ORAL ARGUMENT SCHEDULED FOR MAY 7, 2007

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5208

HAWAI'I ORCHID GROWERS ASSOCIATION,

APPELLANT,

v.

MICHAEL JOHANNS, SECRETARY OF AGRICULTURE, ET AL.,

APPELLEES.

Appeal from the United States District Court for the District of Columbia (No. 05cv01182)

Final Principal Brief of Appellant Hawai`i Orchid Growers Association

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March 28th, 2007

DISCLOSURE STATEMENT

Pursuant to FED. R. APP. P. 26.1(a) and CIR. R. 26.1(a) Appellant Hawai`i Orchid Growers Association (HOGA) certifies: (1) that there are no parent companies, subsidiaries, or affiliates of HOGA which have any outstanding securities in the hands of the public; and (2) that there are no parent companies nor any publicly-held companies that hold any ownership interests in HOGA.

Pursuant to CIR. R. 26.1(b) Appellant HOGA certifies that HOGA is an unincorporated non-profit association established in 1995 in Hawai`i County, State of Hawai`i which promotes coordinated efforts among commercial breeders, propagators, and growers of orchids in Hawai`i and supports marketing, research, and educational projects, including efforts to find and propagate native Hawai`ian orchid species. There are no ownership interests in this trade association.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to CIR. R. 28(a)(1) Appellant HOGA certifies:

A. Parties and Amici. The parties who have appeared before the District Court and the persons who are parties in this Court are HOGA, the United States Department of Agriculture, the United States Department of Interior, the named Federal officers of the United States Department of Agriculture, and the named Federal officers of the United States Department of Interior. There were no intervenors or *Amici* who appeared before the District Court. Pursuant to FED. R. APP. P. 29(a) and CIR. R. 29(b) the State of Hawai`i Department of Agriculture (HDOA) on September 20th, 2006 noticed its intention to participate in this Court as *Amicus Curiae* for Appellant HOGA.

B. Rulings under Review. The Ruling at issue in this Court is the Memorandum Opinion issued by Royce C. Lamberth, United States District Judge on June 29th, 2006. The official citation of this Memorandum Opinion is *Hawai`i Orchid Growers Association v. United States Department of Agriculture, et al.*, Civil Action No. 05-1182 (RCL), 436 F. Supp. 2d 45, *2006 U.S. Dist. LEXIS 44019*, June 29th, 2006.

C. Related Cases. The Civil Action on review in this Court was previously before the United States District Court for the District of Columbia in *Hawai`i Orchid*

Growers Association v. United States Department of Agriculture, et al., *2005 U.S. Dist. LEXIS 4548* (D. D.C. 2005), March 24th, 2005. The United States District Court for the District of Columbia there dismissed for want of jurisdiction the Endangered Species Act claims that are the subject of the Civil Action now before this Court. *Id.*, *2005 U.S. Dist. LEXIS 4548 *8*. There are no related cases currently pending in this Court or in any other Court in the District of Columbia of which counsel is aware.

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GLOSSARY

A	=	Deferred Appendix.
APHIS	=	United States Department of Agriculture's Animal and Plant Health Inspection Service.
ESA	=	Endangered Species Act.
FWS	=	United States Department of Interior's Fish and Wildlife Service.
HDOA	=	State of Hawai`i Department of Agriculture.
HOGA	=	Hawai`i Orchid Growers Association.
NMFS	=	United States Department of Interior's National Marine Fisheries Service.
USDA FS	=	United States Department of Agriculture's Forest Service.

JURISDICTIONAL STATEMENT

This Civil Action arises from the Rule published Wednesday, May 5th, 2004 which is now final, 5 U.S.C. § 704, and from the APHIS Biological Assessment of 2002, 16 U.S.C. § 1536(c)(1), which preceded it. The District Court previously considered this Final Rule in *Hawai`i Orchid Growers Assoc. v. U.S. Department of Agriculture, et al.*,

2005 U.S. Dist. LEXIS 4548 (D.D.C. 2005). The District Court there dismissed for want of jurisdiction the ESA claims that are the subject of this Civil Action. *Id.*, *2005 U.S. Dist. LEXIS 4548 *8.*

In compliance with 16 U.S.C. § 1540(g)(2)(A)(i), and more than sixty days prior to the filing of the Civil Action in the District Court, Appellant gave Notice to Appellees of Appellant's intent to file suit under the Citizen suit provision of the ESA, 16 U.S.C. § 1540(g)(1)(A), for Appellees' violations of:

(a) Section 2(c)(1) of the ESA, 16 U.S.C. § 1531(c)(1), by failing to ensure that Agency actions, specifically, APHIS actions under the Final Rule entitled "Importation of Orchids of the Genus *Phalaenopsis* From Taiwan in Growing Media," 69 Fed. Reg. 24916-36 (2004) (codified at 7 C.F.R. § 319.37-8(e)), conserve Federally-listed Endangered Species and Threatened Species and do not jeopardize the continued existence of Endangered Species and Threatened Species or critical habitat;

(b) Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), by failing to ensure that the Final Rule is not likely to jeopardize the continued existence of any Federally-listed Endangered Species or Threatened Species, or is not likely to result in the destruction or adverse modification of critical habitat of such Species, and by failing to use the best scientific and commercial data available in the informal consul-

tations over the APHIS Biological Assessment of 2002 that preceded the Final Rule; and

(c) Section 9 of the ESA, 16 U.S.C. § 1538(a), through past, present, and planned future actions which have resulted in, and imminently threaten to continue, unlawful "Take" of Federally-listed Endangered Species and Threatened Species within the meaning of said Section and implementing regulations.

The violations complained of in the Notice are continuing and have not been remedied.

Appellant filed this Civil Action with the District Court on June 13th, 2005. The District Court had jurisdiction under 5 U.S.C. § 702, 16 U.S.C. § 1540(g)(1), and 28 U.S.C. § 1331. Venue was proper in the District Court under 5 U.S.C. § 703, 16 U.S.C. § 1540(g)(3)(A), and 28 U.S.C. § 1391(e). The requested relief was proper under 5 U.S.C. § 706; under 16 U.S.C. § 1540(g)(1); and under 28 U.S.C. §§ 1361, 2201, 2202.

On July 25th, 2006 Appellant filed a Notice of Appeal as of right, 28 U.S.C. §§ 1291, 1294(1), from the Order and accompanying Memorandum Opinion issued by Royce C. Lamberth, United States District Judge on June 29th, 2006 denying Appellant's Motion for Summary Judgment, granting Appellees' Motion for Summary Judgment, denying as moot Appellant's Motion to Supplement the Administrative

Record, denying Appellees' Motion to Strike, and entering Judgment for the Appellees. *Hawai`i Orchid Growers Association v. United States Department of Agriculture, et al.*, 436 F. Supp. 2d 45 (D. D.C. 2006). This Notice of Appeal was timely filed within sixty calendar days after entry of the District Court's Judgment. 28 U.S.C. § 2107(b). The Notice of Appeal was likewise timely. FED. R. APP. P. 4(a)(1)(B).

The Order and accompanying Memorandum Opinion issued by Royce C. Lamberth, United States District Judge on June 29th, 2006 finally disposes of Appellant HOGA's ESA Claims. *Hawai`i Orchid Growers*, 436 F. Supp. 2d, at 55.

STATEMENT OF THE ISSUES

- Did the District Court properly consider the adequacy of the information provided by APHIS to FWS, i.e., was this information "the best scientific and commercial data available" as required by 16 U.S.C. § 1536(a)(2)? APHIS, in informal ESA consultations, 15 U.S.C. § 1536(a)(2), did not provide to FWS Comment letters submitted on behalf of HOGA and from HDOA, Comment letters which contained available scientific and commercial data concerning the issue of screen size necessary to prevent greenhouse contamination by invasive alien plant pests.

But the District Court concluded that the mere act of discussing the issue of screen size necessary to prevent greenhouse contamination by invasive alien plant pests was itself sufficient. *Hawai`i Orchid Growers*, 436 F. Supp. 2d, at 53.

