THE DEPARTMENT OF THE INTERIOR'S PROPOSAL TO USE A CATEGORICAL EXCLUSION UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) FOR ADDING SPECIES TO THE LACEY ACT'S LIST OF INJURIOUS WILDLIFE

OVERSIGHT HEARING

BEFORE THE

SUBCOMMITTEE ON FISHERIES, WILDLIFE, OCEANS AND INSULAR AFFAIRS

OF THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

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OVERSIGHT HEARING ON THE DEPARTMENT OF THE INTERIOR'S PROPOSAL TO USE A CATEGORICAL EXCLUSION UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) FOR ADDING SPECIES TO THE LACEY ACT'S LIST OF INJURIOUS WILDLIFE

Friday, September 20, 2013
U.S. House of Representatives
Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs
Committee on Natural Resources
Washington, DC

The subcommittee met, pursuant to notice, at 10:07 a.m., in room 1324, Longworth House Office Building, Hon. John Fleming [Chairman of the Subcommittee] presiding.

Present: Representatives Fleming, Sablan, Shea-Porter, Garcia, and DeFazio.

Dr. FLEMING. The subcommittee will come to order. The Chairman notes the presence of a quorum.

Good morning.

STATEMENT OF THE HON. JOHN FLEMING, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA

Dr. FLEMING. On July 1, 2013 the Department of the Interior proposed a categorical exclusion for the listing of injurious wildlife by the U.S. Fish and Wildlife Service. Three weeks later, I, along with my distinguished committee colleagues Rob Bishop, Don Young, and Steve Southerland, asked the Director of the Service to withdraw the proposed rule.

On September 10 we received a response to that letter, indicating that the public comment period would be extended until October 15, and that the proposed exemption would affect only one small part of a complex regulatory procedure.

This begs the question as to why, 43 years after the enactment of the National Environmental Policy Act, NEPA, this change is suddenly necessary. Before examining the new categorical exclusion, it may be useful to review the history of the injurious wildlife program. To date, the Service has added 236 species of birds, crustaceans, fish, mammal, and reptiles to the list that prohibits their importation and interstate trade.

Since 1970, more than 40 species have been reviewed under NEPA. And on two occasions the Service did utilize a Department of the Interior categorical exclusion, which meant that there was no scoping process, discussion of environmental alternatives, public hearings, economic analysis, or a record decision on those two petitions.

In the *Federal Register* notice, the summary section states that the goal of the new categorical exclusion is "making the NEPA process for listing injurious species more efficient."

My question is, more efficient for whom? Because it will certainly not be more efficient for aquariums, individual Americans, research institutions, small businesses, and zoos who will be forced to seek redress in our Federal courts.

While not contemplating an environmental impact statement or environmental assessment may save the Fish and Wildlife Service money, I suggest a better alternative to short-circuiting the NEPA process would be to dedicate more than two Federal employees to the listing process each year.

By contrast, the Service has 1,139 employees working on the Endangered Species Act program, 246 working on migratory bird management, 105 on the Federal aid programs, and 89 employees in the Land Acquisition Office. By making this program a priority, this service can utilize its resources to stop invasive species before, and not after, they become established in the United States.

We must strive to ensure that never again will species like nonnative carp be allowed to devastate our fisheries. There is no reason, other than the lack of attention, that it should have taken the Service 7 years to list black, silver, and large-scale carp.

Today, the Fish and Wildlife Service will have the opportunity to justify the request for a new categorical exclusion, why the Service has not previously sought such an exclusion, and how it will benefit the regulated community. We will also hear from the Association of Zoos and Aquariums, the Pet Industry Joint Advisory Council, the U.S. Association of Reptile Keepers, and the Center for Invasive Species Prevention, who will give us their perspective on the proposed categorical exclusion.

At this time, I am pleased to recognize the distinguished Ranking Member, the gentleman from the Commonwealth of the Northern Marianas, Congressman Sablan, for an opening statement that he would like to make.

STATEMENT OF THE HON. GREGORIO KILILI CAMACHO SABLAN, A DELEGATE IN CONGRESS FROM THE TERRITORY OF THE NORTHERN MARIANA ISLANDS

Mr. SABLAN. Well, thank you very much, Mr. Chairman. And welcome to all of our witnesses this morning. Today we will hear testimony on the Fish and Wildlife Service's proposal to establish a categorical exclusion under NEPA, the National Environmental Policy Act, for adding species to the Lacey Act's list of injurious wildlife. The Service's welcome foresight in this instance is based on sound science, not politics, and it is a logical step to protect our environment, while also making government more efficient.

The value of this measured proposal should be clear to those on both sides of the aisle, especially considering the Majority's repeated attempts to waive NEPA entirely whenever it suits them. Ironically, though, it seems that in this case the Majority's witnesses are arguing to slow down the NEPA process.

The purpose of a NEPA review is to determine whether a proposed Federal action will impact the environment. As the Fish and Wildlife Service will testify, adding a potentially harmful species to

the injuries wildlife list does not have a negative impact on the environment. It is beneficial to the environment.

In fact, reviews of previous injurious wildlife listing proposals have resulted in findings of no significant impact under NEPA. I find opposition to this proposed rule particularly puzzling, because H.R. 1823, a bill to add the Quagga mussels to the list of injurious wildlife, with no consideration of NEPA, or the evaluation process established under the Lacey Act, has no fewer than three Republican cosponsors of this committee.

We should be moving more swiftly to prevent the spread of invasive species. Economic damage from biological invasions in the United States is estimated at $137 billion per year. That is a huge sum of money, as much as the total cost of all cyber crime in the United States, or the same amount that Fannie Mae and Freddie Mac owe the American taxpayers after the collapse of the housing market, or the GDP of my district for 250 years.

Yet, instead of addressing the threat invasive species pose to our environment and economy, some of this committee would prevent the Federal Government from acting swiftly against the threat and protecting taxpayers while conserving valuable resources.

In my home, the Commonwealth of the Northern Mariana Islands, we face severe ecological and economic threats from invasive species. The brown tree snake, for example, is considered the number one threat to native wildlife. This snake has already caused major economic and ecological damage on the Island of Guam, where it has hunted more than 75 percent of native birds and lizard species into extinction, and causes frequent and costly power outages.

Our Division of Fish and Wildlife has had to create an entire program dedicated to preventing the introduction of this snake to our islands. We worry that other reptiles, particularly giant constrictor snakes, could cause similar damage to our islands. Sadly, this is already unfolding in Puerto Rico, where invasive boa constrictors have established breeding populations and are displacing native wildlife.

We face invasive species problems across the Nation. Infestations of invasive plants and animals can negatively affect property values, agriculture, productivity, public utility operations, native fisheries, tourism, outdoor recreation, and the overall health of an ecosystem.

In the Florida Everglades, the injurious Burmese python is associated with startling declines in native mammal populations. In the Great Lakes, the Federal Government has committed millions of dollars to stop the Asian carp from doing further harm to the region's fisheries and remaining populations of endangered or threatened aquatic species. In Louisiana and other States, the invasive nutria, a large, semi-aquatic rodent, has caused extensive damage to coastal wetlands. U.S. agriculture loss is $13 billion annually in crops from invasive insects.

The list goes on, and the threat is only increasing, as continued global warming creates new suitable habitats for non-native species. With that, I look forward to hearing from our witnesses and discussing how we can work together to address our Nation's invasive species.

And, Mr. Chairman, I ask unanimous consent to enter into the record a recent report published in the peer review journal, "Biological Invasions." The report shows that non-native boa constrictor populations have become established in Puerto Rico. The report is titled, "Genetic Analysis of Invasion of Puerto Rico by an Exotic Constricting Snake."

Thank you, and I yield back my time.

Dr. FLEMING. Without objection, so ordered.

[The report from the journal "Biological Invasions" submitted by Mr. Sablan for the record follows:]

Biol Invasions (2013) 15:953–959
DOI 10.1007/s10530-012-0354-2

INVASION NOTE

Genetic analysis of a novel invasion of Puerto Rico by an exotic constricting snake

R. Graham Reynolds · Alberto R. Puente-Rolón · Robert N. Reed · Liam J. Revell

Received: 30 May 2012 / Accepted: 19 November 2012 / Published online: 29 November 2012

Abstract The tropical island Puerto Rico is potentially vulnerable to invasion by some species of exotic snakes; however, until now no established populations had been reported. Here we report and genetically characterize the nascent invasion of Puerto Rico by an exotic constricting snake of the family Boidae (*Boa constrictor*) using mtDNA and microsatellite data. Over 150 individual *B. constrictor* have been removed from Mayagüez municipality since May 2011, and our results from the genetic analysis of 32 individuals suggest that this population was recently founded by individuals of one subspecies from a genetic lineage common to zoo and breeding collections, but that the potential propagule pool consists of two subspecies. We also suggest that anthropogenic long-distance dispersal within the island of Puerto Rico may be occurring from the established population, with implications for further establishment across the island. This study represents the first report of the naturalization of an invasive species of boid snake in Puerto Rico and will be important in determining mitigation strategies for this invasion as well as providing a basis for comparison to other on-going studies of invasive snakes.

Keywords *Boa constrictor* · Boidae · Effective population size · Genetic diversity · Invasive species · Microsatellite

Electronic supplementary material The online version of this article (doi:10.1007/s10530-012-0354-2) contains supplementary material, which is available to authorized users.

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Introduction

Recently, much attention has been given to the impact and spread of invasive snakes; and the Boa Constrictor (*Boa constrictor*), native to Central and South America, has established invasive populations on the islands of Cozumel (Vázquez-Domínguez et al. 2012) and Aruba (Quick et al. 2005), as well as in a small area of south Florida (Snow et al. 2007). Previous climate-matching exercises based on conditions in the extensive native range of this species suggest that *B. constrictor* represents a high establishment risk to large areas of the globe, including most or all of the island of Puerto Rico (Bomford et al. 2005; Reed and Rodda 2009; van Wilgen et al. 2009).

Puerto Rico is a large (8,900 km^2) tropical island in the Greater Antilles. At least four exotic reptiles have established naturalized populations on the island (Mayer 2012), and many more species are encountered as waifs or seized by wildlife officers. Large constricting snakes, including Indian (*Python molurus*), Burmese (*P. bivittatus*), African (*P. sebae*), and Reticulated (*Broghammerus reticulatus*) Pythons, Dumeril's Boa (*Acrantophis dumerili*), and *B. constrictor* are regularly found as waifs or are confiscated from private homes on the island (authors, pers. obs.; Mayer 2012), but until recently none had become reproductively established in the wild. However, since May 2011, over 150 *B. constrictor* of all size classes (738–3,015 mm total length) have been removed from the wild in an expanding area of the western Puerto Rican municipality of Mayagüez. Anecdotal reports from local conservation officials, based on their discussion with parties involved in the incident, suggest that this population may have been established around 1992 by the accidental release of neonates, though boas have regularly been reported and removed only in the last few years.

Here, we provide the first report of the establishment of a large (>2.5 m total length) constricting snake in the United States outside of south Florida. We show that the invasion likely resulted from the introduction of *B. c. constrictor* from a genetic lineage common to zoo and breeder collections and not from genetically divergent individuals or multiple subspecies of *B. constrictor*. Furthermore, our findings suggest that waif individuals discovered in other parts of the island are the result of anthropogenic long-distance movement from the introduced population in Mayagüez, and not from introductions of novel genetic stock.

Materials and methods

Sample collection

Between May 2011 and March 2012, we obtained 32 samples of *B. constrictor* (625–2,785 mm snout-vent length; SVL) from an established population in Mayagüez, Puerto Rico (Online Resource 1). Sampling periods were separated in space and time during this interval. Most samples were obtained by rangers from the Departamento de Recursos Naturales y Ambientales (DRNA) and officials from the Dr. Juan A. Rivero Zoo responding to calls from local residents who had seen *B. constrictor* from localities throughout Mayagüez. We also conducted focused sampling at different locations in Mayagüez at intervals throughout the sampling period, where the authors searched for snakes both diurnally and nocturnally in forest patches.

Since 2011, individual boas have occasionally been found in other municipalities of northern Puerto Rico, usually along the main highways (PR-2, PR-22). These animals are thought to represent waifs, as no established populations are known outside of Mayagüez. To investigate whether these waifs are genetically differentiated animals (and hence originating from possible independent introductions) or are consistent with jump dispersal from Mayagüez, we obtained samples of three waif individuals captured during March of 2012 outside of the established population. As a preliminary investigation of whether genetic diversity exists within the pet trade in Puerto Rico, we also sampled two individuals confiscated from a private home in San Juan. As it is illegal to keep these animals in captivity, it is quite challenging to obtain samples from the pet trade outside of confiscated individuals. We obtained samples from all five of these animals at a DRNA animal holding facility at Cambalache State Forest (Online Resource 2).

Genetic analysis

Our 37 samples consisted of muscle tissue from dissected animals or tail tips from live individuals. We used PCR to amplify a portion of the mitochondrial genome (1,067 base pairs of cytochrome B; *CYTB*) using primers and conditions from Burbrink et al. (2000). We purified and resolved sequencing reactions on an automated sequencer (Applied Biosystems Inc.; ABI 3730XL) at Massachusetts General Hospital DNA Core Facility, Cambridge, MA. We edited sequences manually using SEQUENCHER 5.0 and then performed multiple sequence alignment using CLUSTALW 2.1 (Larkin et al. 2007) in MESQUITE 2.75 (Maddison and Maddison 2011). To identify the subspecies represented in Puerto Rico, we downloaded all 120 available *CYTB* sequences of *B. constrictor* and one sequence of the outgroup *Corallus enydris* (=*C. hortulanus*) from GenBank (March 9, 2012). We then aligned these 121 sequences with the only two unique haplotypes found among the 37 sequences in the present study; we then estimated a Bayesian consensus

tree using MrBayes 3.2 (Ronquist et al. 2012). The alignment consisted of 123 sequences 1,065 base pairs in length (alignment submitted to TreeBASE) and each codon was partitioned and unlinked. The best-fit models of molecular evolution for each partition (1st codon: HKY + I + G; 2nd codon: HKY + I; 3rd codon: TIM + G) were selected using the Akaike's Information Criterion implemented in Modeltest Server (Posada 2006). A six-chain MCMC was run for 10 million generations with 25 % burn-in and we examined the resultant trace files to confirm convergence of the chains. We deposited novel representative sequences in GenBank (JX026897-98).

We genotyped all individuals sampled from Mayagüez at six microsatellite loci (Online Resource 3) using primers and conditions from Booth et al. (2011) and Tzika et al. (2008). We resolved genotypes on the above equipment using GeneScan™ 500 LIZ size standard and GeneMapper 4.0 software (ABI) with manual verification of peak calling. To ensure consistency in allele calling, we re-genotyped from the PCR stage any locus with more than two alleles. We estimated the number of alleles (N_A), effective number of alleles (N_E), observed heterozygosity (H_O), and expected heterozygosity (H_E), using GenAlEx 6.4 (Peakall and Smouse 2006). We tested for departures from Hardy–Weinberg equilibrium (HWE) using exact tests with 10,000 dememorizations, 2,500 batches, and 20,000 iterations per batch implemented in GenePop 4.0 (Raymond and Rousset 1995). We estimated genetic relatedness of individuals from the introduced population at Mayagüez using a maximum-likelihood estimator implemented in the program ML-Relate (Kalinowski et al. 2006), which has the advantage of controlling for null alleles.

Finally, we estimated the genetic effective population size (N_e), which approximates the effective number of breeders (N_b) when generations overlap (Waples 2006). This was accomplished by calculating linkage (gametic) disequilibrium (LD) using a parametric method implemented in the program LDNE 1.31 (Waples 2006; Waples and Do 2008).

