January 28, 2013

Public Comments Processing
Attn: FWS-R9-ES-2012-0025
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive
MS 2042-PDM
Arlington, VA 22203

Re: 90-Day Finding on a Petition to List the African Lion Subspecies as Endangered; Docket No. FWS-R9-ES-2012-0025; 450 003 0115

Dear Sir or Madam:

Safari Club International (SCI) submits these comments in response and opposition to the 90-day finding that the listing of the African lion as endangered may be warranted. An endangered listing for the African lion subspecies is far more likely to harm than improve or encourage the species' conservation. For the following six reasons, SCI recommends that the U.S. Fish and Wildlife Service (FWS) issue a 12-month finding that endangered status is not warranted:

1) An endangered listing will do nothing to stop the take of the African lion; it will merely stop importation of lion trophies into the United States. As a result, the take, including illegal poaching of the African lion will continue or, more likely, increase, and only the nationality of the individuals taking the lions will change;
2) It is highly likely that the absence of U.S. hunters will reduce the trophy fees and other revenue associated with African lion hunting, which supports the species' conservation;
3) A listing will violate the FWS's obligation under the Endangered Species Act (ESA), 16 U.S.C. §1537, to encourage foreign conservation efforts, by undermining rather than supporting foreign African lion sustainable use conservation programs;
4) The 90-day finding failed to address the possibility of different listings for the populations within different range countries, despite this listing discretion being a tool within the FWS's listing authority;
5) The 90-day finding made no mention of consideration of a threatened status alternative to endangered status.

6) The issuance of a 90-day "may be warranted" finding and initiation of the 12-month status review prior to the publication of the CITES periodic review deprives the public of a meaningful opportunity to utilize that important scientific information to comment on the 90-day finding;

Safari Club International

Safari Club International ("SCI"), a nonprofit IRC § 501(c)(4) corporation, has approximately 50,000 members worldwide, many of whom have hunted and/or seek to hunt African lions and import African lion trophies into the United States. The conservation benefits generated by SCI members' sustainable use of African lions is at the heart of SCI's missions, which are to protect the freedom to hunt and to promote wildlife conservation worldwide. SCI's purposes include the following:

- To advocate, preserve and protect the rights of all hunters;
- To promote safe, legal and ethical hunting and related activities;
- To engage in advocacy within the limits imposed by law and regulation, to monitor, support, educate or otherwise take positions on local, national and international legislative, executive, judicial or organizational endeavors that foster and support these purposes and objectives; and
- To inform and educate the public concerning hunting and related activities.

SCI members in the United States, through their sustainable use hunting efforts, have helped provide resources and incentives for African lion conservation. An endangered listing of the subspecies would likely put an end to those sustainable use efforts and would bring no benefit to the species. An endangered species listing must be rejected as contrary to the conservation principles of the ESA.

1. An Endangered Listing Will Likely Stop Importation, But Not the Take of the African Lion

Because the African lion is a foreign species, the FWS lacks authority to regulate or control its take. The listing of the species as "endangered" gives the FWS little authority other than to regulate, and most likely prohibit, the importation of species and/or trophies into the United States. As a consequence, the take of African lions will continue and will be governed by the range countries with authority over the lion. The petition that prompted the 90-day finding argues that U.S. hunters constitute the majority of those who seek to hunt African lions. Whether or not this assertion is true, it is essentially irrelevant. The loss of the U.S. hunter from the market will not result in an end or long-term reduction in the take of African lions.

The FWS is well aware of the likelihood that the absence of U.S. hunters will be balanced by an increase in hunters from other countries that will erase any potential decline in take caused by U.S. hunters' inability to import their lions. This was the result prompted by the U.S.'s closure of argali (Marco Polo) sheep importation from Tajikistan in the mid-1990s. Evidence of the consequences of that importation closure helped the FWS and SCI achieve victory, on the basis of lack of standing, against a legal challenge to the FWS's argali trophy importation policy, in the case of *Fund for Animals v. Norton*, 295 F.Supp.2d 1 (D.D.C.2003).