- When APHIS made the finding required by 16 U.S.C. § 1536(b)(4) that importation of mature, flowering orchid plants is "not likely to jeopardize" Endangered or Threatened species or critical habitat, was there a proper evaluation of the problems/risks that would be imposed through entry of breeding habitats contaminated with alien species? FWS had previously issued a Biological Assessment as a result of formal ESA consultations which contained an extensive discussion of the risk of invasion of alien species that might be imposed by importation of contaminated breeding habitats.

But while APHIS *identified* the problems/risks with entry of breeding habitats contaminated by invasive alien plant pests, neither FWS nor APHIS *evaluated* these problems/risks as to invasive alien species in the ESA consultations for the Final Rule, and instead both relied, for the "not likely to jeopardize" finding, only on an existing APHIS regulatory program for alien plant pests.

Was this identification of problems/risks for invasive alien plant pests sufficient of itself without an evaluation of the problems/risks for invasive alien species, e.g., is the

absence of any evaluation of the difficulties inherent in visual examinations of potted mature, flowering moth orchid plants, and these all subspecies (spp.) of the genus *Phalaenopsis,* for the presence of *invasive alien species* excused by mere recognition of the problem as it concerns *invasive alien plant pests*? *Hawai`i Orchid Growers*, 436 F. Supp. 2d, at 54.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in a separate Addendum that is bound with this Principal Brief.

STATEMENT OF THE FACTS

Quarantine 37 Regulations.

Importation of plants and plant products is restricted or prohibited to prevent the introduction or dissemination of alien plant pests and noxious weeds. Subpart 37 of Section 319, Title 37, Code of Federal Regulations (known generally as the Quarantine 37 Regulations) sets out prohibitions and restrictions on the importation of nursery stock, plants, roots, bulbs, seeds, and other propagative plant products. Generally, this Subpart requires that imported plants "shall be free of sand, soil, earth, and

other growing media." 7 C.F.R. § 319.37-8(a). Nonetheless, certain greenhouse-grown plants from listed categories of organisms (taxa) may be imported in an approved growing medium. 7 C.F.R. § 319.37-8(e).

This Quarantine 37 provision specifies attributes for the greenhouses in which plants from these listed taxa are to be cultivated, including requirements that these greenhouses must have screening with openings of not more than 0.6 mm on all vents and openings except entryways; that entryways must be equipped with automatic closing doors, 7 C.F.R. § 319.37-8(e)(2)(ii); and that plants in these greenhouses must be rooted and grown in approved growing media on benches supported by legs and raised at least 46 cm above the floor, 7 C.F.R. § 319.37-8(e)(2)(vi).

The Importation Request.

In 1997 the Government of Taiwan requested that APHIS consider amending the Quarantine 37 Regulations to allow importation of *Phalaenopsis* spp. orchid plants established in sphagnum moss as a growing medium. A0126-0129.

By April 1997 APHIS had completed a Pest Risk Assessment, A0130-0165, and this Pest Risk Assessment considered the potential alien plant pest risk arising from importations of greenhouse-grown *Phalaenopsis* spp. orchid plants potted in sphag-

num moss, A0146. APHIS noted that *Phalaenopsis* spp. orchid seedlings were then being allowed entry as bare-root seedlings. A0147.

This APHIS Pest Risk Assessment listed seven species of Thrips and a Mealybug, *Planococcus minor*, all of these alien plant pests on *Phalaenopsis* spp. orchid seedlings which had been intercepted by APHIS at Ports of Entry. A0142-0144. This Pest Risk Assessment concluded that the only alien plant pest likely to travel with the potted orchid plants was the Mealybug and that those other alien plant pests of *Phalaenopsis* spp. orchid plants, the various Thrips species, would be "mitigated" by the Quarantine 37 Regulations. A0144.

APHIS concluded in this Pest Risk Assessment of 1997 that the Quarantine 37 Regulations would reduce the alien plant pest risk from importations of potted *Phalaenopsis* spp. orchid plants to a level not greater than the existing alien plant pest risk resulting from importations of bare-rooted *Phalaenopsis* spp. orchid seedlings. A0147.

As required by 5 U.S.C. § 553(b) on September 1st, 1998 APHIS issued notice of a proposed Rule in the FEDERAL REGISTER. APHIS proposed a Rule which would "allow *Phalaenopsis* spp. orchids established in approved growing media to be imported from any country into the United States provided the orchids were produced, handl-

ed, and imported in accordance with the requirements of § 319.37-8(e) . . . ." A0166-0169.

The Kahului Airport Biological Assessment.

In connection with a project at Kahului Airport on the island of Maui, State of Hawai`i to modify Runway 2/20, the Hawai`i Department of Transportation and the Federal Aviation Administration, United States Department of Transportation conducted a Biological Assessment, 16 U.S.C. § 1536(c)(1), and, as required by 16 U.S.C. § 1536(a)(2) initiated formal ESA consultations with FWS to assess the potential effects of this project on Federally-listed or proposed Endangered or Threatened Species or their habitats. A0041-0043.

A part of this Biological Assessment was a paper entitled "Effectiveness of Potential Mitigation Measures for Selected Invasive Alien Taxa" prepared and published by Dr. Francis Howarth of the Department of Natural Sciences, Bishop Museum, Honolulu, Hawai`i on February 3rd, 1997. Dr. Howarth had particular concern for the invasion of Hawai`i by biting midges of the *Culicoides* family, and he focused on the risk of invasion by alien species through introduction of contaminated breeding habitats, and not, as in the APHIS Pest Risk Assessment of 1997, on the risk of invasion of alien plant pests that might result from entry of specific plant hosts:

Immature Midges in Breeding Habitats:

Pre Entry:

• Damp absorbent material (such as sphagnum, other mosses, and wood chips) used to transport cut flowers and other fresh plant and animal material can harbor immatures of biting midges as well as many other pests. Some *Culicoides* aestivate as dry immatures and can rehydrate and emerge when moistened. This strategy allows for efficient long-distance dispersal in untreated material. Larvae or other immature stages are likely to be found in breeding substrates at any time of the year, even in the temperate region. *Culicoides obsoletus* is thought to over winter as larvae. Therefore, the risk may not be seasonal, unless the shipment is treated or other precautions are taken.
• Treatment of this packing material before use is recommended. Treatments could include heat, dipping or washing with soap solution, or fumigation. Certification that organic packing material is free of pests would further reduce the risk.

Port of Entry:

• Suspected substrates should be looked for during inspections and treated if necessary.
• High risk material also may include fresh cut flowers and other living plant material, particularly from high risk areas. Larval biting midges have been intercepted in Hawaii in bromeliad leaf axils, a known habitat for some *Culicoides* species. The recent arrival of the mosquito, *Wyeomyia mitchellii*, is suspected of having been introduced with bromeliads from southeastern North America. A number of plant-feeding insects remain closely associated with their host; some are sessile like the scale and white fly on the stems, flowers, leaves, and fruits of plants.
• Other measures are listed in Table H2 and similar to the descriptions given for the ants.

Post Entry

> • Organic packing material from high risk areas should be treated before disposal on Maui. This can be accomplished by heat, submersion in insecticidal or soap solution, or by fumigation. Heat (hot water dip) would probably be the cheapest and safest.
> • Given the tiny size, cryptic behavior and high mobility, Culicoides are probably very difficult to control or eradicate once they become well established. Therefore, greater reliance must be placed on prevention.

A0032.

Upon receipt of the Biological Assessment, on March 11th, 1997 the Federal Aviation Administration, United States Department of Transportation provided it to FWS for formal ESA consultations as required by 16 U.S.C. § 1536(a)(2) and 50 U.S.C. § 402.14. FWS issued its own formal Biological Assessment on July 23rd, 1997. In this formal Biological Assessment FWS concluded, as to the effects of the project at Kahului Airport to modify Runway 2/20, that:

> The most serious potential effects involve introduction of alien species. The effects of alien species have been cited as causes of past decline, and potential further decline, of all T&E [Federally-listed or proposed Endangered or Threatened Species] species in Hawaii (Asquith 1997, NMFS 1992, NMFS & USFWS 1996, USFWS 1983b, 1984, 1990, 1992b, 1996a, 1997, in prep. a, b). The Service believes that all presently listed species on Maui could be adversely affected by alien species not yet on Maui. . . .

A0047.