Results

We observed a single mtDNA haplotype among 32 individuals in the introduced population of *B. constrictor* in Mayagüez, corresponding to the northern South American *B. constrictor* clade and the subspecific trinomial name *B. c. constrictor* (Fig. 1). This haplotype is common to 14 sequences in GenBank from European breeding collections (Fig. 1; Hynková et al. 2009) and is also found in zoo specimens (e.g. Knoxville Zoological Gardens, Knoxville, TN, USA; GenBank JX126860). Three waifs from elsewhere in Puerto Rico and one individual confiscated from a private home in San Juan shared this haplotype, while one confiscated individual was 6.7 % divergent and corresponded to the Central American *B. constrictor* clade and the trinomen *B. c. imperator* (Fig. 1).

All six microsatellite markers were polymorphic for the 32 individuals from Mayagüez (Online Resource 4); however, one locus (μsat 20; Tzika et al. 2008) proved unreliable when repeated and was excluded from the analyses. We found a total of 20 alleles (avg. 4 per locus, allelic richness = 0.13) across the five remaining loci (range 2–6 per locus; Table 1) with no error in allele calling. Only one locus (Bci-15) did not conform to HWE (Table 1) due to heterozygosity deficiency, a situation which is common to populations subject to non-random mating and genetic drift (Loew et al. 2005). Given the low number of loci and the fact that this locus did not appear to influence the results, we include it in our analyses, which is consistent with similar studies (e.g. Vázquez-Domínguez et al. 2012). Average F_{IS} (an index of the inbreeding coefficient of individuals relative to the population) across loci was 0.15 (0.07–0.25). The number of breeders ($\approx N_e$ when generations overlap; Waples 2006) was estimated as $N_b = 15.7$ (5.2–57.9, 95 % CI), and mean pairwise relatedness (r) was 0.16 (SE 0.007; 0–0.83). Three waifs and one confiscated individual belonging to the *B. c. constrictor* mtDNA genetic lineage shared the same alleles as the individuals from Mayagüez (Online Resource 4).

Discussion

Though the use of population genetics in invasion biology has some notable shortcomings, forensic genetic questions can yield important insights into the invasion process and the origin of the invasion (Fitzpatrick et al. 2012). Our analysis of 32 *B. constrictor* from an established population in Mayagüez, three waifs from elsewhere in Puerto Rico, and two confiscated animals revealed that the individuals sampled from the

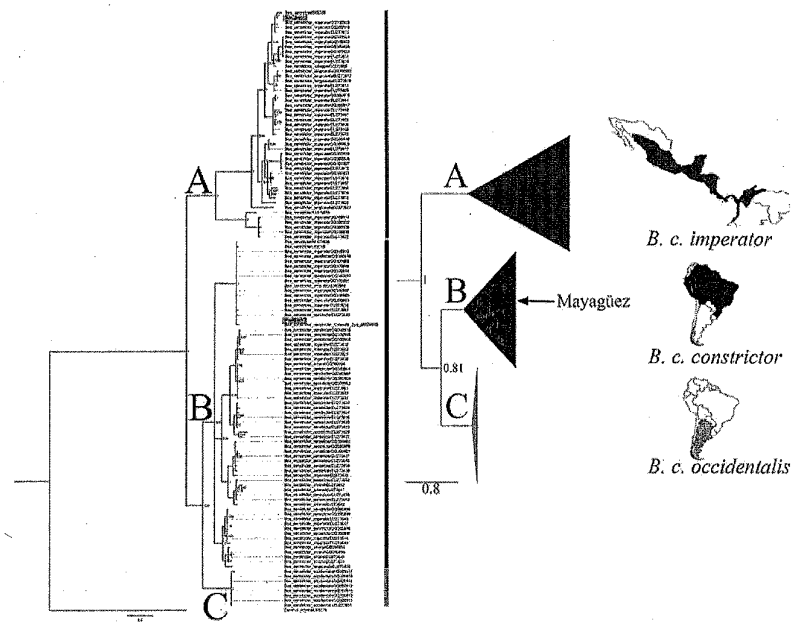

Fig. 1 Full (*left*) and collapsed (*right*) consensus *CYTB* gene tree for all available sequences on Gen Bank. One sequence of *Corallus enydris* is included as an outgroup. Three clades are recovered: **a** *B. c. imperator* from Central America, **b** *B. c. constrictor* from northern South America; and **c** *B. c. occidentalis* from Argentina. The introduced population in Mayagüez, Puerto Rico falls in the northern South American *B. constrictor* clade. Note that the tip names on left are drawn directly from GenBank with accession numbers provided for reference, and that some of the tip names are probably erroneous with respect to taxonomy and geographic origin of the sample owing to ambiguous origins or admixture in captivity (see: Hynková et al. 2009). Nodal values are Bayesian posterior probabilities. Two haplotypes recovered in this study are highlighted on the left: the introduced population in Mayagüez municipality ("Mayagüez," in *blue*) and the haplotype from an individual found in San Juan municipality ("San Juan," in *red*). (Color figure online)

established population share a single mitochondrial haplotype from the northern South American *B. c. constrictor* clade, despite the fact that at least two subspecies constitute the potential propagule pool (Fig. 1). Microsatellite data revealed that the individuals from Mayagüez have a mean relatedness ($r = 0.16$) approaching half-sibship ($r = 0.25$). Because we obtained samples near what was likely the start of the invasion approximately 20 years ago, we expect that fewer than four generations (5-year generation time) have passed in the invaded range and hence that little inbreeding has occurred. This expectation is corroborated by our estimate of the fixation index ($F_{IS} = 0.15$). However, it will be interesting to monitor temporal changes in genetic relatedness and genetic effective population size. Two individuals had alleles (240, 244, 248) at locus Bci-15 which were not found to associate with other alleles at this locus. This is likely an artifact of sampling and the low frequency of these alleles in the population (Online Resource 4).

Table 1 Genetic diversity at five loci for 32 individual *Boa constrictor* sampled from the established population in Mayagüez

Locus	Repeat motif	N_A	N_E	H_O	H_E	F_{IS}	HWE
Bci-14	$(AAGA)_n$	4	3.02	0.63	0.67	0.08	0.87
Bci-15	$(TATC)_n$	6	3.28	0.81	0.69	0.15	<0.001*
Bci-18	$(TCCT)_n$	5	2.67	0.59	0.63	0.07	1.0
Bci-21	$(AG)_n$	2	1.99	0.41	0.50	0.20	0.30
Bci-23	$(TCTG)_n$ $(TC)_n$	3	2.14	0.41	0.53	0.25	0.14
Average		4	2.62	0.57	0.60	0.15	

N_A number of alleles, N_E effective number of alleles, H_O observed heterozygosity, H_E expected heterozygosity, F_{IS} fixation index, *HWE P* value for test of departure from Hardy–Weinberg equilibrium

* Significant at $P \leq 0.05$

It is important to note that estimates of N_e based on LD assume population genetic (mutation-migration-drift) equilibrium. Under this assumption, the expected value of the correlation between alleles at different loci (r^2) is inversely proportional to the product of the effective population size (N_e) and the recombination rate (c):

$$E(r^2) \approx \frac{1}{1 + 4N_e c}$$

between two loci (Hill and Robertson 1968; Ohta and Kimura 1969). The rate of recombination might be reduced in the case of inbreeding or genetic bottlenecks, both common in introduced populations, owing to an excess of homozygotes producing identical gametes during recombination, and yielding a reduction in the rate of decay of LD (Hedrick 2005). Importantly for biological invasions, a recent rapidly expanding population will experience little *new* LD at tightly linked loci as the influence of drift is reduced (rate of decay of LD is not slowed) and mutations occurring on the tips of gene trees have not had the opportunity to recombine. Thus, the calculation of N_e by this approach in non-equilibrium populations (biological invasions) can serve as a rough estimate of N_b in the parental generation, but should not be regarded as a precise estimate of N_e. Furthermore, it is important to contextualize the meaning of N_e in biological invasions—because estimates of N_b are sampling residual LD in the parental population, little relationship is expected between N_e and the census population size (N_c; actual number of individuals in the introduced population) of a rapidly expanding population. Although we measured a very small genetic effective population size in this study, over 150 individuals of this cryptic and secretive species have been found (mostly without targeted searches) in a single year, indicating that the census population size is likely quite high.

To our knowledge, very few published studies of population genetics in alien snakes exist. Serially introduced populations of dice snakes (*Natrix tessellata*) in Switzerland revealed a significant loss of allelic diversity and heterozygosity (Gautschi et al. 2002). Analysis of mtDNA and ISSR (between repeat-region) fragments in an introduced population of viperine snakes (*N. maura*) on Mallorca suggested a recent non-natural arrival to the island from France and not from Africa or the adjacent Iberian coastline (Guicking et al. 2006). The only other study characterizing genetic variation in an introduced population of boid snakes (Vázquez-Domínguez et al. 2012) found a much greater degree of genetic structure in *B. constrictor* (including two genetic populations), a higher number of alleles using the same loci targeted in this study ($N_A = 70$, avg. allelic richness = 0.16–0.29), and a larger effective population size ($N_b = 455$); as well as a much lower degree of relatedness ($r = 0.065$) among individuals on the island of Cozumel, Mexico. Also, in contrast to our study, the initial introduction in Cozumel included individuals of the subspecies *B. c. imperator* that appear to have originated from several distinct geographic areas (Vázquez-Domínguez et al. 2012).

Establishing the origin of *B. constrictor* waifs in Puerto Rico is important for designing eradication and prevention strategies, as the observation that boas are possibly being moved long distances along roads indicates the potential for rapid colonization of the rest of Puerto Rico and suggests means of conveyance

(e.g., in agricultural goods). It is important to note that as yet we have found no evidence of the introduction of additional genetic diversity from zoo specimens or the illegal pet trade, even though genetically differentiated animals are present in these industries both in Puerto Rico and elsewhere (Fig. 1). This, in addition to anecdotal evidence suggesting that the introduced population is of recent origin and our finding of low genetic diversity relative to another introduced population of *B. constrictor*, indicates that immediate awareness outreach measures might help prevent introduction of new genetic material, eliminate additional anthropogenic spread of the established population, and slow or prevent the spread of exotic boas from Mayagüez.

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Dr. FLEMING. The Chairman now recognizes the Ranking Member of the full committee, Mr. DeFazio, for an opening statement.

STATEMENT OF THE HON. PETER DEFAZIO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON

Mr. DEFAZIO. Thank you, Mr. Chairman. I appreciate the opportunity. I brought a photo. I will explain it and then I will incorporate it in my speech. This would be a python. This would be the tail of an alligator, where it burst through the python which attempted to devour it. This was, of course, in the Florida Everglades. So thanks, that is good.

The—you know, invasive species pose enormous threats to our economy and native wildlife. Some have been inadvertently introduced through ballast water or cargo, and we need to take steps to deal with that. Some have been smuggled in. We need to have strong sanctions on those folks. But some have actually been deliberately imported for commercial purposes.

Now, this python, which is descended from a python that was introduced for the pet trade was only 13 feet long. Only. They actually grow to 20 feet and weigh over 200 pounds. And perhaps one that was that large would have been able to digest the alligator. You know, the alligator was an endangered species, we have brought it back from endangered status. And now it is threatened by a non-native invasive species that was deliberately imported into the United States. The snakes also eat wood storks, Key Largo wood rats, and many other species. If it could get a hold of the last Florida panther, it might eat that, too.

So we are now spending millions of dollars a year in the Everglades to try and eradicate this non-native predator. Last year, Fish and Wildlife took action to add Burmese pythons and three similar species, large constrictor snakes, to the Lacey Act of injurious wildlife. But unfortunately, the Burmese pythons are already—have established a large breeding population in the Everglades. If they could have acted more quickly or sooner, perhaps we could have prevented this problem.

The proposed rule is the agency's attempt to take a proactive approach, a more prompt approach, to deal with potentially injurious species under the Lacey Act. Environmental concerns aside, you don't need to look much further than our neighbor to the north, in Canada, where last summer an African python, one of four species

listed by the Services last year, escaped from its cage and killed two young boys in their sleep. These are pets?

You know, when public safety and massive damage to the environment are at stake for all, the benefits of taking a precautionary approach greatly outweigh the costs incurred by a few. In the case of the four constrictor snakes, the loss of estimated sales was between $3 and $7.6 million. But the costs that are going to be borne by the taxpayers of the United States will probably ultimately total tens or hundreds of millions of dollars to try and eradicate this python.

In the Northwest we have a particular concern about the spread of Quagga mussels, and we see this proposed rule as a potential tool for taking action to prevent the spread of that by imposing more stringent measures and quarantines from areas that are infected. You know, and I look forward to hearing more today about how the Service intends to use the categorical exclusion to stop biological invasions.

You know, I am not totally hostile to the concerns raised by the industry folks, and I will propose later, I think, perhaps a way that we might deal with some of their concerns but still give this tool for potentially injurious wildlife to the agency.

Dr. FLEMING. The gentleman yields back. And before we begin, just to make an announcement, we expect votes probably in about 15 minutes. So it is our goal to get through our panel of witnesses' testimony. Assuming that we have not had enough time to ask questions, we will recess until after the votes, which could take 60 to 90 minutes, give you plenty of time to load up on coffee and all the other goodies here at the Capitol, and then we will return, of course, to finish out our panel today.

We will now hear from our panel of witnesses, which includes Mr. David Hoskins, Assistant Director of Fish and Aquatic Conservation, U.S. Fish and Wildlife Service; Mr. Peter Jenkins, Executive Director, Center for Invasive Species Prevention; Mr. Jim Maddy, President and CEO, Association of Zoos and Aquariums; Mr. Shaun Gehan—sir?

Mr. GEHAN. Gehan.

Dr. FLEMING. Gehan. Sorry. In Louisiana we always add an extra syllable. So I apologize.

[Laughter.]

Dr. FLEMING. Gehan, Attorney, Kelly Drye & Warren, representing the U.S. Association of Reptile Keepers; and Mr. Marshall Meyers, Senior Advisor, Pet Industry Joint Advisory Council.

Your full written testimony will appear in the hearing record, so I ask that you keep your oral statements to 5 minutes, as outlined in our invitation letter to you, and under Committee Rule 4(a).

Our microphones are not automatic. Be sure to turn them on, and make sure the tip is close to you. Shift it over, they are moveable.

To explain our timing lights, they are very simple. You will be under a green light for the first 4 of your 5-minute testimony, then yellow for the last minute, leading up to red. And we want you to conclude your remarks by the time red comes on.

And remember that your written testimony will be entered into the record, even if you don't complete it today, verbally.

Mr. Hoskins, you are now recognized for 5 minutes to present testimony on behalf of the U.S. Fish and Wildlife Service.

STATEMENT OF DAVID HOSKINS, ASSISTANT DIRECTOR, FISH AND AQUATIC CONSERVATION, U.S. FISH AND WILDLIFE SERVICE

Mr. HOSKINS. Good morning, Chairman Fleming, Ranking Member Sablan, Ranking Member DeFazio, and members of the subcommittee. I am David Hoskins, Assistant Director for Fish and Aquatic Conservation for the U.S. Fish and Wildlife Service. Thank you for this opportunity to talk to you about the Service's proposal for a categorical exclusion under the National Environmental Policy Act for listing of injurious wildlife under the Lacey Act.