In that case, a 1996 report submitted by A.K. Fedosenko, entitled "The Pamirs Argali in Tadjikistan Population State," demonstrated that in the absence of U.S. hunters, hunters of other nationalities and poachers increased their take of argali. The author identified the numbers of argali taken during 1993, 1994, and 1995 as well as the nationality of the hunters of these animals. According to Fedosenko, during the years

when the U.S. banned importation, the hunters included four individuals from the United States, five from Canada, five from Austria, two from England, two from Germany, two from Mexico, one from Argentina, one from Japan and one from Denmark. Based on this and other evidence from the Administrative Record, the D.C. District Court agreed with SCI and the FWS and rejected Plaintiff's argument that an end to argali importation into the United States would redress harm to their purported interest in the conservation of argali. The Court explained:

> In fact, there 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. (citation omitted) 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. *Id.*
>
> While Intervenors have offered evidence that the hunting and killing of argali will not decrease as a result of a U.S. ban on imports, Plaintiffs have only offered speculation that, because the majority of hunting permits issued by Kyrgyzstan, Mongolia, and Tajikistan have been issued to U.S. hunters, the Service's prohibition on imports will likely decrease the hunting of argali. ***Although U.S. hunters currently comprise the majority of argali hunters in these countries, the evidence addressed above reveals that, if U.S. hunters were prohibited from hunting argali, hunters from other countries and increased poaching would take their place.***

Fund For Animals v. Norton, 295 F.Supp.2d 1, 8 (D.D.C.2003) (emphasis added). As the argali case demonstrates, if the FWS's goal is to benefit the species' conservation by

reducing the take of the subspecies, that goal will not be achieved through listing the subspecies as endangered.

2. The Absence of U.S. Hunters Will More Likely Reduce Conservation Resources

Following an importation ban by the U.S., the take of African lions will most likely return to pre-listing levels due to an increase in non-U.S. hunters and in poachers. The same cannot be said for the revenues generated by U.S. hunters. As the court noted above, evidence in the argali litigation demonstrated that non-U.S. hunters pay lower fees to hunt the same animals and generate less revenue in the communities and for species conservation. The decrease in revenue consequently decreases the value of the animal, making it more vulnerable to poaching by local residents.

In a letter introduced into the Administrative Record in the argali litigation, dated June 2, 1996, the Deputy Minister of the Ministry of Nature Conservation of the Republic of Tajikistan and the Deputy Chairman of the Nature Conservation Committee of the Gorno-Badahshan told Marshall Jones, Deputy Director of the U.S. Fish and Wildlife Service that due to an increase in poaching prompted by the reduced value of the argali, "the ban on the importation of Marco Polo into the U.S. has not improved Marco Polo protection, on the contrary it has worsened it."

SCI recognizes that there are obvious differences between lions and sheep and that there are disparities in the relationships that each of these types of animals have with local communities. Despite these differences, there can be no denying that U.S. hunters bring revenue to local communities that raises the value of native species, generates funds

for the communities and for conservation and discourages the illegal killing of animals that bring significant potential revenue into those communities. A listing and the likely resultant prohibition on trophy importation will undermine that revenue source and will decrease the African lion's value. Again, if the FWS's goal is African lion conservation, listing, and its likely prohibition on trophy importation, will not achieve that goal.

3. **A Listing Will Violate the FWS's ESA Obligation to Encourage Foreign Conservation Efforts**

Sadly, the ESA currently bears no explicit directive that, in listing a species, the FWS shall do no harm. In fact, the five ESA listing factors appear to be blind to the consequences of listing, establishing criteria based solely on the species' status as opposed to whether listing will actually improve that status.

Implicit in the listing provisions is the ESA's overriding conservation mandate. For foreign species that mandate is more explicit due to the provisions directed at foreign conservation, found in 16 U.S.C. §1537(b), entitled "Encouragement of foreign programs." In that section, Congress directed the Secretary of the Interior to ***encourage***

> foreign countries to provide for the conservation of fish or wildlife and plants including endangered species and threatened species listed pursuant to section 1533 of this title;

Id. § 1537(b)(1). If listing, and the likely consequent ban on trophy importation, will discourage, rather than encourage foreign efforts to conserve African lions, then the listing will violate the requirements of Section 1537(b). Since the ESA's overriding purpose is conservation, a conflict between the listing directives in Section 1533 and

conservation encouragement requirements of Section 1537(b) should be resolved by a decision to "do no harm" and not to list the species.