> Almost all alien species introductions in Hawaii are the result of human actions, either governmental or private. For example, a total of 2275 alien in-

vertebrates were intercepted by Federal inspectors in 1994. Out of this total, 89% were found in either air cargo or passenger baggage (Noda and Associates 1997). It is estimated that over 4373 alien species have become established in the wild in the Hawaiian Islands. This includes 956 plants, 46 birds, 19 mammals, 23 reptiles, 4 amphibians, 73 fish, and more than 3247 invertebrates (Eldridge and Miller 1997). In addition to the total number of alien species, the rate at which alien species are entering Hawaii is increasing. The average number of invertebrate introductions per year has gone from 16 during the years between 1937 and 1961, to 20 in the 1970s (TNCH 1992). The current estimated rate of invertebrate introduction to Hawaii is between 20-30 species per year (Noda and Associates 1997).

A0063.

The primary concern of the Service is the potential indirect effect of this project on listed and proposed species and critical habitat due to the potential introduction of alien species to the island of Maui (the indirect action area). The continuing influx of alien species poses a grave threat to all native species in Hawaii, including those on Maui. These species are introduced by accidental or deliberate transport on aircraft and ships. The proportion of these species that arrive by air is probably large (BA [the Biological Assessment of March 10th, 1997] table 1-5), especially for those species purposely transported by humans. Because of extensive interisland transport, even native species on other Hawaiian Islands could eventually be affected by alien organisms that become established on Maui.

There is little question that a large number of alien organisms which could be transported purposefully or inadvertently by air could, if established on Maui, cause or contribute to the eventual extinction of listed taxa. Examples include weaver ants, high-altitude mosquitoes, biting midges, snakes and predatory lizards (BA pp. 6-1 to 6-10). Alien plants and animals that colonize native ecosystems can affect listed and proposed species and critical habitat through a variety of means documented in scientific literature. In addition to the direct effects such as predation and herbivory (Cole *et al.* 1992, Sohmer 1996), parasitism (van Riper and van Riper 1985), and competition (Smith 1985), non-native species can interfere with pollination (Cole *et al.* 1992), promote disturbance such as fire (Smith 1985), change nutrient regimes

> (Vitousek *et al.* 1987), or favor the spread of other alien species (Wester and Wood 1997). . . .

A0064-0065.

In this formal Biological Assessment FWS expressly precludes, because of the irreversible and catastrophic consequences of an invasion by an alien species, even the incidental "Take" of Endangered Species and of Threatened Species:

> Introduction of alien species as a result of this project, although unlikely, *would be practically irreversible and could have catastrophic consequences for one or more listed species* included in this biological opinion. Therefore, any incidental taking that results from such an introduction is not authorized. . . .

A0070.

FWS ultimately issued a formal "No Jeopardy" Biological Assessment, but doing so FWS required explicit measures—state-of-the-art alien species interdiction features—to preclude the invasion of alien species at Kahului Airport. A0069.

FWS imposition of these explicit state-of-the-art alien species interdiction features is required by the ESA Joint Regulations when FWS determines that "reasonable and prudent measures [are] necessary and appropriate . . . ." 50 C.F.R. § 402.14(i)(1)(ii).

Comments on the Proposed Rule of 1998.

On October 26th, 1998 the Pacific Islands Ecoregion, FWS wrote APHIS that the proposed Rule might affect three species of native Hawai`ian orchids, one of which,

the bog orchid, *Platanthera holochila,* is listed as an Endangered Species, and, as well, might affect a jewel orchid, *Anoectochilus sandvicensis,* and twayblade, *Liparis hawaiiensis*, both of which are Species of Concern. FWS wrote that introduction of the alien plant pests identified in the APHIS Pest Risk Assessment of 1997 could be detrimental to these native orchid species "by altering the critical conditions required by Hawaiian orchid [sic] for successful germination, growth, and reproduction." FWS requested that APHIS enter into the consultations required by 16 U.S.C. § 1536(a)(1). A0172-0173.

On November 30th, 1998 FWS wrote APHIS that the proposed Rule might affect a total of seven species of native orchids (both on the Mainland United States, and in Hawai`i) listed as Endangered or Threatened Species, that these impacts may result in the need to list additional native orchid species as Threatened or Endangered Species, that HDOA had records of alien plant pests associated with importations of bare-rooted orchid seedlings (through its State-mandated 60-day quarantine of high pest-risk bare-rooted orchid seedlings from foreign countries located South of 30 degrees North latitude) that were not addressed in the APHIS Pest Risk Assessment of 1997, and that because many of the alien plant pests listed in the APHIS Pest Risk Assessment of 1997 are "polyphagous," i.e. they feed on many plant species, 113 Federally-

listed plant species from the Mainland United States and 48 Federally-listed plant species from Hawai`i might be affected in addition to the entire orchid plant family, *Orchidaceae*. A0174-0176.

HDOA provided Comments on November 25th, 1998. HDOA explained to APH-IS that the Hawai`i State quarantine provision then in effect, A0214-0215, considered the plant family *Orchidaceae* generally as a long term crop with enhanced plant pest risk. A0182. Likewise, HDOA explained the distinction that HDOA draws between crops from countries North of 30 degrees North latitude and crops from countries South of 30 degrees North latitude—crops from these latter countries (and Taiwan is among them) which have a tropical climate like that in Hawai`i present higher plant pest risk. A0182.

HDOA was careful to explain that since 1953 it has routinely intercepted alien plant pests on shipments of high pest-risk bare-rooted orchid seedlings (bare-rooted orchid seedlings from countries South of 30 degrees North latitude, A0215), alien plant pests that were detected while these high plant pest-risk bare-rooted orchid seedlings were then being held for 60 days in State-mandated quarantine. A0183-0184.

These same shipments of high plant pest-risk bare-rooted orchid seedlings had been examined and passed by inspectors of the exporting country, and examined and passed by APHIS inspectors, before moving into State-mandated quarantine. HDOA suggested that the supposed "modern" conditions of the Quarantine 37 regulations would not reduce plant pest risk to a minimum—even if the existing system was working (and it was not—importations examined in two different inspections were deemed to be safe and, actually, they were not), there was no reason to suppose that adherence to 7 C.F.R. § 319.37-8(e) would result in minimal risk. A0184.

It turns out that HDOA had had first-hand experience in 1993 with a program much like the growing, inspection, and certification requirements of 7 C.F.R. § 319.37-8(e). In its Comments HDOA explained that it had allowed the importation of 50,000 bare-rooted *Phalaenopsis* spp. orchid seedlings from Taiwan under a special permit, a special permit which required that these orchid seedlings be obtained from tissue cultures contained in sterile flasks, that these orchid seedlings be cultivated in Taiwan in a greenhouse enclosed by screens and doors, and that HDOA inspectors examine and approve each and every bare-rooted *Phalaenopsis* spp. orchid seedling before export from Taiwan.

These same bare-rooted *Phalaenopsis* spp. orchid seedlings were later examined by APHIS inspectors in Hawai`i and then moved to a State-mandated quarantine facility where they were held for 60 days. APHIS inspectors found a snail and 2 mites upon entry of the bare-rooted *Phalaenopsis* spp. orchid seedlings into the United States. But during the State-mandated 60-day quarantine period, more plant pests emerged. A0186.

HDOA explained that a mature, potted *Phalaenopsis* spp. orchid plant is a self-sustaining entity and for this reason poses the highest plant pest risk for the spread and establishment of non-indigenous invasive plant pests. Mature, potted *Phalaenopsis* spp. orchid plants cannot be turned in such a way to facilitate seeing signs of infestation, tiny entry holes of plant pests that feed internally, or seeing minute plant pests such as *Thripidae* that can hide in unopened flower spikes. A0179.

Likewise, HDOA explained that greenhouses with screens and even automatic doors are not impermeable to all insects, pests, and disease pathogens; that the required 0.6 mm screen hole size (7 C.F.R. § 319.37-8(e)(2)(ii)) will not exclude the crawler stage of Mealybugs; and that, as has happened with past APHIS inspections of readily-observable bare-rooted *Phalaenopsis* spp. orchid seedlings, "mealybug

crawler-infested orchids would then be placed on store shelves and rapidly dispersed throughout the United States." A0180.