First crafted in 1900, the injurious provisions of the Lacey Act are the Nation's only legal tool for prohibiting the importation of such species. We don't have to look far to see the adverse impacts of injurious wildlife species. For example, the zebra mussel spread rapidly from its initial introduction into the United States, clogging municipal water supplies and even causing a Great Lakes power plant to close after the mussels interfered with its operation and damaged its infrastructure.

Another well-known example are Asian carp. Imported into the United States 30 to 40 years ago to keep waste water and agriculture retention ponds clean, silver and bighead carp have overwhelmed the Mississippi River Basin, threatening commercial valuable fisheries in the Mississippi and Ohio Rivers.

In addition to the harm these and other species can cause to our native biodiversity, the cost of addressing the threats from and damages caused by invasive species nationwide is now billions of dollars each year. Although preventing the introduction and establishment of these species in the wild is clearly the most cost-effective approach, the protracted listing process under the Lacey Act can jeopardize our ability to achieve this important goal.

With the increasing globalization of trade and potential for invasions of harmful species, we believe that we need to begin to take modest steps to streamline the listing process to strengthen our ability to avoid the environmental and economic harm caused by invasive species.

As part of the listing process under our current procedures for complying with the National Environmental Policy Act, the Service prepares an environmental assessment to determine whether the proposed action would result in a significant effect on the human environment requiring the preparation of an environmental impact statement. All of the EAs done for injurious wildlife listings under the Lacey Act, subsequent to the enactment of NEPA, have found no significant impact.

The Council on Environmental Quality Regulations allow Federal agencies to establish categorical exclusions for actions that, under normal circumstances, do not have a significant environmental effect, individually or accumulatively. When appropriately established and applied, categorical exclusions serve a beneficial purpose. They allow Federal agencies to expedite the environmental review process for proposals that typically do not require more resource-intensive EAs or EISs.

In July of this year, the Service published a proposal in the *Federal Register* to establish a categorical exclusion for listings of injurious wildlife under the Lacey Act to streamline the listing process. For the reasons set forth in our proposal, we believe that this step would not only greatly strengthen the Service's ability to act more quickly to protect the Nation from invasive species, but is readily justified, based on CEQ's own guidance.

In particular, listings of injurious wildlife maintain the environmental status quo and have a long track record of EAs that have consistently resulted in a finding of no significant impact.

I would like to take this opportunity to also briefly address some of the concerns that have been raised about this proposal.

First, it is important to note that a categorical exclusion does not waive the National Environmental Policy Act. Instead, consistent with CEQ's guidance, it simply would give us the flexibility, under normal circumstances, to forego preparing an EA.

In addition, all analyses and assessments required under other applicable statutes would continue to be carried out in conformance with these laws and regulations. Under the Lacey Act and the Administrative Procedure Act, we are required to explain in our rules the basis for our determination that a species qualifies as injurious, and the effect that the action is expected to have on the public. In addition, the public has the opportunity to comment on a regulatory action.

In addition, we would continue to comply with the Regulatory Flexibility Act and Executive Order 12866. As you know, the Regulatory Flexibility Act requires Federal agencies to analyze the effect of their regulatory actions on small entities. And, where the regulatory effect is likely to be "significant," affecting a "substantial" number of these entities, to consider less burdensome alternatives.

Executive Order 12866 looks at the effect the rule will have on the economy, other Federal agencies' actions, entitlements, grants, user fees and loan programs, or if it raises novel, legal, or policy issues. We have conducted and will continue to conduct economic analyses where appropriate under this executive order.

In conclusion, I very much value and welcome this opportunity to share our views on this important issue, and to hear your concerns on the proposed categorical exclusion. I would be happy to answer any questions you may have.

[The prepared statement of Mr. Hoskins follows:]

PREPARED STATEMENT OF DAVID HOSKINS, ASSISTANT DIRECTOR FOR FISH AND AQUATIC CONSERVATION, U.S. FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR

Good morning Chairman Fleming, Ranking Member Sablan, and Members of the Subcommittee. I am David Hoskins, Assistant Director for Fish and Aquatic Conservation for the U.S. Fish and Wildlife Service (Service), and I welcome this opportunity to testify before you today.

As you are aware, the Secretary of the Interior has the authority to take regulatory action to list species of wild animals as "injurious wildlife" under 18 U.S.C. 42, a portion of the Federal statute sometimes called the Lacey Act. The public may also petition the Secretary for such a listing. Once listed under this statute, the species may not be transported over state lines or imported into the country without a permit. Permits may be granted only for zoological, educational, medical, and scientific purposes, if the Secretary deems that the permit ensures the continued protection of the public interest and health. A violation is a Class B misdemeanor, pun-

ishable by no more than 6 months in jail and/or up to a $5,000 fine for an individual, or $10,000 for an organization.

Before I explain our rationale for seeking a categorical exclusion under the National Environmental Policy Act (NEPA) for adding species as injurious under 18 U.S.C. 42, I would like to explain the purposes and obligations carried out by the Service in the implementation of this statute. The statute was first created by Congress in 1900 to protect United States' interests from the harmful effects of species that are determined to be injurious, including some specific species added by Congress (such as mongooses and bats known as "flying foxes") and "such other birds and animals as the Secretary of the Interior may declare to be injurious to the interests of agriculture or horticulture." In 1960, this was amended (74 Stat. 753) to apply the statute's prohibitions to any species that is "injurious to human beings, to the interests of agriculture, horticulture, forestry, or to wildlife or the wildlife resources of the United States." More recently, the zebra mussel (*Dreissena polymorpha*) was added by Congress to the list of injurious wildlife species during passage of the Non-Indigenous Aquatic Nuisance Prevention and Control Act of 1990 (NANPCA) because of its rapid spread from initial introduction to the United States and the economic harm it was causing, including causing a Great Lakes power plant to close after the mussels interfered with its operation and damaged its infrastructure. The Service, therefore, implements 18 U.S.C. 42 in light of the purpose expressed in the original Lacey Act and subsequent amendments and the context of the Congressional zebra mussel listing to protect United States interests from the harm such species can cause to the nation's economic, environmental, and human interests. However, the administrative process for listing injurious wildlife can be protracted and complex, reducing its effectiveness in preventing initial importation and introduction of new invasive species into the country.

THREATS FROM INJURIOUS WILDLIFE SPECIES

Invasive species are among the primary factors that have led to the decline of native fish and wildlife populations in the United States and are among the most significant natural resource management challenges facing the Service.

Next to loss of habitat, invasive species are considered the greatest threat to native biodiversity. They play a significant role in driving populations of native species toward extinction. In fact, invasive species significantly harm the populations of about four in ten species listed under the Endangered Species Act (ESA). They are also among the most significant of threats to the National Wildlife Refuge System (NWRS), where they can destroy habitat, displace wildlife, and significantly alter ecosystems. While much of the invasive species burden on the NWRS is created by invasive plants that cover approximately 2.4 million acres of NWRS lands, there are also at least 4,423 invasive animal populations recorded on NWRS lands. Although the NWRS is committed to controlling and eradicating these invasive animals and plants, the task is challenging and expensive. Between 2004 and 2012, base funding spent on managing invasive species increased from $6 million to $17.2 million.

Among the best known of invasive species are the zebra mussel, noted above as listed as injurious wildlife by congressional action, and the related quagga mussel (*Dreissena rostriformis bugensis*). Both are nonnative, invasive freshwater mollusks that negatively affect both the natural environment and human infrastructure. They spread rapidly, covering all available surfaces and removing large amounts of organic material from the water column, thus outcompeting and smothering native mussel species, including species federally listed as threatened or endangered. The mussels also clog municipal and industrial infrastructure that process water, such as power generating plants or fresh water supply transport and delivery; they cause an estimated $30 million in damage each year to water delivery systems in the Great Lakes.[1] These species attach quickly to recreational boating and other equipment used in fresh water, and they are then carried from one hydrologic system to another. In early 2007, quagga mussels were discovered in the Lake Mead National Recreation Area. They have since been found in Arizona, California, other parts of Nevada, and all 242 miles of the Colorado River Aqueduct. In January 2008, the first populations of zebra mussels were found in the San Justo Reservoir in California and Lake Pueblo in Colorado.

Another well-known example is the brown tree snake (*Boiga irregularis*), which is a major threat to the biodiversity of the Pacific region. A native of Indonesia, New Guinea, the Solomon Islands, and Australia, brown tree snakes arrived on Guam sometime during the 1940s or 1950s as stowaways on boats. The snakes have since spread across the entire island and have caused or contributed to the extirpation

[1] http://anstaskforce.gov/more_impacts.php.

of 17 of Guam's native terrestrial vertebrates, including fruit bats, lizards, and 9 of 13 native forest bird species. Insect species that are no longer naturally controlled by native birds and lizards on Guam reduce fruit and vegetable production and their uncontrolled numbers require greater reliance on pesticides. Brown tree snakes also cause millions of dollars in damage to Guam's infrastructure and economy by climbing power poles and causing power outages. Of major concern is that the brown tree snake could be carried to other Pacific Islands (including Hawaii) and subtropical regions of the continental United States in cargo. The brown tree snake was listed as injurious in the early 1990s.

While the above examples were accidentally introduced into the United States and were not intentionally imported, deliberate importations have played a significant role as the origin of invasive species in the United States. Brought into the country to meet or create consumer demand, individuals of nonnative species have escaped—or been released—into the wild and have established reproducing populations in the wild. The United States is a leading import market for live non-native animals. Regardless of whether an invasive species was accidentally brought into the United States or intentionally imported, these species are costing the Nation billions of dollars each year in local, State, and Federal tax dollars, loss of private incomes, and loss of economic potential.

One of the most widely known—and among the most dramatic—of nonnative species imported into the United States are the group of fish known collectively as Asian carp. These include the silver carp (*Hypophthalmichthys molitrix*) and bighead carp (*Hypophthalmichthys nobilis*). Silver and bighead carp were imported into the United States 30 to 40 years ago to keep wastewater and aquaculture retention ponds clean. Competing with native fish for the same food sources, both carp species can quickly overtake native fish in biomass, and they can live for 20 years. They now occur in 23 states. The silver carp tends to jump en masse into the air when startled, and because they can grow to be 100 pounds, this can present a significant physical hazard for recreational boaters and fishermen. These two species have overwhelmed the Mississippi River Basin; commercial harvest of bighead carp in the Mississippi River Basin, for instance, increased from 5.5 tons to 55 tons between 1994 and 1997.[2] Within the Basin, Asian carps now compose up to a staggering 63 percent of the fish biomass.[3] The commercial value of Asian carp is extremely low and much less valuable than the native fish they replaced, and the loss of more commercially valuable fish is threatening an industry worth billions of dollars to the economies of the States in the region. The geographic range of Asian carp species is expanding in the Mississippi River Basin and threatening invasion of the Great Lakes.

As another example, a small number of nutrias (*Myocastor coypus*) were brought to the United States in the 1930s to the Chesapeake Bay and to Louisiana to bolster the fur trade. The nutria is a large, aquatic rodent from South America. Animals escaped or were released into the wild, and by the early 1990s, the Delmarva Peninsula (Eastern Maryland and Virginia and Delaware) population was estimated to exceed 150,000 animals. Although highly vulnerable to very cold winter temperatures, the rodent's capacity to reproduce allows its populations to quickly rebound and grow in milder spring, summer, and fall weather. Nutria eat aquatic plants, particularly brackish wetland species that are crucially important for holding wetland soils together to prevent wetland loss to erosion and for providing food for native species in and around the Blackwater National Wildlife Refuge. In 2004, the Maryland Department of Natural Resources estimated that economic losses from related wetland damage were $4 million per year. This report also predicted that social losses and the losses associated with the environmental services of these wetlands could reach up to nearly $40 million a year by 2050 if the nutria population was not controlled.[4] Nutria has since been extirpated on the Refuge, but work to eradicate them from the Delmarva Peninsula continues.

Another example of a commercially imported species that has become established in the wild is the Burmese python, which was brought into the country for the pet trade. Many pythons have escaped or been released into the Everglades and other areas. A population of these snakes is established and breeding now, and the National Park Service reports that over 1,900 have been removed from Everglades National Park and surrounding areas. A study published in 2011 by the National Academy of Sciences links the growth of the Burmese python population in the Park with

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[2] Chick, J. H., and M. A. Pegg. 2001. *Invasive carp in the Mississippi River basin*. Science 292(5525):2250–2251.

[3] Draft Asian Carp Surveillance Plan for areas outside of the Great Lakes. 2013.

[4] Southwick Associates. 2004. *Potential economic losses associated with uncontrolled nutria populations in Maryland's portion of the Chesapeake Bay*, 17 pp.

a severe decline in mammals in the Park, including a 98 percent decline in raccoons.[5]

The ongoing efforts to control established populations of invasive species clearly cost much more than would prevention of their introduction. The Lacey Act injurious wildlife provisions provide the only legal instrument the United States can use to prohibit importation of such species, but the listing process can be protracted to effectively accomplish this. For example, a petition to list certain invasive carp species was received by the Service in October of 2002, but the final listing decision did not occur for 5 years.

THE LISTING PROCESS

Under the injurious wildlife provisions of the Lacey Act, the Secretary of the Interior is authorized to prescribe by regulation those wild mammals, wild birds, fish, mollusks, crustaceans, amphibians, and reptiles, and the offspring or eggs of any of the aforementioned, that are injurious to human beings, or to the interests of agriculture, horticulture, or forestry, or to the wildlife or wildlife resources of the United States. An injurious listing subsequently prohibits importation and interstate transportation of that species. The provisions of the Act regarding injurious species are intended to protect human health and welfare and the human and natural environments of the United States by identifying and reducing the threat posed by certain nonnative wildlife species.

I would like to explain briefly how the Service currently lists species as injurious and what would change if we obtain the categorical exclusion. The Service currently complies with the legal requirements of the Lacey Act, the Administrative Procedure Act, the Regulatory Flexibility Act, and other required determinations for all injurious rulemakings *and will continue to do so*. This includes NEPA.

The Lacey Act and the Administrative Procedure Act (APA) require that the agency explain in our rules the basis for our determination that a species qualifies as injurious and the effect that the action is expected to have on the public. The public has the opportunity to comment on the regulatory action. We will continue to present our biological assessments and evaluation of each species for injuriousness in our rules as part of analyses under the Lacey Act and the APA.

The Regulatory Flexibility Act is the governing statute that requires Federal agencies to analyze the effect of their regulatory actions on small entities (small businesses, small non-profit organizations, and small jurisdictions of government) and, where the regulatory effect is likely to be "significant," affecting a "substantial number" of these small entities, consider less burdensome alternatives for them. The Service will continue to provide the required information under the Regulatory Flexibility Act.

Executive Order 12866 for Regulatory Planning and Review looks at whether the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government; whether the rule will create inconsistencies with other Federal agencies' actions; whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients; or whether the rule raises novel legal or policy issues. We have conducted and will continue to conduct economic analyses, where appropriate, under this Executive Order.

Under our current procedure for complying with NEPA, the Service prepares an environmental assessment (EA) for listing species as injurious. The purpose of an EA is to determine whether the proposed Federal action would result in a significant effect on the human environment requiring the preparation of an environmental impact statement (EIS). If, after investigating and preparing the EA, the agency finds no significant effects on the environment, the agency produces a Finding of No Significant Impact (FONSI). All injurious wildlife listing EAs subsequent to the enactment of NEPA have resulted in FONSIs, including the most recent—the 2012 listing of the four species of large, constrictor snakes as injurious wildlife.