4. The 90-Day Finding Does Not Address the Potential for Different Listing/Conservation Designations for Populations Within Different Range States

The 90-Day Finding appears to present the public with a single option – a range-wide listing or no listing at all. There is no discussion of the possibility that populations within some range countries, due to variations in biological/conservation status and/or differing regulatory mechanisms, may indicate that populations within some international boundaries could require more or less protection than others. It is possible, for example, that some countries that currently do not benefit from sustainable use hunting and conservation programs may require more protection than those currently operating such beneficial programs.

The FWS unquestionably has the authority to designate the population within each individual, independently governed, range-state as a distinct population segment (DPS), whether or not African lion populations may be shared by countries on different sides of an international boundary. Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 FR 4722, 4723-4724 (February 7, 1996). Although SCI does not agree with the FWS that the listing of any portion or population of the African lion subspecies may be warranted, the fact remains that if the FWS finds itself compelled to issue a warranted finding, it should make that decision based on a population by population or DPS by DPS analysis. The FWS should propose for listing ***only*** those populations or DPSs that meet the ESA listing

criteria and only where the listing of that population or DPS would encourage rather than inhibit foreign conservation efforts.

This type of analysis is exactly what Congress had in mind when it included within the ESA special directives to the FWS concerning the potential listing of foreign populations. In its own *Draft Policy on Interpretation of the Phrase "Significant Portion of Its Range" in the Endangered Species Act's Definitions of "Endangered Species" and "Threatened Species,"* the Service acknowledged that Congress intended the FWS to use its authority to create and separately classify DPSs to encourage international wildlife conservation efforts. In that draft policy, the Service explained that Section 1533(b)(1)(A) of the ESA directs the Secretary of the Interior, when making a listing determination for a foreign species

> to take into account "those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas."

76 Fed. Reg. 76987, 76999 (December 9, 2011). In that draft policy, the Service interpreted the Congressional directive to apply to the Service's authority to create and separately classify distinct population segments defined by international boundaries. The Service's draft policy further explained the agency's motivation and the value of the DPS tool for foreign species listings:

> Legislative history, although not entirely clear on what mechanisms Congress intended the Services to use, also indicates that we should give consideration to differences in status, recognize and encourage other agencies to exercise their management authorities, and apply differing management where appropriate (see The Endangered Species

> Conservation Act of 1972: Hearings on S. 3199 and S. 3818 Before the Subcomm. On the Environment of the Senate Comm. on Commerce, 92d Cong. 109 (1972) (statement of Curtis Bohlen, Deputy Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior: "It is our hope that this ability to apply selective protections would provide protection to those animals needing it, encourage the agencies which have management and protective authority to exercise that authority and allow the recognition of such efforts".)). We also note that a Senate Committee Report discussed the Secretary's failure to recognize differing status of populations of a species in response to testimony regarding game species listed in foreign countries (S. Rep. No. 97-418(1982)). ***The DPS authority to apply differing statuses across the range of a vertebrate taxon, along with the use of special regulations for threatened species under section 4(d) of the Act, is one of the few mechanisms available to us to consider and recognize efforts made by States or foreign nations in our application of protections of the Act. This draft policy's definition of "significant," which sets a high threshold for the purposes of SPR analysis, would help to promote the consistent application of SPR analysis among vertebrates and plants and invertebrates, while maintaining the flexibility afforded by the DPS authority to apply differing statuses (and thus differing management) across the range of vertebrate species.***

Id. (emphasis added), Unless the Service analyzes the status of each individual population of African lions within each international boundary and takes into account not only each country's conservation strategies, but also the impact that an endangered or threatened listing would have on those efforts, the Service will have violated the ESA, rejected Congressional intent and will have acted in direct conflict with its own policies.

5. The 90-Day Finding Offers No Alternative to an Endangered Listing

SCI does not oppose an endangered listing solely because of the harm that it would bring to African lion conservation. SCI also challenges the Service's ability to demonstrate that the African lion qualifies for endangered status. The ESA defines the term "endangered" as "in danger of extinction throughout all or a significant portion of its

range." 16 U.S.C. §1532(6). Although the ESA does not expressly define the phrase "in danger of extinction" the Service itself has attempted to do so. In the polar bear listing, the FWS adopted a meaning for the term "endangered" that should be applied here (and should be made known to the public). As explained by the District Court:

> In their original briefs and at a motions hearing held on October 20, 2010, the federal defendants argued that the text, structure, and legislative history of the ESA plainly and unambiguously require that a species must be in *imminent* danger of extinction to be designated as an endangered species. This Court held in a November 4, 2010 Memorandum Opinion that neither the statute itself nor its legislative history compels the federal defendants' reading of the term "in danger of extinction" and that the term is, instead, ambiguous. *In re Polar Bear,* 748 F.Supp.2d at 28–29. Accordingly, following D.C. Circuit precedent, the Court remanded the rule to agency decision-makers to "fill in the gap" in the statute by providing additional explanation for the agency's determination that the polar bear was not in danger of extinction at the time of listing. *Id.* at 29. On December 22, 2010, the federal defendants submitted the agency's Supplemental Explanation in response to the Court's remand order.
>
> The Service emphasizes that its Supplemental Explanation is not intended to set forth a new statement of agency policy or a new "rule" pursuant to the APA, nor does the agency intend to adopt independent, broad-based criteria for defining the statutory term "in danger of extinction." Supp. Exp. at 1–2. Nonetheless, **the agency claims that its starting point in making such a determination is the general understanding that the phrase "in danger of extinction" describes a species that is *currently on the brink of extinction in the wild.*** Supp. Exp. at 3. According to FWS, to be "currently on the brink of extinction" does not necessarily mean that extinction is certain or inevitable; rather, whether a species is currently on the brink of extinction "depends on the life history and ecology of the species, the nature of the threats, and the species' response to those threats." Supp. Exp. at 3.

In re Polar Bear Endangered Species Act Listing and Section 4(d) Litigation, 794 F.Supp.2d 65, 82-83 (D.D.C. 2011) (italics in original; bold added), *appeal pending*. The FWS has relied on the "currently on the brink of extinction" definition for endangered

status several times in the last year, including in Federal Register notices governing the listing status of the wood stork (77 Fed. Reg. 75947 (December 26, 2012)) and the lesser prairie-chicken (Listing the Lesser Prairie-Chicken as a Threatened Species, 77 Fed. Reg. 73828, 73884 (December 11, 2012)). To make an endangered determination, the FWS would have to explain in any proposed rule how, based on the best scientific data available and the listing factors, the African lion is "currently on the brink of extinction in the wild." Nothing in the 90-Day Finding suggests that the Service has made such an analysis.

SCI does not consider any listing, whether endangered or threatened, to be warranted by the facts or law, but recommends that no analysis of the status of the lion can face legal scrutiny unless all potential listing classifications are thoroughly studied and assessed for applicability. Although SCI concludes that no listing is appropriate, a threatened listing would be preferable over an endangered listing in terms of continuing sustainable use conservation activities that benefit the species. The 90-Day Finding offers no indication that the Service considered any alternative to an endangered listing.

Although the listing petition sought endangered status for the African lion, the FWS has the authority to consider alternatives, such as a threatened classification for qualified populations or DPSs of the African lion. The 90-Day Finding makes no mention of the potential for threatened status. The FWS cannot adequately fulfill its statutory obligations without considering whether threatened status might, throughout the range or for some populations, be the appropriate status.

In accordance with the FWS's ongoing practice of refusing to issue importation

permits for the sport-hunted trophies of any species designated as endangered (with the exception of the bontebok), threatened status could potentially give the FWS the ability to allow importation of sport-hunted trophies to continue while still fulfilling its obligation to list pursuant to the requirements of Section 1533. SCI recommends that the FWS consider whether range-wide or any of the populations/DPSs within any of the range country boundaries are not currently "in danger of extinction" but are only, at most, "likely to become endangered in the foreseeable future."

If the Service does analyze threatened status as an alternative to the petitioned for endangered listing, it will be necessary for the Service to identify a "foreseeable future" applicable specifically for the African lion. The 90-Day Finding offers nothing to suggest that the Service has even begun to embark on the road to this analysis. SCI is aware of the fact that the Service establishes "foreseeable future" on a "case-by-case" basis. Nevertheless, a definition of foreseeable future for the species at issue is essential before listing can be fully analyzed. *Otter v. Salazar,* 2012 WL 3257843 *18-19 (D.Idaho, August 8, 2012) (listing rule vacated due to lack of species specific definition for "foreseeable future"); *Western Watersheds Project v. Foss,* 2005 WL 2002473, *16 (D.Id, August 19, 2005) (listing rejected due to absence of general and qualitative criteria defining species' foreseeable future).