Writing on behalf of Appellant HOGA, on November 23rd, 1998 Dr. Arnold Hara, an Entomologist at the College of Tropical Agriculture and Human Resources, University of Hawai`i at Manoa, provided Comments on the proposed Rule. A0251-0257. Dr. Hara wrote APHIS that the Quarantine 37 Regulations were ineffective and would not reduce the plant pest risk from potted *Phalaenopsis* spp. orchids to a risk not greater than the plant pest risk presented by importations of bare-root *Phalaenopsis* spp. orchid seedlings, and, as an example, he explained that infestations of *Thrips palmi* had occurred in Europe as a result of importations of cut orchid flowers marketed through Dutch auction houses. A0255-0256.

Dr. Hara cautioned that eradication of alien plant pests which successfully invade will require extreme measures, this because "incipient populations introduced into the United States will [already] be highly resistant to many chemical insecticides." He explained that when *Thrips palmi* invaded Hawai`i in 1982 "almost all registered insecticides were ineffective . . . ." A0255.

Endangered Species Act Consultations.

APHIS commenced informal ESA consultations with FWS in September 2002. 50 C.F.R. § 402.13(a). APHIS initiated these informal ESA consultations by preparing on September 5th, 2002 a Biological Assessment which attempted to explain away the APHIS Pest Risk Assessment of 1997—per this later APHIS Biological Assessment "the pests identified in the 1997 risk assessment occur in uncultivated situations in Taiwan . . . ." A0301. In fact, the alien plant pests identified in the 1997 APHIS Pest Risk Assessment were alien plant pests intercepted by APHIS inspectors on importations of greenhouse grown and cultivated bare-root *Phalaenopsis* spp. orchid seedlings.

On March 21st, 2003 FWS wrote APHIS that FWS had "identified two areas of residual concern," one of which was as follows:

> It is not clear why the several species of quarantine pest thrips were eliminated from consideration as pests that are likely to follow the importation pathway. The phytosanitary measures do not appear to adequately address the potential for infestation of thrips, resulting in a substantial risk of the organisms entering greenhouse units, openings, and vent coverings. Specifically, the prescribed screening mesh size does not appear fine enough to exclude thrips from growing areas. Please provide an explanation why these species of thrips were dropped from the list of quarantine pests, and the rationale for the prescribed screening mesh size.

A0369.

At a conference convened on April 2nd and 3rd, 2003 APHIS responded to this "residual concern" as follows:

> Thrips is a pest of Orchidaceae in Taiwan; however, *there is no evidence in either the scientific literature or from the interceptions at APHIS plant inspection stations that thrips is a pest on Phalaenopsis. PPQ ran a search on their database for thrips interceptions on Phalaenopsis from Taiwan. No interceptions turned up. . . . Phalaenopsis has been imported bare root into the United States for at least 20 years. During that time no problems with pests on Phalaenopsis have arisen.* The importation has amounted to a long-term uncontrolled experiment.

A0372 (Emphasis added).

On April 3rd, 2003 APHIS, again responding to this "residual concern," wrote FWS as follows:

> The thrips identified in the pest risk assessment (PRA) were not considered for several reasons. *The extensive literature searches APHIS conducted revealed that none of the thrips identified in the PRA have ever been reported on Phalaenopsis. Furthermore, a review of pest interceptions made over the past eight years on bare-rooted Phalaenopsis plants from Taiwan show that thrips have not been intercepted. . . .*

A0374 (Emphasis added).

The APHIS Pest Risk Assessment of 1997 had reported, from a literature search, and from review of APHIS interception records of bare-rooted *Phalaenopsis* spp. orchid seedlings, that Thrips were "associated" with *Phalaenopsis* spp. from Taiwan. A0137-0139. Dr. Hara's Comments submitted on November 30th, 1998 had carefully

explained that a required 0.6 mm hole size in greenhouse screening would not exclude *Thripidae* alien plant pests of *Phalaenopsis* spp. orchids in Taiwan which had been identified in the APHIS Pest Risk Assessment of 1997. A0137, 0139, 0143.

And in Comments submitted on November 25th, 1998 HDOA had reported that in 1993 it had allowed an importation of 50,000 bare-rooted *Phalaenopsis* spp. orchids into Hawai`i under a special permit whereby the orchid seedlings were obtained from flasked material, the greenhouses in Taiwan were enclosed by screens and doors, and HDOA inspectors had traveled to Taiwan and there inspected and approved "each and every Phalaenopsis plant for packing." Nonetheless, several alien plant pests were intercepted by APHIS when the bare-rooted orchid plants were presented for entry into the United States, and even more alien plant pests were found after these bare-rooted *Phalaenopsis* spp. orchid seedlings were thereafter grown-out in a quarantine house in Hawai`i for the then State-mandated post-entry period of 60 days. A0186.

APHIS revealed none of this readily available scientific and commercial data to FWS. On April 7th, 2003 FWS concurred with APHIS in these informal consultations that the Rule proposed by APHIS would not adversely affect Federally-listed or proposed Endangered or Threatened Species or their habitats. A0377.

Neither APHIS nor FWS had considered alien species interdiction features such as those FWS had imposed to preclude the invasion of hitchhiking alien species at Kahului Airport, alien species interdiction features that were a condition of the formal "No Jeopardy" Biological Assessment earlier issued by FWS.

Neither did APHIS/FWS consider the difference between an assessment of the risk of alien plant pest invasion through entry of specific plant hosts, *viz.*, *Phalaenopsis* spp. orchid plants, and an assessment of the risk of alien species invasion through introduction of breeding habitats contaminated with alien species, i.e., the pots filled with sphagnum moss in which mature *Phalaenopsis* spp. orchid plants will enter from Taiwan.

The Proposed Rule of 2003.

On Friday, May 9th, 2003 APHIS announced publicly in the FEDERAL REGISTER a proposed Rule allowing the importation *from Taiwan only* of mature *Phalaenopsis* spp. orchid plants potted in sphagnum moss as a growing medium. APHIS there explained that in response to Comments on the proposed Rule of 1998 it had "narrowed the application of the rule to *Phalaenopsis* spp. from Taiwan only . . . ." Further, APHIS explained that it had received FWS concurrence on its determination "that

the importation of *Phalaenopsis* spp. from Taiwan will not adversely affect federally listed or proposed endangered or threatened species or their habitats." A0505.

What APHIS did not say in this FEDERAL REGISTER announcement (nor could it have) was that APHIS had obtained this FWS concurrence with the APHIS ESA determination, 16 U.S.C. § 1536(a)(2), without APHIS ever providing to FWS the Comments that APHIS had received from HDOA, or on behalf of HOGA. Had there been formal ESA consultations (there were not), the ESA Joint Regulations, 50 C.F.R. § 402.14(d), would have required APHIS to provide HODA and HOGA an "opportunity to submit information for consideration during the consultation."

This distinction between formal and informal ESA consultations is a distinction made only in the ESA Joint Regulations, 50 C.F.R., Chapter IV. Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) requires that Federal Agencies consulting with FWS, whether these or not these consultations are formal, or informal, "shall use the best scientific and commercial data available."

At the same time that it announced the proposed Rule of 2003 APHIS revised and reissued the Pest Risk Analysis of 1997 as the Risk Analysis of 2003. A0407-0443. APHIS did not in this reissued document or in a companion Environmental

Assessment, A0379-0406, review or discuss the Comments received by APHIS on the proposed Rule of 1998.

In the Risk Analysis of 2003 APHIS eliminated from consideration six *Thripidae* plant pests of *Phalaenopsis* spp. orchids in Taiwan, this because APHIS plant pest interception records did not identify these intercepted alien plant pests specifically to *Phalaenopsis* spp. orchid plants. A0418. APHIS recognized in the Risk Analysis of 2003 that the orchid-growing areas of Taiwan have a tropical climate, but then APHIS supposed, wrongly, that in the United States it is only in south Florida that invasive alien plant pests from Taiwan could survive in the out-of-doors: "The risk assessment assumes that those pests will be unable to establish or spread in the out-of-doors environment."

APHIS thus saw little risk to the United States from invasive alien plant pests when these alien plant pests were only "associated with plants grown, either indoors or in a greenhouse . . . ."A0419.

Comments on the Proposed Rule of 2003.