THE PROPOSED CATEGORICAL EXCLUSION

The Service is concerned with the length of time our previous listings have taken, because that protracted process has often defeated the purpose of the listing. Part of that process has been the preparation of EAs. However, the Council on Environmental Quality (CEQ) regulations allow the agency to establish a categorical exclusion and to bypass the completion of an EA or an EIS when undertaking actions

[5] Dorcas, Michael E., et al. 2011. *Severe Mammal declines coincide with proliferation of invasive Burmese pythons in Everglades National Park*, Proceedings of the National Academy of Sciences (December 2011).

that a Federal agency identifies that, under normal circumstances, do not have a potentially significant environmental impact, either individually or cumulatively (40 CFR 1507.3(b); 40 CFR 1508.4). When appropriately established and applied, categorical exclusions serve a beneficial purpose. They allow Federal agencies to expedite the environmental review process for proposals that typically do not require more resource-intensive EAs or EISs (CEQ 2010). Thus, we are pursuing the categorical exclusion.

To ensure that a categorical exclusion was appropriate for injurious wildlife listings, the Service first consulted with the Department of the Interior's Office of Environmental Policy and Compliance, and with CEQ, which administers NEPA implementation. CEQ approved the proposal for publication with notice and comment. Thus, the Service published the proposal in the *Federal Register* on July 1, 2013. The action is based on three justifications consistent with CEQ's guidance for categorical exclusions: (1) maintaining the environmental status quo, meaning the listing action does not cause the condition of the environment to change; (2) history of findings of "no significant impact" for injurious listings; and (3) the proposed categorical exclusion would be consistent with existing Service categorical exclusions. The Service must obtain CEQ's final approval after we address the public comments. To address concerns about the public comment period for the proposed categorical exclusion, the Service reopened it for 60 days on August 16, 2013, and comments are now due by October 15.

The categorical exclusion proposed would apply only to the listing of injurious wildlife species, not to any further Federal action taken to prevent introduction or control established populations of injurious wildlife species in the United States. This proposal is consistent with our ongoing efforts to increase the effectiveness of the Lacey Act injurious wildlife provisions to prevent the introduction and establishment of invasive species into new habitats in the United States and to maximize efficiency wherever possible in Service procedures. A categorical exclusion would give the agency the flexibility to forgo the preparation of an EA when, absent any "extraordinary circumstances," listing a species as injurious. The protections of NEPA would still apply. The review for using a categorical exclusion for a proposed listing would consider whether "extraordinary circumstances" particular to the proposed listing, would merit additional environmental review. In the Department of the Interior's Manual (Environmental Quality Program Series, Part 516, Chapter 8-Managing the NEPA Process, U.S. Fish and Wildlife Service) is a section including the categorical exclusions that are currently in place and that may be used under appropriate circumstances.

CONCLUSION

In conclusion, the proposed categorical exclusion is consistent with NEPA and CEQ's regulations and guidance for complying with NEPA. With the categorical exclusion, the agency would have the flexibility to forgo preparing an EA. All analyses and assessments required under the Lacey Act and other applicable statutes would continue to be carried out for each proposed injurious wildlife listing.

With the increasing globalization of trade and potential for invasions of harmful species, the Federal Government needs to create more efficient procedures, to strengthen the Service's ability to protect the nation's interests from harm caused by invasive species. This one step of obtaining a categorical exclusion would greatly strengthen the Service's ability to act quickly yet intelligently to protect the Nation from invasive species.

Dr. FLEMING. Thank you, Mr. Hoskins.

Mr. Jenkins, you are recognized for 5 minutes.

STATEMENT OF PETER JENKINS, EXECUTIVE DIRECTOR, CENTER FOR INVASIVE SPECIES PREVENTION

Mr. JENKINS. Thank you, Mr. Chairman. Chairman Fleming, Ranking Member Sablan, members of the subcommittee, thank you for the opportunity to speak today.

Speaking as a consultant working through my firm, The Center for Invasive Species Prevention, I advise the National Environmental Coalition on invasive species, or NECIS. NECIS works to improve Federal policy on invasive species. It includes the National

Wildlife Federation, the Nature Conservancy, the Wildlife Society, and many other groups. With the short notice for the hearing, my testimony is not official NECIS testimony, but the positions I am going to talk about are directly from the NECIS comment we submitted on the categorical exclusion proposal, which I wrote.

I have 23 years of experience on invasive species issues as a policy analyst, attorney, advocate, consultant, author, and speaker. On NEPA itself, the bedrock of our environmental laws, I worked for the Fish and Wildlife Service Region 2 for 5 years as a NEPA compliance consultant. I have trained law students as adjunct law professor and Federal officials in NEPA compliance.

Before getting into the categorical exclusion, though, let me talk about one question in your hearing invitation that goes beyond NEPA. In the hearing invitation it asks, "Do I expect the agency to use the categorical exclusion for the hundreds of amphibian species proposed for listing in 2009?"

First, that question is just wrong on its facts. I wrote that 2009 Defenders of Wildlife petition on amphibians, and it does not propose to list hundreds of species as injurious. The background of that petition is that a deadly disease carried in trade, the chytrid fungus, is wiping out amphibians worldwide, including in the United States. In 2008, the World Organization for Animal Health, or OIE, recommended measures to reduce the risk of chytrid in the trade.

That OIE standard was written with input by USDA Veterinary Services experts, and then it was adopted in 2008 by unanimous vote of the OIE parties. The Defenders of Wildlife petition to Service was simply that the agency adopt that OIE standard into an enforceable trade regulation. The proposal and the petition was not to list all amphibians as injurious. It would only regulate particular amphibian shipments as injurious if they do not comply with that OIE standard. Shipments that do comply and don't pose a risk of carrying chytrid into the country would not be regulated as injurious.

The Service took a very similar disease prevention listing approach for all salmonid imports under the Lacey Act, and it has worked, largely to protect our native salmon and trout from imported diseases.

Now, on to the categorical exclusion, or what practitioners call a CATEX. It will save wasted time and resources preparing unnecessary environmental assessments which, in the past, have never found a significant harmful impact from any injurious species listing—going back to 1982.

While my client environmental groups, the ones I mentioned, generally don't like CATEXs, they disfavor CATEXs generally in many contexts, here it makes sense and our group strongly supports it. Prohibiting an injurious species is a positive environmental benefit, by definition. Thus, preparing a NEPA EA is redundant and unneeded. Foregoing that step will help speed up listings of harmful, non-native animals.

The United States currently has one of the developed world's slowest and most expensive systems for regulating imports of injurious animals. It is widely recognized as inadequate to address the risks of the trade. We need to speed it up. It is taking 4 years, on

average, for one regulatory listing. Proposed CATEX is a very small step to help remedy this.

Now, some of the business interests here today are going to allege that CATEX might weaken the economic analysis the Service conducts. But we have just heard that that is not the case. NEPA EAs do not address pure economic impacts; they only address economic effects that flow from a tangible environmental impact. And, as we have heard, there are no tangible environmental impacts from doing these regulatory actions in the United States.

Further, the CATEX in no way reduces the Service's obligation to assess economic effects of the proposals under other laws, primarily the Regulatory Flexibility Act. Any business here that is concerned about economic effects can rely on those other acts and executive orders, and make sure that their economic concerns are addressed.

The bottom line is that our Nation, as a whole, is losing—we are losing—economic benefits by allowing thousands of non-native species—harmful non-native species, in some cases, to be imported that haven't gone through any risk assessment at all, which is generally the case. Speeding the process up and letting the Service do more risk assessment for imports will provide our Nation more, not fewer, economic benefits. That is what this is about.

Chairman Fleming, I recall the field hearing that you had 2 years ago in your Louisiana district on the invasive species. There your focus was Caddo Lake and its severe infestation by imported giant salvinia—that is a plant. If the United States had a more efficient and effective risk assessment process in place for plant imports, that invasion might have been prevented.

We need a better, faster system on the animal side, too, to protect your district and the rest of the Nation from further invasions. We don't need an agency that is further bogged down in red tape, which is what we have now. Thanks very much.

[The prepared statement of Mr. Jenkins follows:]

PREPARED STATEMENT OF PETER JENKINS, EXECUTIVE DIRECTOR, CENTER FOR INVASIVE SPECIES PREVENTION

Chairman Fleming, Ranking Member Sablan, members of the Subcommittee, thank you for the opportunity to testify on *The Department of the Interior's proposal to use a Categorical Exclusion under the National Environmental Policy Act (NEPA) for adding species to the Lacey Act's list of injurious wildlife*.

I am testifying as an independent consultant. My work in this area is through my firm the Center for Invasive Species Prevention, and I advise the National Environmental Coalition on Invasive Species (NECIS). NECIS is a coalition of groups concerned about invasive species and Federal policy. It includes the National Wildlife Federation (NWF), The Nature Conservancy, The Wildlife Society and many other groups. Given the short notice for me being a witness, my full testimony has not been approved as NECIS testimony, but the positions I will advocate are directly from the NECIS comment on the Categorical Exclusion Proposal, which I drafted.

A bit on my background: I have 23 years of experience, both national and international, in invasive species as a policy analyst, attorney, advocate, lobbyist, consultant, manager, author and speaker. I have been invited to speak at conferences around the world on invasive species policy and management and testified three times before to this Sub or Full Committee on the topic—once back in 1993 and again in 2008 and 2012. I have approximately 15 publications addressing multiple aspects of invasive species, including having written the chapter on the "Pet Trade" in the comprehensive *Encyclopedia of Biological Invasions*, published in 2011 by the University of California Press. My most recent paper is in *Biological Invasions*, enti-

tled "Invasive animals and wildlife pathogens in the United States: the economic case for more risk assessments and regulation."

On NEPA, I worked for the U.S. Fish and Wildlife Service, Region 2, in Albuquerque for 5 years as a NEPA compliance consultant. I have trained both law students (as an Adjunct Professor) and Federal officials in NEPA compliance. I am very familiar with this law as a practicing environmental lawyer.

Before getting into the Categorical Exclusion issue, let me talk about two subjects the Hearing Notice focuses on that go beyond NEPA.

(1) **Why the completion of Economic assessments has become such a burden to the U.S. Fish and Wildlife Service?** They are a burden but the Categorical Exclusion has very little to do with Economic assessments and will not change the Service's obligation to do them. They are a burden as they require detailed economic analysis in some cases and the Service lacks the staff and funding to pay for them so they can take many years.

(2) **Do I expect the agency to use a Categorical Exclusion for the hundreds of amphibian species that were proposed for listing in 2009?** First, that question is wrong in its facts. I wrote the 2009 Defenders of Wildlife petition on amphibians and it simply does not propose to list hundreds of species of amphibians. That must be from some ill-informed blog or other source that has not read the Petition.

The background to that listing Petition is that a deadly disease carried in trade, the Chytrid fungus, is wiping out amphibians worldwide, including in the United States. In about 2006–2008, the World Organization for Animal Health (OIE) developed recommended measures to reduce the risk of chytrid in trade. That OIE standard was developed with extensive input by USDA Veterinary Services experts. It was adopted in 2008 *unanimously* by an OIE vote—consisting of delegates from virtually the entire world. The Defenders of Wildlife Petition to the Fish and Wildlife Service was very simply that the agency adopt that OIE standard into an enforceable trade regulation—as it is not an enforceable standard unless countries adopt it into law. Unfortunately, U.S. law on *wildlife* diseases is very sparse—the Lacey Act is it. In any event, the proposal in the Petition is not to list all amphibians as injurious. It would only list particular amphibian shipments as injurious if they do not comply with the unanimously supported OIE standard. Shipments that comply and do not pose significant risk of carrying dangerous chytrid pathogens into the country would not be injurious, regardless of the species. The Service took exactly the same listing approach for all salmonid imports under the Lacey Act and it has worked—and people don't go around nonsensically saying that hundreds of salmon and trout species are listed as "injurious" because of that Lacey disease standard.

I would urge this subcommittee to look at this issue more closely and consider adopting a better law aimed specifically at preventing wildlife disease, as the Lacey Act is not the ideal law for that, but right now it is what we have. A great start is in Section 10 of H.R. 996, the Invasive Fish and Wildlife Prevention Act, that is right now in this subcommittee's jurisdiction. It was introduced by Mrs. Slaughter of New York and has 30 co-sponsors. The NECIS groups strongly support it and urge a hearing on it as soon as possible.

Now, on the Categorical Exclusion, or what NEPA practitioners call a "CatEx"; it will save wasted time and resources preparing unnecessary environmental assessments (EAs), which in the past have never found a significant impact from any nonnative injurious species listing regulation, going back to 1982 when NEPA implementation began for this program. While my client environmental groups general *disfavor* CatEx's, in this case it makes sense. Prohibiting an injurious species is a positive environmental benefit, virtually by definition. Thus, preparing a NEPA EA is redundant. Avoiding that administrative step will help speed up listings.

This is consistent with NECIS policy positions urging the Service to do swifter injurious species listings. We do note that the Service's proposal correctly points out that the CatEx for listing a species does not apply to a possible later Federal management or control action for the listed species. In short, a Lacey Act injurious species listing does not compel or mandate any later Federal management or on-the-ground control actions for the species.

The United States currently has one of the developed world's slowest and costliest known systems for regulating imports of non-native injurious animals.[1] It has been criticized as too reactive and inadequate to address the ongoing invasion and disease risks of the globalized live wild animal trade, taking an average of 4 years to

[1] Jenkins PT (2012) Invasive animals and wildlife pathogens in the United States: the economic case for more risk assessments and regulation. Biol. Invasions DOI: 10.1007/s10530–012–0296–8.

achieve one regulatory listing over recent decades.[2] The proposed CatEx is a small, needed step to partially remedy this.

Some comments from business interests allege that adoption of the CatEx might weaken the economic analysis that the Service conducts for proposed listings. That will *not* be the case. EAs under NEPA do not analyze purely economic effects, only economic effects that flow from environmental impacts. As it is very unlikely that there will be any environmental impacts from the listing of injurious non-native species, there will be no need to analyze resulting economic effects in a NEPA EA. Further, the CatEx does not in any way reduce the Service's obligation to assess economic effects of its listing proposals under *other* laws, primarily the Regulatory Flexibility Act.[3] Any business concerned about economic effects can rely on that Act and need not rely on future NEPA EAs.

In fact, the economic arguments cut strongly in favor of speeding up the listing process, rather than keeping it in its slow *status quo*. A recent study reported in *Ecological Economics*, using years of United States data on amphibian and reptile imports, demonstrated how doing pre-import risk assessments for that segment of the trade can "pay off" in reduced costs for the nation.[4] The study estimated the long-term expected net benefits from using a risk screening system range from roughly $54,000 to $141,000 for each species assessed, including both those species found to be harmful and non-harmful, assuming typical import and impact scenarios. While based on amphibian and reptile imports, the authors indicated that similar benefits likely apply to risk screening for birds, mammals and other groups. Their findings are consistent with findings from Australia documenting that pre-import risk assessments for the plant trade are cost-beneficial for that nation.[5]

The bottom line is our nation is *losing* potential economic benefits by allowing novel non-native animal species to be imported that have not gone through any risk assessment, as is overwhelmingly the case now. Speeding up the process and doing more risk assessments for such imports will provide *more*, not fewer, economic benefits for our country.

While the Service has properly observed in its proposal that it has never found a "significant" impact in three decades of doing NEPA EAs for listing proposals, nevertheless I concur with the Service that it is appropriate to allow for EAs to be prepared in "extraordinary circumstances" under long-standing Department of the Interior NEPA policies (50 CFR 46.215). Such extraordinary circumstances that would justify overriding the CatEx and conducting an EA or full EIS are hypothetical at this point, but it is not inconceivable that such circumstances could arise.