Even if the FWS does find that the science demonstrates that the African lion is "in danger of extinction" that finding alone will not be sufficient for a listing of the subspecies throughout any portion of its range. As indicated above, for an endangered listing, the Service must make a determination that the African lion is "currently on the

brink of extinction." For a threatened listing, the Service must define the African lion's foreseeable future and then demonstrate, by the best available scientific data, that the subspecies is threatened with extinction within that foreseeable future in all or a significant portion of its range. The Service itself has stated that "[a] species that is in danger of extinction at some point beyond the foreseeable future does not meet the definition of either an endangered species or a threatened species." *Listing the Lesser Prairie-Chicken as a Threatened Species*, 77 Fed. Reg. 73828, 73884 December 11, 2012).

If the FWS's goal is to encourage the conservation of the African lion and not simply to placate those who are offended by the sport hunting of the African lion, then a determination that encourages conservation via sport hunting should be the FWS's primary goal. To attain that goal, the Service will need to factor in all alternatives to the petitioned action. In addition, the Service will be required to research, analyze and scientifically justify each of the components of its listing decision including the imminence of any threat of extinction.

6. A Comment Opportunity Prior to the Release of the CITES Periodic Review Deprives the Public of a Meaningful Opportunity to Comment

In a few months, the Convention on International Trade in Endangered Species (CITES) is anticipated to release its own review of the African lion. This data will be extremely valuable to the FWS's decision making, a factor acknowledged by the FWS itself in the 90-day finding:

> Although we are not considering this information in this 90-day finding in accordance with section 4(b)(3)(A) of the Act, the African lion is currently

> under a periodic review of the CITES Appendices being conducted by the CITES Animals Committee, led by two range countries for the African lion, Kenya and Namibia. This periodic review is based on a recommendation by a Working Group at the 25th meeting of the CITES Animals Committee (AC25) held in July 2011, which recommended that the African lion be considered for inclusion in the Periodic Review of Felidae, as part of the Periodic Review of the Appendices (AC25 Doc. 15.2.1). The Animals Committee adopted this recommendation at AC25. The decisions and working documents can be located on the CITES Web site at http://www.cites.org/eng/com/ac/index.php. Our status review under the Act will consider the results of the review being conducted through the CITES process.

77 Fed. Reg. 70727, 70730**.** Nevertheless, the public comment period will close before this CITES research will be released. Therefore, the public is forced to comment on and offer input on the biological status of the African lion in the absence of the most current source of information.

Although the ESA includes rulemaking requirements distinct from those included in the Administrative Procedures Act, 5 U.S.C. §553, the principles of rulemaking are much the same. The courts have interpreted the public comment opportunity identified in Section 553 to require a "meaningful" comment opportunity. *Rural Cellular Ass'n v. F.C.C.,* 588 F.3d 1095, 1102 (D.C. Cir. 2009). Without the most recent and highly valuable scientific data due to come from the CITES Status review, the public is being given a potentially "meaningless" opportunity to comment at this time. The FWS should delay the closing of the public comment period until after the CITES data is available for examination. For example, in the polar bear listing decision-making, the Service

reopened a public comment period after reports on polar bears by the U.S. Geological Survey became publicly available.[1]

SCI appreciates this opportunity to comment but encourages the FWS to extend or reopen the comment period after the CITES review has been made public. We recommend that the FWS follow the conservation mandates of the ESA, including those that require the Secretary of the Interior to encourage foreign conservation and to avoid any finding that would undermine ongoing conservation efforts, whether or not those efforts involve sustainable use. SCI further advises the FWS to look for alternatives that will not deprive African lion conservation of important resources generated by U.S. hunters.

We look forward to working with the FWS to see that U.S. hunters can continue to engage in sustainable use conservation of this important subspecies. If you have any questions concerning these comments, please contact Anna Seidman, Director of Litigation, Safari Club International 202-543-8733, aseidman@safariclub.org.

Thank you.

Sincerely,

John Whipple
President

[1] SCI is well aware that the FWS is responding to a petition that imposes certain statutory deadlines. SCI is also aware that those deadlines have come and gone and have not been met in a timely manner. Nevertheless, a delay to give the public a meaningful opportunity to comment on valuable scientific data should excuse rather than exacerbate any further failure to meet listing deadline requirements prompted by that petition.

Safari Club International