Dr. Hara provided Comments on the proposed Rule of 2003, this time on July 8th, 2003. A0508-0517. Among other things, Dr. Hara observed that consideration of *Thripidae* pests of *Phalaenopsis* spp. orchids in Taiwan was wrongly omitted:

> APHIS rationalized that thrips were NOT analyzed as quarantine pests because host plant records were not specifically linked to *Phalaenopsis* (RA, pp. 9). This is totally invalid, because scientific publications routinely report "orchid" or Orchidaceae in insect host records and do not specify the host species, such as Phalaenopsis (Kumashiro et al. 2001, Hawaii Dept. of Agriculture 2000).

A0509.

And Dr. Hara explained to the APHIS scientists that had authored the Risk Analysis of 2003 that Hawai`i, like south Florida, is also in a tropical climate: "DOESN'T THIS ENVIRONMENTAL ASSESSMENT AND PEST RISK ANALYSIS CONSIDER HAWAII TO BE PART OF THE UNITED STATES?" Dr. Hara pointed out that in Hawai`i "most orchids are grown outdoors or under shadehouses and almost never in completely enclosed temperature-controlled greenhouses." *Id.*

On July 9th, 2003 HDOA provided Comments on the proposed Rule of 2003. A0518-0539. HDOA explained that beyond the devastating economic impact to Hawai`i's orchid industry, adoption of the proposed Rule and the certain invasion of alien species as a result would likewise devastate Hawai`i's "native ecosystems" and would threaten Hawai`i's "tourism and agricultural industries, watershed and public health." A0518.

HDOA said that the proposed Rule had not gone through "the proper rule development and clearance process" and that APHIS "did not provide FWS with suf-

ficient information to make a valid determination." *Id*. HDOA explained that along with the APHIS Biological Assessment of September 5th, 2002 APHIS had not provided to FWS the Comments APHIS had received and that APHIS had simply ignored these Comments in the APHIS Biological Assessment of 2002. A0519.

HDOA explained, again, that experience in Hawai`i's tropical climate had proved that APHIS visual inspections of even bare-rooted orchid seedlings were not adequate to prevent the invasion of alien plant pests. A0520.

And now HDOA explained to APHIS that biting midges of the *Culicoides* family; biting midges with at least 30 species in Taiwan; biting midges small enough to easily move through the 0.6 mm openings in the screening on the greenhouses described in the Quarantine 37 Regulations; biting midges that "live in moist substrates, such as sphagnum" are in Taiwan "a serious economic problem especially in coastal resort areas and in mountain areas." A0523.

Reinitiation of Endangered Species Act Consultations.

On October 1st, 2003 APHIS re-opened its informal ESA consultations with FWS. A0540-0542.

FWS responded to these re-opened informal ESA consultations by once again raising a question about the adequacy of the screening for the greenhouses in Taiwan where *Phalaenopsis* spp. orchid plants are to be cultivated in pots of sphagnum moss:

> We had understood during the interagency discussions and subsequent agreement that 0.6 mm mesh size for greenhouse, opening, and vent screening was inadequate to prevent the introductions of thrips infestations into APHIS-approved greenhouses, and that 0.4 mm mesh size or less would be used. Using the smaller mesh size would provide an additional degree of insurance against an infestation of thrips and reduce the potential for importing thrips into the United States. Please explain how requiring use of 0.6 mm mesh will prevent thrips introductions.

A0545.

When it responded on June 2nd, 2004 to this question from FWS, APHIS admitted that its selection of mesh size for the greenhouses was based on economics, not on any concern for species preservation:

> Regarding the comment that FWS understood from our discussions that PPQ would require a mesh size smaller than 0.6 mm for the greenhouse, opening, and vent screenings to prevent the introductions of thrips infestations into APHIS-approved greenhouses, PPQ assumes that this was a misunderstanding. *PPQ recognizes that thrips are very small insects, approximately 0.2 mm, and could get in through even the 0.4 mm mesh size suggested by FWS. Mesh size of 0.6 mm is the most practical for many situations; smaller mesh sizes would require adapting greenhouse construction to accommodate the need for air circulation and cooling fans, especially in more humid climates.* However, PPQ incorporates specific equivalent mitigation measures, including routine or repeated pesticide sprays, when warranted, to reduce the risk of infestation and possible introduction of thrips into the United States.

A0622-0623 (Emphasis added).

On September 1st, 2004 FWS wrote APHIS and FWS again concurred with the APHIS Biological Assessment that the proposed Rule for the importation from Taiwan of finished, flowering *Phalaenopsis* spp. orchid plants established in pots of sphagnum moss was "not likely to adversely affect" Federally-listed species or designated critical habitat. A0626. This FWS letter confirms that APHIS had never provided to FWS Dr. Hara's Comments of November 23rd, 1998, or Dr. Hara's Comments of July 3rd, 2003. Likewise APHIS had provided to FWS neither the November 25th, 1998 Comments from HDOA nor the July 9th, 2003 Comments from HDOA. A0628-0629.

The Final Rule.

On Wednesday, May 5th, 2004 APHIS published its Final Rule adding an additional taxon of plants, mature *Phalaenopsis* spp. orchid plants from Taiwan potted in sphagnum moss, which may be imported subject to the requirements of 7 C.F.R. § 319.37-8(e). "Importation of Orchids of the Genus *Phalaenopsis* From Taiwan in Growing Media," 69 Fed. Reg. 24916-36 (2004) (to be codified at 7 C.F.R. § 319.37-8(e)); A0549-0569.

SUMMARY OF THE ARGUMENT

APHIS lied to FWS when on April 3rd, 2003 APHIS responded to FWS that "a review of pest interceptions over the past eight years on bare-rooted Phalaenopsis plants from Taiwan show that thrips have not been intercepted." The APHIS Biological Assessment of 2002 provided to FWS to initiate informal ESA consultations, 16 U.S.C. § 1536(c)(1), is a lie when it reports that the APHIS Pest Risk Assessment of 1997 concerned alien plant pests encountered *only* "in uncultivated situations in Taiwan."

APHIS did not provide to FWS for these informal ESA consultations Comments which APHIS had received from HDOA and on behalf of HOGA, Comments from Citizens experienced with commercial orchid cultivation in a tropical climate like that in Taiwan, Comments that carefully explained that Thrips could move through the 0.6 mm openings in the screening on the greenhouses described in the Quarantine 37 Regulations, and Comments that told about the failure in 1993 of a HDOA program much like the importation regime proposed by the Rules announced by APHIS in 1998 and in 2003.

The APHIS Risk Analysis of 2003 provided to FWS when ESA consultations were re-opened is a lie because APHIS supposes, wrongly, that in the United States it would be only in south Florida that invasive alien plant pests from Taiwan could survive in the out-of-doors.

Again APHIS did not provide to FWS for re-opened informal ESA consultations Comments that APHIS had received—this time on the proposed Rule of 2003. These Comments included Dr. Hara's observation that Thrips were wrongly excluded from consideration in the APHIS Risk Analysis of 2003, and HDOA's expectation, this based on HDOA's experiences since 1953 with importations of bare-rooted orchid seedlings, that adoption of the Rule of 2003 would result in the certain invasion of alien species, followed by the devastation of Hawai`i's native ecosystems.

As a result of these APHIS actions and inactions, APHIS failed to "use the best scientific and commercial data available" as is required by 16 U.S.C. § 1536(a)(2). These APHIS actions and inactions are arbitrary and capricious. 5 U.S.C. § 706(2)-(A). The District Court excused the duty to use the "best" scientific and commercial data because just what is "best" is undefined. *Hawai`i Orchid Growers*, 436 F. Supp. 2d, at 54. Doing so, the District Court ignored an equally important command

of 16 U.S.C. § 1536(a)(2), the duty to use "available" scientific and commercial data.

And the informal APHIS/FWS ESA consultations ignored, for APHIS, an inconvenient fact: in formal ESA consultations FWS had previously imposed at Kahului Airport explicit state-of-the-art alien species interdiction features to preclude the invasion of alien species. FWS had imposed these state-of-the-art alien species interdiction features because FWS had determined that these "reasonable and prudent measures" were required by 50 C.F.R. § 402.14(i)(1)(ii).