In sum, I applaud the care and foresight the Service has applied in this proposal and urge its swift adoption as an Interior NEPA policy.

Dr. FLEMING. I thank you, Mr. Jenkins.

Mr. Maddy, you are now recognized for 5 minutes to present your testimony on behalf of the 222 accredited members of the Association of Zoos and Aquariums who contribute $160 million a year to wildlife conservation.

STATEMENT OF JIM MADDY, PRESIDENT AND CEO, ASSOCIATION OF ZOOS AND AQUARIUMS

Mr. MADDY. Thank you, Chairman Fleming and Ranking Member Sablan, for the opportunity to testify before the subcommittee regarding the Department of the Interior's proposal to allow a categorical exclusion under NEPA for adding species to the Lacey Act's list of injurious wildlife. My name is Jim Maddy, I am the President and CEO of the Association of Zoos and Aquariums.

As you just mentioned in part, our 222 accredited zoos and aquariums annually see more than 182 million visitors. They col-

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[2] Fowler AJ, Lodge DM, Hsia J (2007) Failure of the Lacey Act to protect U.S. ecosystems against animal invasions. Front. Ecol. Environ. 5:353–359.

[3] Chapter 6, and section 804, of Title 5, United States Code.

[4] Springborn M, Romagosa CM, Keller RP (2011) The value of nonindigenous species risk assessment in international trade. Ecol. Econ. 70:2145–2153.

[5] Keller RP, Lodge DM, Finnoff DC (2007) Risk assessment for invasive species produces net bioeconomic benefits. Proc. Nat. Acad. Sci. 104:203–207.

lectively generate more than 20 billion in economic activity, and support more than 200,000 jobs. AZA-accredited institutions support more than 1,000 field conservation and research projects at the level of approximately $160 million annually, as the Chairman just mentioned.

In the last 10 years, accredited zoos and aquariums formally trained more than 400,000 teachers. School field trips and programs connect more than 15 million students with the natural world every year, just in our institutions.

AZA and its member institutions work in concert with Congress, the Federal agencies, conservation organizations, the private sector, and the public, to conserve our wildlife heritage. In particular, we have the longstanding partnership with the U.S. Fish and Wildlife Service.

Our collaborative efforts have focused on engaging in endangered species recovery and reintroduction—for example, black-footed ferrets, the California condor, the Mexican and red wolves and whooping cranes, and many other species. Our collaborative efforts with the Fish and Wildlife Service are also dedicated to serving multinational species conservation funds and State wildlife grants. And we collaborate with the agency on partnership involving wildlife refuges, migratory birds, freshwater fisheries, illegal wildlife trade, amphibians, and invasive species.

The issue of injurious wildlife listing under the Lacey Act is of concern to many of our member institutions, especially those who regularly transport certain wildlife species for education and conservation purposes. Our accredited zoos and aquariums cannot fulfill their important mission of conservation, education, outreach, public display, and science without living animals. Responsible management of living animal populations necessitates that some individuals be acquired and others be removed from collection at certain times for the purposes of genetic and geographic diversity. The ability to effectively and efficiently transport animals is critical to the success of national and international efforts to conserve and maintain animal species and to educate the public on the plight of threatened and endangered species.

In the case of AZA-accredited zoos and aquariums, the movement of animals between these member institutions, between these institutions and other international zoological parks and aquariums worldwide, and from countries around the world into our institutions, would be negatively impacted without the timely transport of live animals. Any additional permit restrictions or regulations which could arise from a significant increase in injurious wildlife listings would greatly hamper our members' ability to engage in these critical animal movements.

So, we believe that when adding species to the list of injurious wildlife, all avenues for public comment must be made available. This is especially true in this case, since objective injurious wildlife listing criteria are not readily available.

AZA and its member institutions take the issue of invasive species very seriously. And 10 years ago, our board of directors adopted a policy on non-native invasive species, which encourages our members to partner with Federal, State, and local agencies to es-

tablish policies that regulate the acquisition, ownership, and disposition of non-native, potentially invasive organisms.

As part of our rigorous accreditation standards, we require that animal transportation must include plans for any emergencies and contingencies that may occur. This requirement includes ensuring an adequate number of appropriately trained personnel to handle the transport, and the standards also require that all animal exhibits and holding areas must be secure to prevent the unintended animal egress, and they require the implementation of risk management plans.

The strict standards required by AZA accreditation and the strong commitment by zoo and aquarium professionals to the safety of animals and the public means that accredited zoos and aquariums have not been responsible for the introduction and spread of injurious wildlife into the United States. Unfortunately, some injurious wildlife listings, without the proper vetting and opportunity for public notice and comment, could have a deleterious effect on our ability to build and sustain zoological collections. A categorical exclusion for adding species to the Lacey Act's list of injurious wildlife would potentially eliminate valuable NEPA procedures that help to ensure that Federal rules do not result in undue and unreasonable financial or permitting burdens on these accredited zoos and aquariums.

With that, I conclude my remarks. Happy to take questions. And, again, I thank you for the invitation to appear.

[The prepared statement of Mr. Maddy follows:]

PREPARED STATEMENT OF JIM MADDY, PRESIDENT & CEO, ASSOCIATION OF ZOOS AND AQUARIUMS

Thank you Chairman Fleming and Ranking Member Sablan for the opportunity to testify before the Subcommittee regarding the Department of the Interior's proposal to allow a Categorical Exclusion under the National Environmental Policy Act (NEPA) for adding species to the Lacey Act's list of injurious wildlife.

My name is Jim Maddy and I am the President and CEO of the Association of Zoos and Aquariums (AZA). AZA's 222 accredited zoos and aquariums annually see more than 182 million visitors, collectively generate more than $21 billion in annual economic activity, and support more than 204,000 jobs across the country. Over the last 5 years, AZA-accredited institutions supported more than 1,000 field conservation and research projects with $160,000,000 annually in more than 100 countries. In the last 10 years, accredited zoos and aquariums formally trained more than 400,000 teachers, supporting science curricula with effective teaching materials and hands-on opportunities. School field trips and programs annually connect more than 15,000,000 students with the natural world. This is very important as a recent National Research Council study found that people learn as much as 90 percent of their science in informal settings such as AZA-accredited zoos and aquariums.

AZA and its member institutions work in concert with Congress, the Federal agencies, conservation organizations, the private sector and the general public to conserve our wildlife heritage. In particular, AZA and its member institutions have a long-standing partnership with the U.S. Fish and Wildlife Service. Our collaborative efforts have focused on:

- Engaging in endangered species recovery and reintroduction (For example: black-footed ferrets, California condor, Mexican and red wolves, whooping cranes);
- Supporting multinational species conservation funds and state wildlife grants; and
- Collaborating on partnership opportunities involving wildlife refuges, migratory birds, freshwater fisheries, illegal wildlife trade, amphibians and invasive species.

The issue of injurious wildlife listings under the Lacey Act is of concern to many of our member institutions, especially those which regularly transport certain wild-

life species for educational and conservation purposes. AZA accredited zoological parks and aquariums cannot fulfill their important missions of conservation, education, outreach, public display and science without living animals. Responsible management of living animal populations necessitates that some individuals be acquired and that others be removed from the collection at certain times for the purposes of genetic and geographic diversity. The ability to effectively and efficiently transport animals is critical to the success of national and international efforts to conserve and maintain animal species and to educate the general public on the plight of threatened and endangered species. In the case of AZA accredited zoos and aquariums, the movement of animals between these member institutions, between these institutions and other international zoological parks and aquariums worldwide, and from native habitats and countries around the world into our institutions would be negatively impacted without the timely transport of live animals. Any additional permit restrictions or regulations which could arise from a significant increase in injurious wildlife listings could greatly hamper our members' ability to engage in these critical animal movements. Thus, AZA believes that when adding species to the list of injurious wildlife, all avenues for public comments must be made available. This is especially true in this case since objective injurious wildlife listing criteria are not readily available.

AZA and its member institutions take the issue of invasive species very seriously. In 2003 the AZA Board of Directors adopted a policy on non-native invasive species which:

- Encourages AZA members to make every effort to ensure that their animal and plant collections and management practices do not become the source of non-native species introductions;
- Urges zoo and aquarium horticulturalists to be cognizant of invasive species concerns when working with non-native ornamental or browse plants;
- Encourages AZA members to partner with Federal, state, and local agencies to establish policies that regulate the acquisition, ownership, and disposition of non-native, potentially invasive organisms;
- Encourages AZA members who travel overseas to follow all relevant government regulations regarding the transportation of biological materials;
- Encourages AZA members to educate the public and key decisionmakers about the deleterious impacts associated with species introductions; and
- Reminds AZA members to consult the IUCN Guidelines for the Prevention of Biodiversity Loss Caused by Alien Invasive Species.

As part of our rigorous accreditation standards, the AZA requires that animal transportation must include plans for any emergencies and contingencies that may occur. This requirement includes ensuring an adequate number of appropriately trained personnel to handle the transport. The standards also require that all animal exhibits and holding areas must be secured to prevent unintentional animal egress, and they require the implementation of risk management plans.

The strict standards required by AZA accreditation and the strong commitment by zoo and aquarium professionals to the safety of animals and the public means that accredited zoos and aquariums have not been responsible for the introduction and spread of injurious wildlife into the United States. Unfortunately, some injurious wildlife listings, without the proper vetting and opportunity for public notice and comment, could have a deleterious effect on our ability to build and sustain zoological collections.

A categorical exclusion for adding species to the Lacey Act's list of injurious wildlife would potentially eliminate valuable NEPA procedures that help to ensure that Federal rules do not result in undue and unreasonable financial or permitting burdens on AZA-accredited institutions. Without critical reviews, assessments, and opportunities for public comment under the current Federal framework, we are concerned that the Department would be free to declare certain species as injurious without factoring in the significant impact such a listing would place on institutions like AZA-accredited zoos and aquariums.

For example, in our comments on the previous USFWS proposed rule to list nine species of constrictor snakes as injurious under the Lacey Act, AZA provided an example of how such a listing could impact our members. Clyde Peeling's Reptiland, an AZA-accredited zoological park in Pennsylvania, operates a permanent zoological facility and designs, builds, and manages a fleet of educational exhibitions that are hosted by zoos, natural history museums, and science centers throughout North America. These exhibitions include pythons, boas, and other live animals under the care of the zoo's professional staff. Reptiland also conducts wildlife lecture programs (all of which include large boas and pythons) for organizations nationwide. If all of the proposed nine species of constrictor snakes were listed as injurious under the

Lacey Act, it would dramatically affect Reptiland's ability to conduct offsite exhibitions and lectures, which account for fully two-thirds of its revenue and one-third of its staff.

And while it may be possible for institutions to get injurious wildlife permits under the Lacey Act for zoological purposes, theoretically a separate permit would be required for each interstate or international move (and Reptiland makes 50 or more interstate moves each year). Federal wildlife permits are often slow in being issued due to budget and staffing constraints at the USFWS's Division of Management Authority and the Division of Scientific Authority—AZA institutions have waited as much as nine months—and the process is cumbersome. Even if permits took as little as 3 months to issue, contracting with schools or natural history museums to provide date-certain exhibitions or lectures would be a practical impossibility. Very often exhibition and lecture contracts are made with little lead time.

I commend the USFWS for working collaboratively with AZA staff and AZA members to develop and implement a blanket permit protocol to allow AZA institutions to make multiple interstate movements of listed snakes in a timely manner. AZA appreciates the willingness of the Service to work with us on this common-sense solution.

In closing, we view ourselves as critical partners with the Department and the Service for playing a vital role in delivering their key messages and educational programs to more than 182,000,000 zoo and aquarium visitors. Any long-term solution to invasive species depends on responsible, educated citizens. Connecting people with wildlife and environmental issues is what zoos and aquariums do best. We do not believe that a categorical exclusion under NEPA for the future listing of injurious wildlife will help to accomplish this objective. Rather, we believe that we should work with USFWS to make the injurious wildlife listing process more efficient, more effective and more reflective of the current budget, staffing, economic and environmental realities both for invasive species that are already in this country and those that have not been introduced.

Thank you for the opportunity to testify on this important matter, and I would be happy to answer any questions that you may have.

Dr. FLEMING. Thank you, Mr. Maddy.

Mr. Gehan, you are now recognized for 5 minutes to present testimony on behalf of the United States Association of Reptile Keepers.

STATEMENT OF SHAUN M. GEHAN, ATTORNEY, KELLEY DRYE & WARREN, REPRESENTING U.S. ASSOCIATION OF REPTILE KEEPERS

Mr. GEHAN. Mr. Chairman, Ranking Member, members of the committee, thank you very much for this opportunity to appear. My name is Shaun Gehan, testifying on behalf of the United States Association of Reptile Keepers, a trade association representing breeders, conservationists, researchers, hobbyists, academics, and pet owners, as well as the reptile industry's many business sectors.

The hearing addresses the Fish and Wildlife Service's proposal to exclude itself from NEPA's most minimal obligations when listing animals that it, in its sole and unchallengeable discretion, decides are injurious. Due to the specter of expedited future listings, the proposal alone has stalled growth in this interstate commerce-dependent industry.

The proposed exclusion guts the Lacey Act of the only meaningful tool the public has for holding FWS accountable for its listing decisions. It seems hardly a coincidence that the Service made this proposal only 3 months after USARK informed Director Ashe of several NEPA violations committed in listing four species of constricting snakes as injurious. After all, as the Chairman mentioned, NEPA has been on the books for over 40 years, and the agency al-

ready has available a categorical exclusion which it can and has used.

The Lacey Act has none of the requirements or protections more modern laws provide. For example, the Endangered Species and Magnuson-Stevens Acts each provide multiple opportunities for public input, and require rigorous analysis using the best science to justify decisions made. Each requires at least some consideration of economic impacts on all affected parties.

Lacey merely requires that an injurious finding be implemented by regulation. All this means is that a notice of the proposed listing containing virtually any justification, from the Secretary's not-unreasonable belief to un-verified statements in a listing petition be published, and that the public be given an opportunity to comment. The Regulatory Flexibility Act applies, but only requires analysis of impacts on small entities.

As in the case of the constricting snake rule, so long as the Service recognizes some reasonably likely impacts, it prepares a final regulatory flexibility analysis, the RFA imposes no other duties.

There are also many excellent executive orders, but they are policed only by the administration in power. They create no rights the public can enforce. NEPA is the only law that provides additional opportunities for public input, and forces the Service to explain its decision in terms of relevant science, to lay out a case for why listing will have environmental benefits, and explain the harms it may avert. Above all, NEPA allows the public to hold the Service accountable in court if it ignores science, relevant information, or public comment. In short, NEPA is the only law that even partially fills Lacey Act's gaps.

And just because the Service may find that a listing has no significant impact on the human environment does not mean the process has no value. As USARK's experience with the snake rule shows, it does. This was the first-ever listing of a species long-present in the United States, held as pet, and part of a small, vibrant, national industry.

The proposal was based on a single report that generated years of controversy and peer reviewed in literature. Empirical studies cast doubt on the rule's central premise, that these snakes could invade and colonize up to a third of the Continental United States, a discredited finding that applied to only one of the nine species, the Burmese python, proposed to be listed.

NEPA requires, where Lacey does not, that these issues be addressed. The environmental assessment must discuss controversies, contrary science, and all relevant information brought to the agency's attention. Courts call this the "hard look." In the snake world, as USARK amply demonstrated in its letter to Director Ashe, submitted for the record, the Service looked the other way, failing to address the public's and even other public officials at the State and Federal level environmental concerns, a shocking ambition, given NEPA's purpose.

