious, irrational and a violation of FWS's own procedures, practices and longstanding principles.

Respectfully submitted this 16th day of May, 2012.

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of May, 2012, I electronically filed the foregoing Opposition to Defendants' Motion to Dismiss Claims II, III, and IV of the First Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) *via* the CM/ECF system, which will send notification of such to the attorneys of record.

/s/

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