These informal APHIS/FWS ESA consultations proceeded without any analysis of the problems/risks that could arise from the entry of breeding habitats contaminated with alien species. The Final Rule allowing entry of mature, potted *Phalaenopsis* spp. thus entirely failed to consider an important aspect of the problem. This Final Rule is arbitrary and capricious.

STANDING

An Association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the Association's purpose, and neither the claim asserted nor

the relief requested requires the participation of individual members in the lawsuit. *Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167, 181 (2000). HOGA is just such an Association. It is comprised of "breeders, propagators, and growers of orchids in Hawaii." A0014. "Its goals are to promote the development of [the orchid] industry by supporting marketing, research and education projects." A0014. One or more of HOGA's members grow *Phalaenopsis* spp. orchids, A0014, and one or more such members specialize in potted *Phalaenopsis* spp. orchids, A0014.

Article III standing, U.S. CONST., art. III, § 2, requires: (1) injury in fact—certainly impending invasion of a legally protected interest that is itself concrete and particular; (2) injury that is fairly traceable to the challenged act; and (3) injury that is likely to be redressed by a favorable decision, although this redress need be no more than a proper identification of the risks to particular interests. *Bennett v. Spear*, 520 U.S. 154, 167 (1997), citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Fund for Animals v. Norton*, 322 F.3d 728, 732-733 (D.C. Cir. 2003).

All three species of native Hawai`ian orchids are unique. Designated critical habitat for *Platanthera holochila* is bog hummocks which support a variety of mosses and bryophytes; *Anoectochilus sandvicensis* and *Liparis hawaiiensis* are associated with

mosses that grow on the trunks of trees in wet forests. A0172. *Anoectochilus sandvicensis* is an "associated native species" in critical habitat of the Endangered Species *Adenophorus periens* (pendant kihi fern), 68 Fed. Reg. 12987-12988 (2003), and *Liparis hawaiiensis* (awapuhiakanaloa) is an associated native species in critical habitat of the Endangered Species *Phyllostegia hirsuta*, 68 Fed. Reg. 35964-35965 (2003).

FWS has made it clear that the Final Rule may be detrimental to these native Hawai`ian orchids by altering critical conditions required for their successful germination, growth, and reproduction, and has made it clear that possible infestations in Hawai`i of *Thripidae* pests of *Phalaenopsis* spp. orchids from Taiwan are an "area" of "residual concern." A0369. Indeed, this risk to the native Hawai`ian orchids provides the requisite standing.

Each day, Appellant's members have the opportunity to observe the native Hawai`ian orchids. Indeed, because of their avocational interest in *Orchidaceae*, Appellant's members are more likely than other people to make such observations. *Defenders of Wildlife v. Norton*, 257 F. Supp. 2d 53, 62-63 (D.D.C. 2003). Having such commercial, educational, and aesthetic interests, Appellant's members have a particularized interest to prevent harm to, and, potentially, the extinction of, unique Hawai`ian

orchids which warrants this Court's intervention. *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975).

It is a certainty that the threat of introduction of alien plant pests and alien species into Hawai`i and the rest of the United States is significantly heightened by the Final Rule. A0512-0517. Among the alien species that likely will be introduced are invasive *Thripidae* plant pests of *Phalaenopsis* spp. orchids brought to Hawai`i from Taiwan and an invasive alien species, a blood-sucking midge of the of the *Culicoides* family known in Taiwan as "little King Kong," and a serious environmental problem there, which may well invade Hawai`i through eggs laid in the sphagnum moss in which maturing *Phalaenopsis* spp. orchids are cultivated in Taiwan, sphagnum moss that will be allowed entry into Hawai`i with mature potted *Phalaenopsis* spp. orchid plants. A0525-0528.

These impacts to Appellant's members far exceed the "trifle" necessary to establish standing. *Chevron U.S.A., Inc. v. Federal Energy Regulatory Commission*, 193 F. Supp. 2d 54, 60 (D. D.C. 2002), *aff'd sub nom. The Williams Companies v. Federal Energy Regulatory Commission*, 345 F.3d 910 (D.C. Cir. 2003), quoting *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 937 (D.C. Cir. 1986) ("For purposes

of Article III, the injury 'need not be large or intense; an 'identifiable trifle,' the Supreme Court has said, is sufficient to meet the constitutional minimum.'").

And Appellant has a particularized interest in the native Hawai`ian orchids. A member explained efforts, so far unsuccessful, to propagate *Anoectochilus sandvicensis* or *Liparis hawaiiensis*. This is the sort of aesthetic interest that is sufficient for standing, *American Society for the Prevention of Cruelty to Animals v. Ringling Brothers*, 317 F.3d 334, 336-37 (D.C. Cir. 2003), and this aesthetic interest will be harmed by the introduction of alien plant pests and alien species if the Final Rule is not set aside—no more than this is required to satisfy the causation prong of Constitutional standing. *Animal Legal Defense Fund, Inc. v. Glickman*, 154 F.3d 426, 440-41 (D.C. Cir. 1998).

The injury threatened by the Final Rule is not merely conjectural or hypothetical. Appellees have failed to properly assess the impact on unique Hawai`ian orchids which will result from the alien plant pests which will be introduced as an unintended result of the Final Rule. At one point, FWS made it clear that the Final Rule may be detrimental to unique Hawai`ian orchids by altering critical conditions required for their successful germination, growth, and reproduction. Now, however, FWS is deafeningly silent.

Appellant's challenges to the Final Rule will indeed be redressed by a favorable decision in this Case. It is not just that Appellees have performed procedural steps in an incorrect or inaccurate manner—Appellees have overlooked the creation of a demonstrable risk to Appellant's particularized personal and environmental interests, and it is likely that a second, proper review of Taiwan's importation request will correct these errors and impose additional phytosanitary measures such that Appellant's members are protected from invasive alien species and from invasive alien plant pests, and that unique Hawai`ian orchids do not vanish. *Cf. Defenders of Wildlife*, 257 F. Supp. 2d, at 64.

ARGUMENT

I. Standard of Review.

This Case is brought under the Citizen suit provisions of the ESA, 16 U.S.C. § 1540(g). Because the ESA does not specify its own standard of review, judicial review is governed by Section 706 of the Administrative Procedure Act. 5 U.S.C. §§ 702, 706(2)(A); *Carlton v. Babbitt*, 26 F. Supp. 2d 102, 106 (D. D.C. 1998).

Under the Administrative Procedure Act, a reviewing Court may overturn Agency action found to be "arbitrary, capricious, an abuse of discretion, or other-

wise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989). "Normally, an agency rule would be 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 Manufacturer's Asso. of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983).

Although it is a narrow standard, judicial review under the Administrative Procedure Act does not shield an Agency from a "thorough, probing, in-depth review." *Center for Biological Diversity v. Lohn*, 296 F. Supp. 2d 1223, 1231 (W.D. Wash. 2003). An Agency seeking to justify its actions may not offer a new explanation for these actions, and instead must be judged on the rationale and record that led to the challenged decision. *City of Kansas City Missouri v. HUD*, 923 F.2d 188, 192 (D.C. Cir. 1991) ("arbitrary and capricious review . . . demands evidence of reasoned decisionmaking *at the agency level*; agency rationales developed for the first time during litigation do not serve as adequate substitutes") (Emphasis added).

II. APHIS's Failure to Disclose to FWS the Best Scientific and Commercial Data Available is Arbitrary and Capricious.

It is beyond peradventure that an action Agency (as APHIS here) which engages in ESA consultations with FWS may not selectively fail to disclose to FWS adverse scientific and commercial data which is in the possession of the action Agency. Nor may an action Agency beat around the bush (in this case, it is an orchid plant).

In 1986 USDA FS was engaged in informal ESA consultations with FWS concerning planned timber harvesting in the Flathead National Forest in northern Montana. *Resources Limited, Inc. v. Robertson*, 35 F.3d 1300, 1302 (9th Cir. 1994). USDA FS selectively withheld from FWS information that intensive timber harvesting in the Flathead National Forest would likely have adverse impacts on grizzly bear, *Ursus arctos horribilis*, a Threatened Species within the contiguous United States. This information had been developed by a team of USDA FS personnel. *Id.*, 35 F.3d 1300, at 1304-05. Before the Ninth Circuit, USDA FS argued that this information that it had developed need not have been disclosed because there would have been further consultations with FWS about site-specific timber harvesting decisions. *Id.*, 35 F.3d 1300, at 1305.