With a categorical exclusion, none of these issues would even be relevant. However, because one was prepared for the proposed snake listing, it has become obvious that the Service should, in fact, have found the listing would cause significant impacts on the human environment, and thus prepared an EIS.

Moreover, as the Fish and Wildlife Service prepared a wholly inadequate EA, USARK and others had the opportunity to seek redress for its failure to fully engage relevant issues and respond to legitimate concerns. Lacey gives a handful of public officials an awesome amount of power.

In our case, a long-established industry has been jeopardized on a theory proven false by the facts. More American jobs, more liberties, will be lost as the Service increasingly uses Lacey to list other animals that are widely held and in commerce. Such power should be accompanied by some minimal level of accountability.

Lacey is a blunt instrument, offering only one solution. Until replaced by a more refined system, the Service proposal moves the law in exactly the wrong direction.

[The prepared statement of Mr. Gehan follows:]

PREPARED STATEMENT OF SHAUN M. GEHAN, ATTORNEY, KELLEY DRYE & WARREN, REPRESENTING U.S. ASSOCIATION OF REPTILE KEEPERS

Chairman Fleming, Ranking Member Sablan, Members of the Subcommittee, thank you very much for this opportunity to testify on the U.S. Fish and Wildlife Service's ("FWS" or "Service") proposed "categorical exclusion" under the National Environmental Policy Act ("NEPA") for the Service's decisions to designate nonnative species as "injurious" under the Lacey Act, 18 U.S.C. § 42.

My testimony is presented on behalf of the United States Association of Reptile Keepers ("USARK"), a trade association representing all segments of this industry, including its reptile breeding, retail, transportation, equipment manufacture, trade show promotion, medical supply, herpetological veterinary, hobbyists, and wholesale sectors, as well as pet owners, conservationists, researchers, and academics.

I am an attorney with the Washington, DC office of Kelley Drye & Warren LLP and have served as legal counsel and advisor to USARK for over 5 years. My expertise is in natural resources, environmental, and administrative law, with particular focus on issues relevant to this Subcommittee, including, among others, the Lacey Act, Magnuson-Stevens Fishery Conservation and Management Act, the Endangered Species Act ("ESA"), NEPA.

I. SUMMARY OF COMMENTS

USARK believes the Service's proposal for a categorical exclusion for its Lacey Act listings is unjustifiable and wholly unnecessary. There may be instances when employment of a categorical exclusion is warranted, particularly for species not in trade or not currently present in the United States. In such circumstances, however, the Department of Interior already has an appropriate categorical exclusion of which the Service has availed itself in past listing decisions. For most listings, however, NEPA provides for both public participation and rigorous scientific assessment, elements that are currently otherwise lacking in the law.

The Lacey Act invests the Secretary of Interior with discretion, delegated to FWS, to declare species of wildlife "to be injurious to human beings, to the interests of agriculture, horticulture, forestry, or to wildlife or the wildlife resources of the United States." 18 U.S.C. § 46(a)(1). The law is unique among this Nation's conservation laws in that it provides neither standards, such as a "best science" requirement, nor procedural requirements to which the Service must adhere in making such decisions. The only prerequisite is that the listing be done "by regulation," which assures only the provision of notice-and-comment rulemaking and a minimally sufficient explanation of the basis of the decision.

It is important to understand why Administrative Procedure Act ("APA") processes alone are not adequate to protect the public interest. A determination that a species is "injurious" under the Lacey Act involves judgment by agency experts involving determinations both technical and scientific. Congress has vested the authority to make such determinations in the Secretary, while providing no criteria to guide her decisionmaking. Under such circumstances, the agency is given the utmost deference by courts. In fact, so long as *some* rationale is presented, it is unlikely a listing decision could ever be successfully challenged.

This makes FWS' continued adherence to NEPA essential. Years of judicial interpretation have established a clear framework for agencies to follow in making regulatory decisions. For example, it must evaluate the opinions of the public and out-

side experts, respond to all legitimate concerns brought forth relating to the environmental impacts of their actions, and consider significant proposed alternatives. If an agency fails to take the required "hard look" or adhere to processes the law requires, it can be held accountable. By contrast, utilization of a categorical exclusion shortcuts these procedures and places the burden of assuring FWS' NEPA compliance in the hands of the public.

In fact, as described in more detail below, the Service has a checkered past with respect to NEPA compliance in conjunction with Lacey Act listings. When it listed four species of constricting snakes as injurious in 2012, the Environmental Assessment ("EA") prepared was legally inadequate and FWS' accompanying "finding of no significant impact" ("FONSI"), wholly unjustified. This listing, done in partial completion of a 2010 proposal to list nine species of constricting snakes (five others, including the economically important boa constrictor, remain outstanding).

This was the first Lacey Act listing of species that are widely held in pet ownership and the foundation of a domestic industry. The proposal was highly controversial—one of the key NEPA criteria for producing a full environmental impact statement ("EIS")—for social and economic as well as scientific reasons. However, when USARK pointed out legal deficiencies with the EA, FWS' NEPA compliance generally, and other legal shortcomings in a detailed letter to FWS Director Dan Ashe in April of this year (a copy of which is attached to this testimony), the agency responded with the proposed categorical exclusion that is the subject of this hearing.

This response is inadequate, and the proposed exclusion, more generally, is unjustified and should be rejected.

II. BACKGROUND: WHY USARK OPPOSES FWS' PROPOSED LACEY LISTING OF CONSTRICTING SNAKES

USARK has, on several grounds, strongly opposed FWS' effort to list nine species of constricting snakes as "injurious" under the Lacey Act since it was first proposed in 2010.[1] While only a handful of the proposed and listed species are in active trade (most especially the boa constrictor, reticulated python, and the Burmese python), those that are support a thriving and dynamic domestic industry. Comprised of thousands of small, "mom and pop" breeders and hobbyists, this segment of the $1.4 billion reptile pet industry supports specialized equipment manufacturers, veterinarians, feed producers, and an active trade show industry, of which scores are held each year across the country. At every level, this industry is comprised of small businesses.

The proposed and partially finalized listing process has caused economic harm industry-wide, as almost 90 percent of all sales involve interstate commerce. As a result, the market diminished considerably due to fears that FWS will prohibit owners from moving across state lines with their pets. Breeders have had to cut back and even destroy valuable brood stock due to low demand and the high costs of maintenance these animals require. Economic harm at both the macro and micro level has occurred as a result of FWS' actions.

For example, Jeremy Stone, a reptile breeder for over 25 years, built a full-time business 10 years ago. A graduate of Brigham Young University, Stone supports his wife and four children through his reptile business. Stone's business is captive bred, high-end boa constrictors with rare colors and patterns. Advanced hobbyists may spend $10,000 or more on these snakes. Just the proposal to list boa constrictors has decreased his business by over 60 percent. Before the proposed listing, Stone had eight employees. He has reluctantly been forced to lay off five of these individuals. The listing also would have trickle-down effects on other businesses, such as his feeder rodent supplier, which he pays $60,000 annually. This Subcommittee heard a similar story last year from Colette Sutherland of TSK, Inc., who testified on H.R. 511.

However, because FWS failed to do an adequate economic analysis, required by the Regulatory Flexibility Act ("RFA"), USARK commissioned an economic study by a respected Washington economics firm. Even under the most conservative economic assumptions, lost revenue impacts from a finalized listing of all nine snakes range from $42.8 million to $58.7 million annually. However, given the fact that such interstate sales comprise a large portion of total revenue, more realistic annual revenue losses range from $75.6 million to $103.6 million. Many of these impacts have already been experienced, causing harm to USARK's members.

Substantively, FWS' proposed listing is predicated on a highly controversial and imprecise study declaring that Burmese pythons "could find suitable climatic condi-

[1] *See* 75 Fed. Reg. 11808 (March 12, 2010) (proposed rule); 77 Fed. Reg. 3330 (Jan. 23, 2012) (final rule listing four of the nine species as injurious).

tions in roughly a third of the United States."[2] The report, prepared by researchers with the U.S. Geological Survey ("USGS"), utilized a climate-matching methodology, the value of which has been debated in peer-reviewed literature. Detailed critiques over the data and assumptions employed in the USGS study have also been published. Among the principle scientific objections was the climate-matching methodology which relied on mean monthly temperatures rather than temperature extremes and the assumption that Burmese python hibernate, although they have never been observed engaging in this behavior. It has been noted also that a significant percentage of weather stations ostensibly within the species' native range and used to generate mean temperatures were at altitudes or in regions where these snakes have never been observed nor at which they could survive.

Empirical studies demonstrate that the initial projections of suitable habitat have been grossly overestimated. Nonetheless, FWS continued to rely on these findings when it listed four of the nine species under the Lacey Act in 2012. Further, the Burmese python, inappropriately defined as including the Indian python (*Python molurus molurus*)—a distinct subspecies which is listed as "endangered" under the ESA, can be found in a broader range of climates than any of the other eight species. Each is found in tropical regions and are unlikely to survive anywhere in the continental United States outside of the subtropical regions of extreme southern Florida.

In fact, the boa constrictor, which accounts for the largest percentage of revenues for the industry by far, has had a small remnant population in a small area of south Florida known as the Deering Estate since the 1950s. Believed to have been left behind after a film shoot or television production, this population has remained small and well contained. This empirical evidence belies FWS' claims that such snakes will spread and engulf the continental United States, from Washington State to Washington, DC and beyond.

In short, the proposal is unjustified. As shown below, the process by which the four species of snakes was listed violated applicable law, including not only the RFA and APA, but NEPA as well.

III. USARK INFORMS FWS OF NEPA AND OTHER VIOLATIONS

The Federal Register notice proposing a categorical exclusion for Lacey Act listings followed by only 3 months submission of a letter by USARK to FWS Director Ashe that highlighted, among other things, stark inadequacies in the EA accompanying the final rule listing four species of constricting snakes as injurious. USARK's letter identified deficiencies with the rigor and thoroughness of scientific analysis the Service undertook in support of the listing, some of which are described above. In fact, important scientific studies submitted by the public were never considered. More importantly, the EA failed to address significant environmental concerns raised by the public during the rulemaking process.

In addition to USARK, organizations including environmental groups, state wildlife officials, the zoo and aquarium community, academic and private conservation researchers, and personnel with other Federal conservation agencies raised concerns with the environmental impacts stemming from the proposed listing, including:

- Concerns that the proposal would engender the asserted harm; that is, create a perverse incentive for irresponsible or aggrieved owners of snakes to release them into the wild if they cannot be transported across state lines or lose value due to a market collapse;
- Academic and private researchers whose work is partially funded through breeding and sales operations noted that important conservation research and programs to develop captive breeding techniques to replenish threatened and endangered snake populations in the wild would be terminated;
- State fish and wildlife agencies discussed adverse impacts on limited state conservation and enforcement resources;
- The zoo and aquarium community raised concerns about adverse impacts on interstate and international transfers necessary for species survival programs and, along with USARK, negative effects on environmental education programs.

Matters such as these lie at the heart of NEPA. As USARK noted in its letter, however, none of these matters were addressed at all in the EA. Further, the EA

[2] 77 Fed. Reg. at 3332; *see also id.* at 3331 ("The purpose of listing the Burmese python and its conspecifics . . . as injurious wildlife is to prevent the accidental or intentional introduction of and the possible subsequent establishment of populations of these snakes in the wild in the United States.").

entirely failed to mention that the listing itself was controversial and that there was considerable disagreement within the scientific community—including among Federal scientists—over the proposed listings' scientific basis.

Some recommended FWS consider an import ban for these species as an alternative that would minimize much of the adverse economic impacts. Instead, the Service merely considered different combinations of the nine snakes to list as "alternatives." Despite NEPA's requirements, no serious consideration to meaningful alternatives occurred.

The letter, a copy of which is appended for the record, amply supported USARK's claim that these deficiencies in the Service's NEPA documentation was contrary to the law, NEPA's implementing regulations, and decades of well-established case law. In fact, far from making the unsupported finding that the listing would not have a significant effect on the human environment, the record demonstrated that a full environmental impact statement was required. Given that, it is difficult for USARK to see FWS' proposal for a categorical exclusion as anything other than a wholly inadequate response to the legal shortcomings it identified.

IV. PROBLEMS WITH THE CATEGORICAL EXCLUSION AND THE IMPORTANCE OF NEPA IN LACEY ACT PROCESSES

A. Brief Background on NEPA

NEPA applies to "major Federal actions significantly affecting the quality of the human environment." Contrary to FWS' assertion in the proposed Categorical exclusion, there is no exemption for actions that ostensibly benefit the environment.[3] NEPA applies to the actions under the Endangered Species Act,[4] and certainly to injurious listings under the Lacey Act.

NEPA is an "action forcing" statute with two major objectives: (1) it "ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts"; and (2) "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision."[5] "An agency's primary duty under NEPA is to take a 'hard look' at environmental consequences."[6] "[A]n agency takes a sufficient 'hard look' when it obtains opinions from its own experts, obtains opinions from experts outside the agency, gives careful scientific scrutiny and responds to all legitimate concerns that are raised."[7] Further, an agency must consider "all alternatives that appear reasonable and appropriate for study at the time of drafting the EIS, as well as significant alternatives suggested by other agencies or the public during the comment period."[8]

NEPA regulations provide that if the agency is uncertain whether the impacts rise to the level of a major Federal action requiring an EIS, the agency must prepare an environmental assessment. An EA is "a concise document that briefly discusses the relevant issues and either reaches a conclusion that preparation of [an] EIS is necessary or concludes with a finding of no significant impact, in which case preparation of an EIS is unnecessary."[9] For its part, an EIS is required when, among other things, an action's "effects on the quality of the human environment are likely to be highly controversial; . . . possible effects on the human environment are highly uncertain or involve unique or unknown risks; [and when an] action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.'" 40 CFR § 1508.27(b).

An agency's NEPA analysis insufficient where it lacks a "reasoned discussion of major scientific objections."[10] When "highly qualified experts" raise criticisms regarding important scientific findings, an "agency cannot merely say that the [information] and the criticisms arising from it make no difference; to comply with NEPA,

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[3] *See* 40 CFR § 1508.27(b) ("A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial").

[4] *See, e.g., Cape Hatteras Access Pres. Alliance* v. *U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 134–36 (D.D.C. 2004).

[5] *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

[6] *Pub. Utils. Comm'n* v. *FERC*, 900 F.2d 269, 282 (D.C. Cir. 1990) (quoting *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n.21 (1976)) (internal quotes omitted).

[7] *Hughes River Watershed Conservancy* v. *Johnson*, 165 F.3d 283, 288 (4th Cir. 1999) (citing *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 378–85 (1989)); see also 40 CFR § 1500.2 ("Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.").

[8] *Roosevelt Campobello Int'l Park Comm'n* v. *United States E.P.A.*, 684 F.2d 1041, 1047 (1st Cir. 1982) (internal quotations omitted).

[9] *Sierra Club* v. *Espy*, 38 F.3d 792, 796 (5th Cir. 1994).

[10] *Seattle Audubon Society* v. *Moseley*, 798 F. Supp. 1473, 1482 (W.D. Wash. 1992).

it must give a reasoned analysis and response." *Id.* at 1482–83. The need to consider important scientific issues also applies when an agency develops an EA.[11]

A categorical exclusion is a form of NEPA compliance, albeit one that applies to "a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations."[12] However, even for such categories of actions, an agency must analyze an action for "extraordinary circumstances in which a normally excluded action may have a significant environmental effect." 40 CFR § 1508.4.