But the Ninth Circuit held that the prospect of further, site-specific ESA consultations did not excuse that which the Ninth Circuit found as USDA FS's violation

of Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), this a failure to use the best available scientific and commercial data in the informal ESA consultations that were in fact the subject of the Civil Action before the Ninth Circuit. The Ninth Circuit held "not justified" the USDA FS's reliance on FWS concurrence in USDA FS's determination that the proposed timber harvesting would not adversely affect Federally-listed or proposed Endangered or Threatened Species or their habitats. *Id*.

The honesty oath of witnesses, to provide "the truth, the whole truth, and nothing but the truth," is a staple of procedure dating back to English trials in the 13th Century, and this honesty oath informs the question here—just what is required to be provided for ESA consultations which, by statute, must be made using "the best scientific and commercial data available?" Certainly it is at least the whole truth and this is the clear sense of the Ninth Circuit Decision.

In these informal ESA consultations with FWS did APHIS tell FWS the whole truth? No, it did not. APHIS lied to FWS when APHIS reported to FWS that Thrips had not been intercepted by APHIS inspectors upon examination of bare-rooted *Phalaenopsis* spp. orchid seedlings at Ports of Entry. The APHIS Biological Assessment of 2002 is a lie when it reports to FWS that the plant pests reported in the APHIS Pest Risk Assessment of 1997 were encountered only "in uncultivated

situations in Taiwan." The APHIS Pest Risk Analysis of 2003 provided to FWS when ESA consultations were re-opened is a lie because APHIS there supposes, wrongly, that in the United States it would only be in south Florida that invasive alien plant pests from Taiwan could survive in the out-of-doors.

The Navy's plan to test a low frequency sonar system in the open oceans of the World and formal ESA consultations with NMFS about that plan were before the District Court in *Natural Resources Defense Council, Inc. v. Evans*, 364 F. Supp. 2d 1083 (D. ND. Cal. 2003). One of the issues in these ESA consultations was the potential risk to fish as a result of exposure to low frequency sonar noise. There were discussions about this risk in those Navy/NMFS ESA consultations, just as there were discussions in these APHIS/FWS ESA consultations about the screen size necessary to prevent greenhouse contamination by invasive alien plant pests. But there the Navy did not disclose to its own expert a U.K. Defence Research Agency study which reported injuries to fish from exposure to lower signal strengths than those higher signal strengths that were supposed by the Navy's own expert to be the threshold of exposure before injuries to fish could occur. *Id.*, 364 F. Supp. 2d, at 1118-119.

That District Court held that the Navy's failure to disclose this U.K. Defence Research Agency study was arbitrary and capricious:

> [T]he Defense [sic] Research Agency Study is directly relevant and is not "junk science" that can simply be ignored. . . . . Defendants' interpretation of the requirement to provide "the best scientific data available" to exclude highly relevant research because its methodology—like most studies—can be criticized effectively eviscerates the requirement to use the best *available* science and rewrites the standard to perfect science. Therefore, the Navy acted arbitrarily and capriciously in failing to provide NMFS with this highly relevant data.

Id., 364 F. Supp. 2d, at 1131-1132 (Emphasis as in original).

The same Judgment should obtain here. Contrary to our District Court, *Hawai`i Orchid Growers*, 436 F. Supp. 2d, at 53, the command of Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) is not satisfied by the mere act of discussing in ESA consultations the same issues as those in *available* scientific and commercial data that is not disclosed.

III. There Was Here No Consideration of the Prospect of Invasion by Alien Species; Thus the Final Rule is Arbitrary and Capricious.

It is hornbook law that Agency action is arbitrary and capricious if an Agency "has entirely failed to consider an important aspect of the problem." *Motor Vehicle Manufacturer's Asso.*, 463 U.S., at 43.

There is a difference between an alien plant pest and an alien species—an alien plant pest is an organism not known to occur in the United States that adversely affects domestic plants; an alien species is merely an organism not known to occur in a particular environment, i.e., Hawai`i. Alien plant pests are always alien species; alien species are not necessarily alien plant pests.

An example is the Coqui frog, *Eleutherdactylus coqui*, a native species of the United States which lives in Puerto Rico and an alien species that has invaded Hawai`i. This little frog has no predators in Hawai`i and its principal offense is its noisy mating behavior. The Coqui frog is not an alien plant pest.

The ESA consultations between APHIS and FWS that are the subject of this Civil Action considered only alien plant pests, not alien species. Should alien species have been considered along with alien plant pests? Were alien species "an important aspect of the problem"?

The Kahului Airport Biological Assessment, a document generated during formal ESA consultations between FWS, the Hawai`i Department of Transportation, and the Federal Aviation Administration teaches that an important aspect of the Final Rule here would have been consideration of the difficulties inherent in visual examinations of mature, potted *Phalaenopsis* spp. orchid plants for the pres-

ence, *vel non*, of invasive alien species. And this is in addition to consideration of a lesser number of invasive alien organisms, the alien plant pests in fact considered in the APHIS/FWS ESA consultations.

It was wrong for our District Court not to Order that the Administrative Record be supplemented with the formal FWS Kahului Airport Biological Assessment. *Hawai`i Orchid Growers*, 436 F. Supp. 2d, at 55.

An Administrative Record may be supplemented with extra-record materials that are relevant to the challenged Agency action but were not considered. *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989). And supplementation of an Administrative Record is properly required when Agencies exclude from that Administrative Record information adverse to them. The documents to be added must be shown: (1) to have been known to the Agencies at the time of the challenged Agency action, (2) to be directly related to the challenged Agency action, and (3) must be adverse to the challenged Agency action. *The Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 198 (D. D.C. 2005).

Just so here. APHIS/FWS knew about the formal Kahului Airport Biological Assessment at the times of the ESA consultations here; the Kahului Airport Biological Assessment is directly related to the Final Rule that is challenged here; and the Ka-

hului Airport Biological Assessment is adverse to the APHIS determination, this with the concurrence of FWS, that the Final Rule will not adversely affect Federally-listed or proposed Endangered or Threatened Species or their habitats.

Why is the Kahului Airport Biological Assessment adverse to the APHIS determination? Precisely because the Kahului Airport Biological Assessment is a thorough, formal FWS analysis of the problems/risks arising from the entry of breeding habitats contaminated with alien species, whereas the APHIS/FWS ESA consultations here concern only alien plant pests, not alien species. Because adoption of this Final Rule allowing importation from Taiwan of mature, potted *Phalaenopsis* spp. orchid plants entirely failed to consider invasion of alien species, the Final Rule is arbitrary and capricious.

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

For all these reasons, Hawai`i Orchid Growers Association requests that this Court reverse the District Court, and that this Court remand this Civil Action to the District Court with direction that the District Court order the named Federal officers of the United States Department of Agriculture to set-aside the Final Rule.

Respectfully submitted,

/s/ Cyrus E. Phillips, IV

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ADDENDUM

STATUTES

General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued)

that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

5 U.S.C. § 553(b)

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. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein

(1) affects 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) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 702

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

5 U.S.C. § 703

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. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 704

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 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.

5 U.S.C. § 706

It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.

16 U.S.C. § 1531(c)(1)

The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

16 U.S.C. § 1536(a)(1)

Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consulta-

tion as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

16 U.S.C. § 1536(a)(2)

To facilitate compliance with the requirements of subsection (a)(2) of this section, each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on November 10, 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as is mutually agreed to by the Secretary and such agen-

cy, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

16 U.S.C. § 1536(c)(1)

(1) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

(2) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of plants listed pursuant to section 1533 of this title, it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from, the United States;

(B) remove and reduce to possession any such species from areas under Federal jurisdiction; maliciously damage or destroy any such species on any such area; or remove, cut, dig up, or damage or destroy any such species on any other area in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law;

(C) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(D) sell or offer for sale in interstate or foreign commerce any such species; or

(E) violate any regulation pertaining to such species or to any threatened species of plants listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

16 U.S.C. § 1538(a)

(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf—

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any

provision of this chapter or regulation issued under the authority thereof; or

(B) to compel the Secretary to apply, pursuant to section 1535(g)(2)(B)-(ii) of this title, the prohibitions set forth in or authorized pursuant to section 1533(d) or 1538(a)(1)(B) of this title with respect to the taking of any resident endangered species or threatened species within any State; or

(C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be. In any civil suit commenced under subparagraph (B) the district court shall compel the Secretary to apply the prohibition sought if the court finds that the allegation that an emergency exists is supported by substantial evidence.

(2)

(A) No action may be commenced under subparagraph (1)(A) of this section—

(i) prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation;

(ii) if the Secretary has commenced action to impose a penalty pursuant to subsection (a) of this section; or

(iii) if the United States has commenced and is diligently prosecuting a criminal action in a court of the United States or a State to redress a violation of any such provision or regulation.

(B) No action may be commenced under subparagraph (1)(B) of this section—

(i) prior to sixty days after written notice has been given to the Secretary setting forth the reasons why an emergency is thought to exist with respect to an endangered species or a threatened species in the State concerned; or

(ii) if the Secretary has commenced and is diligently prosecuting action under section 1535(g)(2)(B)(ii) of this title to determine whether any such emergency exists.

(C) No action may be commenced under subparagraph (1)(C) of this section prior to sixty days after written notice has been given to the Secretary; except that such action may be brought immediately after such notification in the case of an action under this section respecting an emergency posing a significant risk to the well-being of any species of fish or wildlife or plants.

(3)

(A) Any suit under this subsection may be brought in the judicial district in which the violation occurs.

16 U.S.C. § 1540(g)

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1291

Except as provided in sections 1292(c), 1292(d), and 1295 of this title, appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district.

28 U.S.C. § 1294(1)

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1331

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 U.S.C. § 1361

A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which

(1) a defendant in the action resides,

(2) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or

(3) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

> The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

28 U.S.C. § 1391(e)

> In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time [for Appeal] as to all parties shall be sixty days from such entry.

28 U.S.C. § 2107(b)

> (a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other

legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act.

28 U.S.C. § 2201

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

28 U.S.C. § 2202

REGULATIONS

Any restricted article at the time of importation or offer for importation into the United States shall be free of sand, soil, earth, and other growing media, except as provided in paragraph (b), (c), or (d) or (e) of this section.

7 C.F.R. § 319.37-8(a)

A restricted article of any of the following groups of plants may be imported established in an approved growing medium listed in this paragraph

if the article meets the conditions of this paragraph, and is accompanied by a phytosanitary certificate issued by the plant protection service of the country in which the article was grown that declares that the article meets the conditions of this paragraph:

Alstroemeria
Ananas[11]
Anthurium
Artificially dwarfed (penjing) plants from the People's Republic of China of the following plant species: *Buxus sinica, Ehretia microphylla, Podocarpus macrophyllus, Sageretia thea*, and *Serissa foetida*.
Begonia
Gloxinia (= *Sinningia*)
Nidularium[11a]
Peperomia
Phalaenopsis spp. from Taiwan
Polypodiophyta (=*Filicales*) (ferns)
Rhododendron from Europe
Saintpaulia.

[11] These articles are bromeliads, and if imported into Hawaii, bromeliads are subject to postentry quarantine in accordance with § 319.7-7.
[11a] See footnote 11.

(1) Approved growing media are baked expanded clay pellets, cork, glass wool, organic and inorganic fibers, peat, perlite, polymer stabilized starch, plastic particles, phenol formaldehyde, polyethylene, polystyrene, polyurethane, rock wool, sphagnum moss, ureaformaldehyde, vermiculite, or vol-

canic rock, or any combination of these media. Growing media must not have been previously used.

(2) Articles imported under this paragraph must be grown in compliance with a written agreement for enforcement of this section signed by the plant protection service of the country where grown and Plant Protection and Quarantine, must be developed from mother stock that was inspected and found free from evidence of disease and pests by an APHIS inspector or foreign plant protection service inspector no more than 60 days prior to the time the article is established in the greenhouse (except for articles developed from seeds germinated in the greenhouse), and must be:

(i) Grown in compliance with a written agreement between the grower and the plant protection service of the country where the article is grown, in which the grower agrees to comply with the provisions of this section and to allow inspectors, and representatives of the plant protection service of the country where the article is grown, access to the growing facility as necessary to monitor compliance with the provisions of this section;

(ii) Grown solely in a greenhouse in which sanitary procedures adequate to exclude plant pests and diseases are always employed, including cleaning

and disinfection of floors, benches and tools, and the application of measures to protect against any injurious plant diseases, injurious insect pests, and other plant pests. The greenhouse must be free from sand and soil and must have screening with openings of not more than 0.6 mm (0.2 mm for greenhouses growing *Rhododendron* spp.) on all vents and openings except entryways. All entryways must be equipped with automatic closing doors;

. . . .

(vi) Rooted and grown in approved growing media listed in § 319.37-8-(e)(1) on benches supported by legs and raised at least 46 cm above the floor.

39 C.F.R. § 319.37-8(e)

Informal consultation is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative, designed to assist the Federal agency in determining whether formal consultation or a conference is required. If during informal consultation it is determined by the Federal agency, with the written concurrence of the Service, that the action is not likely to adver-

sely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary.

50 C.F.R. § 402.13(a)

(a) *Requirement for formal consultation*. Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required, except as noted in paragraph (b) of this section. The Director may request a Federal agency to enter into consultation if he identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation. When such a request is made, the Director shall forward to the Federal agency a written explanation of the basis for the request.

(b) *Exceptions*. (1) A Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment under § 402.12 or as a result of informal consultation with the Service under § 402.13, the Federal agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat.

(2) A Federal agency need not initiate formal consultation if a preliminary biological opinion, issued after early consultation under § 402.11, is confirmed as the final biological opinion.

. . . .

(i) *Incidental take*. (1) In those cases where the Service concludes that an action (or the implementation of any reasonable and prudent alternatives) and the resultant incidental take of listed species will not violate section 7-(a)(2), and, in the case of marine mammals, where the taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act of 1972, the Service will provide with the biological opinion a statement concerning incidental take that:

(i) Specifies the impact, i.e., the amount or extent, of such incidental taking on the species;

(ii) Specifies those reasonable and prudent measures that the Director considers necessary or appropriate to minimize such impact . . . .

50 C.F.R. § 402.14

PROOF OF SERVICE

Pursuant to FED. R. APP. P. 25(d)(1)(B), the undersigned hereby certifies, under the penalty of perjury, that on Wednesday, March 28th, 2007 he caused to be sent, by Overnight Delivery, expenses prepaid, two copies of the foregoing Final Principal Brief of Appellant Hawai`i Orchid Growers Association to counsel for the United States at the following address:

Ryan D. Nelson, Esq.
Deputy Assistant Attorney General
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/s/ Cyrus E. Phillips, IV

_____
Cyrus E. Phillips, IV

Pursuant to FED. R. APP. P. 25(d)(1)(B), the undersigned hereby certifies, under the penalty of perjury, that on Wednesday, March 28th, 2007 he caused to be sent, by Overnight Delivery, expenses prepaid, two copies of the foregoing Final Principal Brief of Appellant Hawai`i Orchid Growers Association to counsel for the State of Hawai`i Department of Agriculture at the following address:

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/s/ Cyrus E. Phillips, IV

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Cyrus E. Phillips, IV

CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 32(a)(7) and Cir. R. 32(a) the undersigned hereby certifies, under the penalty of perjury, that this Final Principal Brief is set in Adobe's Minion® Pro Opticals, a proportionally-spaced Garalde Oldstyle face; that this Final Principal Brief is set in face 14-point or larger; and that this Final Principal Brief contains no more than 14,000 words, *viz.*, that exclusive of the Disclosure Statement; the Certificate required by Cir. R. 28(a)(1), the Table of Contents, the Table of Authorities, the Glossary, and the Addendum, FED. R. APP. P. 32(a)(7)(B)(iii) and CIR. R. 32(a)(2), this Final Principal Brief contains 9,582 words out of 941 lines and 52,037 characters. I make this representation based on "Word Count," as presented in the "Tools" menu in Microsoft® Office Word 2003 (11.8125.8122) SP2.

/s/ Cyrus E. Phillips, IV

Cyrus E. Phillips, IV