B. USARK's Concerns With the Proposed Categorical Exclusion

The Lacey Act is a statute with a conservation purpose that is unusual both in the fact it is set forth in Title 18 of the U.S. Code, which deals with criminal laws, and in the utter absence of any standards or process to guide the listing process. Unlike the ESA or the Magnuson-Stevens Fishery Conservation and Management Act, the law contains no requirement that the agency utilize the best scientific information or assess economic impacts of the action. A determination that a species is injurious is almost entirely committed to the Secretary's discretion.

NEPA fills a gap that no other provision of law provides. For example, while the APA sets forth procedural requirements for notice-and-comment rulemaking, that law does not require any substantive analysis of a proposal. Its requirement for reasoned decisionmaking merely provides that an agency explain its authority and rationale for promulgating a rule. Agency determinations, especially those involving scientific determinations, are given high deference by courts. The Lacey Act's lack of standards or criteria ensures that every listing would pass judicial review, unless the Service itself declared that it had "arbitrarily and capriciously" decided to list a species.

The RFA, for its part, requires economic impacts analysis, but only as to small entities. While in the case of constricting snakes, such analysis captures the overwhelming majority of the sector's economic activity, here and elsewhere the law does not require FWS to capture or describe the full range of economic impacts. Similarly, executive orders, like E.O. 12866, require agencies to compare benefits and costs and utilize sound scientific information. However, executive orders are not judicially enforceable. Only the Office of Management and Budget's Office of Information and Regulatory Affairs ("OIRA") controls their implementation. And as OIRA is charged with implementing an administration's regulatory philosophy, it can be a weak guardian of these procedural safeguards.

Among all of these, NEPA is the only law that provides assurances that listing decisions will be based on sound science; that the public will have input on the quality of the analyses and underpinning of a rule; and, most importantly, to hold FWS accountable for political decisionmaking. USARK's letter to Director Ashe makes this case convincingly. Without the ability to challenge the agency's compliance with NEPA, the public would be entirely subject to the whims of the FWS. If the categorical exclusion had been applied in this instance, what was already weak and perfunctory analysis would be even more shrouded from public view.

Even though application of NEPA provides an important tool, it is also far from perfect. USARK agrees with FWS that the law may be too blunt an instrument to effectively address invasive species concerns. However, in addition to providing additional tools to address specific issues—for example, in the case of the constricting snakes, a ban on imports only would effectively meet the concerns while minimizing impacts—the law must include substantive standards and procedures.

USARK would ask the Subcommittee to consider adding the types of protections found in other conservation laws. For example, the MSA requires economic impact analysis, use of the best scientific information available, provides for ample public input, and includes a host of other required analyses including for an impact statement on affected parties. Similar provisions should be considered for the Lacey Act.

Recognizing that a revisiting of the law is unlikely in the near term, full application of NEPA is the next best alternative. For all these reasons, USARK strongly opposes the Service's proposed exclusion.

I thank you very much for this opportunity to testify on this very important matter. If there is any further information that would assist the Committee in its work, I will do my very best to provide it.

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[11] *Found. for N. Am. Wild Sheep* v. *U.S. Dept. of Agr.*, 681 F.2d 1172, 1178 (9th Cir. 1982).

[12] 40 CFR § 1508.4; *see also id.* § 1507.3(b)(2)(ii) (requiring agencies to adopt NEPA procedures including categorical exclusions).

Dr. FLEMING. Thank you, Mr. Gehan.

Next is Mr. Meyers, Mr. Marshall Meyers, who will present testimony on behalf of the Pet Industry Joint Advisory Council. Mr. Meyers, you are now recognized for 5 minutes.

STATEMENT OF MARSHALL MEYERS, SENIOR ADVISOR, PET INDUSTRY JOINT ADVISORY COUNCIL

Mr. MEYERS. Mr. Chairman and members of the committee, I am Marshall Meyers, Senior Advisor and former CEO of the Pet Industry Joint Advisory Council. Thank you for inviting me to appear today to address the Service's proposal to establish a categorical exclusion under Lacey.

PIJAC is a national trade association representing all segments of the pet industry. Our members serve 63 percent of the U.S. households that care for and maintain pets of all types, sizes, and descriptions, the majority of which fall under the purview of Lacey. The empirical evidence demonstrates that the vast majority of these pet species pose little risk of release and establishment as injurious species.

However, inasmuch as we are engaged in trading more live specimens of more species than any other industry, we recognize our responsibility for environmental stewardship. This includes collaboration with the Fish and Wildlife Service pursuant to two memorandums of understanding, one involving public education outreach on non-release, and one signed only this June with the Service and the Association of Fish and Wildlife Agencies to develop voluntary, non-regulatory approaches to reduce the risk of importing potentially invasive species not currently found in the United States.

Our historic and primary concern with respect to implementation of Lacey is its total lack of statutory listing criteria, as well as statutory processes, other than complying with the Administrative Procedures Act.

The Service's justification is somewhat baffling. In one breath the Service argues it would only conduct an EA when, as, and if it determines that there is "significant effect on the human environment." However, in another breath it argues that it will not have to comply with NEPA, because the species should not be here in the first place, and therefore, cannot have a significant effect on the human environment. Such circular reasoning.

For species already present in the United States, prohibiting such species could well have an impact on the human environment, and that impact must be evaluated, pursuant to NEPA standards.

We are also mystified by the justification for a categorical exclusion on the basis that injurious wildlife listings to date have shown that the listings would have no significant effect on the human and natural environment. Assuming, arguendo, that that is accurate for past listings—other than the constrictor listing—how can the Service predict a similar conclusion for all future listings, especially for species in trade or already present in the United States?

NEPA safeguards are far too important to be circumvented by adopting a blanket exclusion in this instance. What is being proposed goes far beyond the use contemplated by NEPA. NEPA calls for evaluating impacts of agency action on a wide variety of areas involving both negative and beneficial impacts on the human and

natural environment, including social impacts, environmental justice issues, and impacts on disadvantaged communities.

We are somewhat sympathetic to the Service's desire to avoid or minimize duplication. There may be grounds for justifying a CATEX when dealing with species not currently present in the United States.

It is our position the Department should step back, withdraw this proposal, consider convening stakeholder meetings to explore how the listing process can be improved, consistent with law and resources, improve transparency, and seek public input at every stage of the process. We recognize and support the need to improve the injurious wildlife listing process, but we don't believe this is the best way forward.

CEs are traditionally reserved for those situations where agency actions are effectively administrative or administerial in nature. At best, we have three proposals. Adoption of and clear enunciation of the listing criteria and processes that the Service is encompassing, the NEPA elements that they claim that are duplicative under NEPA as an integral part of their procedures and protocols. Create a tiered process for evaluating species not present in the United States that would be different than those that are present here, either in trade or otherwise present. And for species in trade or otherwise present, ensure that they incorporate NEPA style processes.

PIJAC is willing to work collaboratively with the Service and other stakeholders to explore the feasibility of such programmatic reviews, and believes such reviews could well meet a range of interests.

Now, in conclusion, Mr. Chairman, I guess I am about to reveal my age. My involvement with injurious wildlife dates back to circa 1973, when the Service sought to list all non-natives injurious until proven innocent. We successfully challenged that approach on the grounds that it lacked, among other things, scientific integrity, and raised a number of substantial due process issues.

Proving a negative has always been problematic for scientists, and even for lawyers like myself. Now, 40-plus years later, they want to sidestep NEPA. Considered by many as one of the most important environmental safeguards for scientific integrity, full disclosure, and reasoned decisionmaking. Loosely paraphrasing H.L. Mencken, for every complex problem there is a categorical exclusion that is simple, neat, and wrong.

Thank you, Mr. Chairman. We look forward to working with the subcommittee and the Service in addressing this very important environmental issue.

[The prepared statement of Mr. Meyers follows:]

PREPARED STATEMENT OF MARSHALL MEYERS, PET INDUSTRY JOINT ADVISORY COUNCIL

Mr. Chairman and Members of the Subcommittee, I am Marshall Meyers, Senior Advisor and former CEO of the Pet Industry Joint Advisory Council (PIJAC). Thank you for inviting me to appear before the Subcommittee today to address the Department of Interior's proposal to establish a Categorical Exclusion under the National Environmental Policy Act (NEPA) for listing non-native species as "injurious wildlife" under the Lacey Act (18 U.S.C. 42, as amended).

PIJAC is a nonprofit, service-oriented national trade association representing all segments of the pet industry. These include importers and exporters of live organisms, retail pet stores, product manufacturers, other industry trade associations in

the United States and abroad, as well as hobby clubs and aquarium societies. Our members serve 63 percent of the U.S. households that care for and maintain pets of all types, sizes and descriptions: the majority of which fall within provisions of the Lacey Act.

Pet owners across this Nation possess thousands of non-native (nonindigenous) species in significant numbers. This is not a new phenomenon. For generations, people have maintained a diverse array of non-native mammals, birds, reptiles, amphibians, and fish as companion animals. It is not the intent of the pet industry to intentionally release these animals into the natural environment. Nor would the vast majority of pet owners have any such intent. In fact, the majority of pet owners consider their pets family members. The empirical evidence demonstrates that the vast majority of these pet species pose little risk of release and establishment as injurious species.

The bond between pets and their owners is well documented—as are the benefits of this bond . . . greater mental and physical health among adults and greater socialization and learning skills among children. Furthermore, it is clear that children who grow up with pets develop empathy for animals and the environment in general. I have no doubt that the vast majority of individuals who are members of environmental organizations are also pet owners and developed their love for animals by the pets they grew up with.

Inasmuch as the pet industry is engaged in trading more live specimens of more species than any other industry, we recognize that part of our mission requires fostering environmental stewardship. Indeed, this is expressly encompassed by PIJAC's mission statement. That includes collaboration pursuant to a Memorandum of Understanding (MOU) with the Fish and Wildlife Service in educating not only our industry, but also our customers on the importance of not releasing animals into the environment.

In June of this year, PIJAC, the Association of Fish and Wildlife Agencies (AFWA), and the Fish and Wildlife Service (Service) executed an MOU to collaborate on the development of non-regulatory approaches to reduce the risk of introducing/importing potentially invasive species not currently found in the United States. The MOU also provides that the parties will collaborate on voluntary biosecurity and mitigation practices designed to minimize the likelihood of release and establishment if such species enter the United States. The Steering Committee, Co-Chaired by AFWA and PIJAC, is currently preparing a 2013–2014 Action Plan.

It is important to note that the pet industry is not the only commercial or recreational group having a long-standing relationship with nonnative species. Other significant stakeholders dependent upon nonnative species include: sports fishing, Federal/state hatcheries, agriculture, biological and biomedical research, entertainment, hunting, food aquaculture, zoos and aquariums, and classroom educators. While most of these organisms are never intended for release into natural environments, some of these species (e.g. oysters, trout, bass, deer, game birds) are intentionally placed into natural environments by government and private entities throughout the United States. Representatives of those communities are invited to support the MOU and become a signatory.

My involvement with the Service's implementation of its "injurious wildlife" authority under the provisions of the Lacey Act dates back to the early 1970s when the Service sought to list all non-native species as 'injurious" until proven innocent on a species-by-species basis. We successfully challenged that approach on grounds that it lacked, among other things, a science-based justification and raised a number of substantial due process issues. Proving the negative has always been problematic! It would have placed an untenable burden on the government and/or the trade to "scientifically prove" a negative—i.e. the absence of current or any potential harm "to human beings, to the interests of agriculture, horticulture, forestry, or to wildlife or wildlife resources of the United States." (18 U.S.C. 42(a)(1))

Prior to seeking a Categorical Exclusion, PIJAC believes it would have been far more prudent, let alone informative, had the Service published in some form (preferably annotated) its listing criteria, including the process or processes utilized in determining environmental harm and concluding that a particular species is in fact "injurious" and warrants listing. Simply directing one to read the recent "Constrictor Rule" and accompanying documents is grossly insufficient.

Our historic and primary concern with respect to the Service's implementation of the Lacey injurious wildlife listing provisions is the total lack of statutory listing criteria as well as statutory processes (other than complying with the provisions of the Administrative Procedure Act) for assessing the species' characteristics, receiving public input and comments, documenting the evidence, disclosure of the rationale for listing, etc.

As noted in the Service's "Frequently Asked Questions" explaining why it is seeking a "Categorical Exclusion for Listing Species as Injurious Wildlife," an Environmental Assessment (EA) or Environmental Impact Statement (EIS) would only be needed "if the action could have a significant effect on the human environment." While one would assume that completing an EA would be at a minimum fundamental to determining whether the listing of a proposed species has or could have a "significant effect on the human environment," simple logic dictates that finding a nonnative species "injurious" would by its very nature require a thorough and complete assessment of its impact on the environment as a condition precedent to any proposed listing. Thus, the Service's justification is somewhat baffling. In one breath, the Service argues it would only conduct an EA when, as, and if it determines (we assume without public notice and comment) that there is a "significant effect on the human environment," however, in another breath it argues it will not have to comply with NEPA because the species should not be here in the first place and "prohibiting a nonindigenous injurious species from being introduced into an area in which it does not naturally occur cannot have a significant effect on the human environment." The argument is specious. For species already present in the United States, irrespective of whether they were unintentionally introduced or intentionally imported for commercial or other purposes, prohibiting such species indubitably does have an impact on the human environment, and that impact should be evaluated.

So attempts to circumvent such assessments by adopting Categorical Exclusions for all nonnative species, absent some process for assuring NEPA-styled safeguards, defeats the underlying purpose of NEPA. Nor has the Service provided a compelling justification for abandoning its prior reliance on utilizing Categorical Exclusions on a case-by-case basis when the action did not warrant conducting a full blown NEPA analysis.

To add to the confusion of the Service's position is its recognition that "it has generally prepared EAs for listing rules . . ." and therefore "a categorical exclusion would allow the Service to exercise its authority . . . more effectively and efficiently by precluding the need to conduct redundant environmental analyses." This position could have merit depending on the criteria utilized and the scope of the initial Service assessment. If the Service does in fact conduct an EA or other NEPA-styled assessments, PIJAC acknowledges there may be benefits by minimizing redundancy by not having to simply replicate them under NEPA. However, the failure to conduct a NEPA-styled EA or EIS would allow the Service to bypass consideration of social, economic or other beneficial impacts taken into consideration within a NEPA process. The Service's concerns about redundant processes are belied by its FAQ statement, in which it indicates that it would not have to produce an EA to determine whether or not "a significant effect on the human environment" exists or could exist! What type of an assessment would the Service rely on other than an EA or an EIS to reach such a conclusion? The Service appears to be discounting the need for NEPA based on an alternative process that it then goes on to suggest would, itself, be unnecessary. Such disingenuousness confirms the worst fears of those concerned about the broad Categorical Exclusion being proposed by the Service: that the ultimate result will be no evaluation process at all or at best an extremely limited assessment!

Thus, we remain somewhat mystified by the Service's justification for seeking a Categorical Exclusion so it could avoid conducting an Environmental Assessment (EA) on the basis that injurious wildlife listings to date have shown that the listings would have no significant effect on the human and natural environment. Assuming *arguendo* that this is accurate for past listings, other than the recent Constrictor listing decision, how can the Service predict a similar conclusion for all future listings, especially for species already in trade and/or in the United States? The apparent justification is based on the premise that "a listing action helps keep species out of the United States that are not naturally found here or helps prevent the spread of injurious wildlife into new areas within the country where they are not normally found . . ." therefore, *ipso facto*, they have "no effect on the environment.[1]" Such a conclusion, if it has any validity at all, could only apply to species not yet found in the United States. For species already present, whether unintentionally introduced or the result of importation years or even decades ago for commercial purposes, the rationale offered by the Service is wholly inapplicable.

The Service's argument is overly simplistic in justifying its desire to indulge in an "abbreviated review" of a proposed species listing and severely limits if not essentially precludes public input prior to the Service's publishing its conclusions in a proposed rule. While this would certainly streamline the process intended to keep

[1] U.S. Fish & Wildlife Service Bulletin, dated July 1, 2013.

out injurious wildlife or to prevent their spread across state lines, it would not make the process more effective but would, rather, undermine the fundamental tenants of NEPA, an Act that is relied upon to ensure a systematic interdisciplinary approach to decisionmaking involving the environment. Indeed, eliminating due process will always "streamline" any legal procedure, but far from enhancing effectiveness it defeats the purpose of the process itself. NEPA's safeguards are far too important to be sidestepped by adopting a blanket Categorical Exclusion in this instance. What is being proposed goes far beyond the use contemplated by NEPA.

We are somewhat sympathetic to the Service's desire to avoid or minimize the degree of duplication that may result by complying with NEPA under all circumstances. There may be grounds for justifying a Categorical Exclusion when dealing with a species which is not present in the United States and for which the Service has demonstrated potential invasiveness if introduced into the environment of the United States. For species in trade or otherwise already present in the United States, utilizing Categorical Exclusions does not provide adequate safeguards to prevent the Service from systematically indulging in species' listings without full and complete NEPA-styled Environmental Assessments or Environmental Impact Statements when a significant impact on the human and natural environment has been documented or there is substantial controversy surrounding the science, its impact on the human environment, and the overall proposed listing.

PIJAC assumes that the Service relies upon different criteria for listing an unintentionally introduced species versus a species intentionally imported into the United States. Additionally, PIJAC assumes that the criteria for listing species not yet in the United States would differ substantially from species already in-trade and/or are possessed as pets or are maintained in some form of commercial or recreational activity, such as food aquaculture, sports fishing, bio-control agents, zoological exhibition, biomedical research, etc. Such listings are clearly not analogous and certainly deserve separate treatment. But nothing in the proposal demonstrates the manner in which these two completely different circumstances will be addressed. Absent such well-defined criteria as an integral component of an EA and/or an EIS, seeking a Categorical Exclusion for all potential scenarios simply cannot be justified.

For those species in trade or already within the United States an Environmental Assessment at a minimum is an essential tool for decisionmakers when evaluating the positive and negative environmental effects of a proposed action, including identifying one or more alternative actions that might be selected instead of a simple ban. Based upon those findings, a properly conducted Environmental Impact Statement would be required to address substantial controversies involving the scientific assessments, socioeconomic impacts, potential mitigation measures, environmental justice issues, or other mechanisms for regulating or limiting access to such species. A glaring weakness in the Service's justification of their proposal is the failure to give due consideration to the balancing act that a NEPA assessment is meant to provide; that is, not only the potential for harm due to a species' presence, but also the benefits such presence brings as well.

In our opinion, an Environmental Assessment is a critical and essential component of any evaluation of a nonnative species as a potentially "injurious wildlife" species. Circumventing a process that incorporates NEPA-styled processes under the theory that keeping "species out of the country that are injurious or to prevent their spread across State lines" is ill conceived when dealing with species in-trade or already within the United States. For such species, the Service cannot legitimately claim such action would have no effect on the human and natural environment because the species' being listed are not normally found here when in fact such species are already present, often in significant numbers. How would the Service determine that such species are harmful to the named interests under Lacey without conducting an EA? How can it conclude that its proposed action does not individually or cumulatively have an impact on the human environment absent receipt of public comment and completing some form of an assessment subject to public comment? Again, the NEPA assessment must weigh not just potentially negative benefits of a species, but the positive benefits of such species as well.

The simplistic approach of ignoring a NEPA-styled EA or EIS essentially disregards from the outset any benefits that may result from trade in many non-native species. Moreover, if the Service can simply find a non-native species injurious without ascertaining the scope of its harm (e.g. it impacts a significant portion of the United States vs. being regional or found locally negatively impacting a single thermal spring,) or take into consideration alternatives as contemplated under NEPA, the Service's approach falls far short of any claim that its decisions are transparent, science-based, or have thoroughly evaluated whether there are any positive or negative impacts on the environment.

The pursuit of a more efficient and effective process under the Lacey Act requires a thorough overhaul of an outdated law not geared to a modern economy or today's world. Listing criteria for species in trade should be significantly different than for species not in trade or not yet found within the United States. Once in trade, however, the Service should not circumvent processes that promote collaboration, transparency, and sound science-based decisionmaking. Simply reducing the time to process a listing should not be the goal—improving the risk assessment processes, enhancing transparency, and encouraging increased collaboration by engaging stakeholder involvement in the process should be the desired objective. Until this Act is updated, an effective, thorough, and transparent evaluation process is that much more critical. Inasmuch as the Lacey Act's injurious wildlife provisions are conspicuously silent as to the criteria for listing or evaluating the environmental impacts/benefits, NEPA is an essential safeguard to ensuring a rigorous assessment evaluating all relevant information and reliance on scientific integrity, public input, and transparency at various stages of the decisionmaking process.

PIJAC has long advocated updating the injurious wildlife listing process by differentiating between first time introductions/importations and species already in international trade or present in the United States. PIJAC has served on the Invasive Species Advisory Committee since its inception and recognizes the need for tools that facilitate more effective and efficient listings. Shortcutting the process by not automatically conducting an EA to ascertain injuriousness, as well as conducting an EIS when the species is in international and/or domestic trade or otherwise exists in the United States for recreational purposes, pets, research, zoological exhibition would create a severe risk of unnecessarily restricting species that not only represent no harm but in fact offer substantial benefits to the people of this country. For species in trade or already in the United States, the Service should automatically conduct a NEPA-styled EA as well as an EIS as a matter of course. And this does not mean that the process would have to be duplicated under NEPA. The Service would be able to continue its practice of NEPA compliance as it has in the past.

It is our position that the Department should step back, withdraw this proposal, and consider convening stakeholder meetings to explore how the listing process can be improved consistent with law and resources, improve transparency, seek public input at different stages of the process in lieu of publishing at one time a proposed rule containing the Department's conclusions and findings along with the Service's Draft Environmental Assessment, Draft Economic Analysis, Initial Regulatory Flexibility Analysis, etc. By shifting injurious listings to a Categorical Exclusion and the non-development of an EA, there is very limited, or even no, disclosure of environmental impacts, including social impacts, environmental justice issues, and impacts to disadvantaged communities in the Service's reaching its ultimate determination. A Categorical Exclusion assumes that none of these occur and the public could be precluded from submitting comments in an informed way on impacts normally disclosed in an EA. Eliminating any chance of public meetings even when the issues are highly controversial, subject to scientific debate and disagreement.

On behalf of the Pet Industry Joint Advisory Council (PIJAC), we thank you for providing us an opportunity to share our thoughts and concerns on utilization of a blanket Categorical Exclusion for injurious wildlife listings. We recognize and support the need to improve the injurious wildlife listing process, but do not believe that this is the most efficacious or proper approach. As mentioned previously, at best there should be:

1. A tiered process evaluating species not present in the United States from species in-trade or otherwise already present in the United States;
2. Adoption of and clear enunciation of the listing criteria and processes that encompasses the elements that the Service claims are duplicative under NEPA as an integral part of the Service's procedures and protocols for listing injurious wildlife; and
3. For species in trade or otherwise present in the United States incorporate in the Service's protocols a mandate for public input at various stages of the process to ascertain which issues, if any, involve questions of scientific debate and integrity, highly controversial issues with respect to significant impacts on the human and natural environment, and ensure that highly controversial issues are thoroughly vetted in an open and transparent fashion.

Despite our reservations about the Service's position on this matter, we remain committed to working with the Subcommittee and the Service to address this important environmental issue.

Thank you again for inviting me to appear today. I would be happy to answer any questions.

Dr. FLEMING. OK. Thank you, Mr. Meyers. Votes have been called. Rather than going ahead and digging in, I think we will go ahead and recess for votes. We will return after votes, and we will hear questions from the panel. And we thank you. We are in recess.

[Recess.]

Dr. FLEMING. The committee is back in session. And we thank you for your indulgence. Hopefully you enjoyed some good Capitol coffee while we were voting.

At this point I would like to recognize myself for 5 minutes for questions. And first, for the Fish and Wildlife Service, these are yes-and-no questions. We will go on to maybe more discussion, but I would like to get just brief yes-or-no answers to these, thus far.

Has the Service previously sought a categorical exclusion for Lacey Act listing in the past?

Mr. HOSKINS. Yes. In 2002 we invoked a categorical exclusion for listings.

Dr. FLEMING. So one example, then, thus far.

Mr. HOSKINS. Well, there were two different species, snakehead and a brushtail possum. But yes, it was one case in which we invoked it in 2002.

Dr. FLEMING. OK. According to your congressional affairs office, the Service has two Federal employees and spends about $60,000 a year on listing decisions. Does that sound like your agency believes this is a priority program?

Mr. HOSKINS. Given the financial and budget constraints that we are operating, we are doing the best that we can with the resources that we have.

Dr. FLEMING. Let's see. Well, you have, for candidate conservation, 74; listing, 144; consultation, 451. Let's see, where is the land acquisition? Oh, land acquisition, realty division, 89. So are you having similar difficulties finding resources for those departments and that manpower?

Mr. HOSKINS. Well, in the current budget climate we are in the process of trying to operate within less funds each year. And so, those are historical numbers, but I think the other programs headed by other assistant directors are facing similar budget constraints.

In the context of the Lacey Act, as you know, the categorical exclusion is intended to help streamline the process——

Dr. FLEMING. But——

Mr. HOSKINS [continuing]. So that we can move forward more effectively——

Dr. FLEMING. But the size has been this way for a number of years. So this was well before we came into our financial constraints. So, obviously, that really wouldn't apply, would it? If you only had two employees 10 years ago, before these issues came to bear, then you really couldn't use that as an excuse, can you?

Mr. HOSKINS. Well, I take your point that the resources that we devote to the program are a limiting factor in our ability to move forward with listings. But, in that context, the categorical exclusion—that is the subject of the July 1 proposal—is intended to streamline the process so that we can make more effective and efficient use of the resources that we have.

Dr. FLEMING. Well, needless to say, of the over 1,000 employees you have, 2 employees would be a very, very small, minuscule aspect, in terms of priority.

How about this question? Would you make the commitment today that the agency would only use a categorical exclusion for the listing of species that are not yet here in the United States?

Mr. HOSKINS. The categorical exclusion that we proposed on July 1 is intended to apply across the board. So the answer, in terms of the proposal, is that it is intended to apply, under normal circumstances, because there is an extraordinary——

Dr. FLEMING. Again, I am limited in time. A yes or no would be adequate.

Mr. HOSKINS. Is it——

Dr. FLEMING. Are we not——

Mr. HOSKINS. Would we apply it to species that are not in trade, that are in trade? Yes, we intend to apply it to both.

Dr. FLEMING. OK, thank you. All right. If you have not—what has dramatically changed that cries out for this fundamental change?

Mr. HOSKINS. As I said in my testimony, the problem of invasive species is a significant one, costing billions of dollars per year. And what we are trying to do is work within the construct of the current Act to move forward more efficiently and effectively to address that problem, which causes not only environmental damage, in terms of loss of biodiversity, but significant economic damage.

Dr. FLEMING. You know, I am impressed with the fever, the energy to streamline regulations for this purpose of exclusions. But it is amazing how there is not the equal exuberance when it comes to the effect and impact on private industry.

But I will move on to the next question. What has been the environmental community's reaction to your proposed categorical exclusion?

Mr. HOSKINS. I think, as reflected in Mr. Jenkins' testimony, it has been generally favorable, not because they are in favor of categorical exclusions under NEPA, per se, but because they recognize that this is a need that needs to be addressed, and that, in this case, based on the prior record of FONSIs, finding of no significant impact, it is warranted.

Dr. FLEMING. OK. Can you provide us letters or some documentation of their support?

Mr. HOSKINS. Well, I believe Mr. Jenkins testified on behalf of several environmental organizations today.

Dr. FLEMING. Well, that is kind of secondhand. Can we get a direct comment from those organizations? Mr. Jenkins?

Mr. JENKINS. Thank you, Mr. Chairman. Yes, happy to address that. We did submit a detailed letter of support into the record that the Service has, a comment letter, as well as my testimony, which reflects the points in our comment letter. We would be happy to put our comment letter into the record for this hearing, if you would like.

And, as Mr. Hoskins said, the environmental community generally has looked disfavorably on categorical exclusions, and tends to be suspicious of them because, you know, we like to see EAs about projects. However, as Mr. Sablan pointed out, this is an iron-

ic situation where the environmental community sees the real value of this and how it fits with the NEPA guidelines and history, whereas you have this business community that typically has wanted more—sorry.

Dr. FLEMING. Yes, I am sorry. I am way over my time. I appreciate your comments.

The Chairman now yields to the Ranking Member, Mr. Sablan, for 5 minutes.

Mr. SABLAN. Thank you very much, Mr. Chairman. I am tempted to let Mr. Jenkins continue, but I have my own set of questions.

So, Mr. Hoskins, according to the Fish and Wildlife Service, the brown tree snake was first detected on Guam in the 1950s, and by the early 1960s had already started devastating native bird populations. However, the Service did not list the snake as injurious under the Lacey Act until 1990. Today, nearly $2.5 million is spent annually to control and detect the brown tree snake. And the snake continues to wreak havoc on Guam's island ecosystem.

Will you please talk about how the option to use a categorical exclusion will help stop costly biological invasions before they get out of control?

Mr. HOSKINS. Well, as reflected in your question, once a species becomes established, control and eradication is very expensive and potentially impossible. And the goal of the categorical exclusion is to try to streamline the listing process under the Lacey Act so that we can expedite listings to try to prevent the introduction and establishment before these species become a problem.

Mr. SABLAN. All right. And following a pattern of similar—the word here is "eerily similar"—to that of the brown tree snake on Guam, the boa constrictor has invaded Puerto Rico, and is having serious negative impacts on native wildlife. I am very disappointed last year when the Service failed to list the constrictor, the boa constrictor, along with four other proposed species of the large constrictor snakes as injurious under the Lacey Act.

What is the Service doing to stop the spread of invasive boa constrictors in Puerto Rico, and prevent them from becoming established elsewhere in the United States? And are you still considering an injurious wildlife listing for the boa constrictor? How will that make your job easier?

Mr. HOSKINS. I need to consult with our ecological services and refuge programs about the work that we are doing in Puerto Rico that you referenced, and I will be happy to get back to you on that question.

With respect to the proposed listing of nine species, as you alluded to, we went forward with four, and we are still considering how to move forward, in terms of a final determination with respect to the remaining five, which includes the boa constrictor.

Mr. SABLAN. Yes, and I hope it doesn't take you 40 years, like you did with the brown tree snakes on Guam.

Mr. HOSKINS. I hope so, too.

Mr. SABLAN. Mr. Jenkins, can you please describe the purpose of NEPA with respect to protecting our environment and the meaning of the term "human environment"? Is it true that NEPA regulations state clearly that the economic and social effects of a Federal

action do not, by themselves, require an environmental impact statement?

Mr. JENKINS. That is correct, Mr. Sablan. And that purely social and economic effects are not the subject of NEPA. As I said in my testimony, they are the subject of other Federal laws that require economic effects to be analyzed.

But NEPA is really about tangible environmental effects on the natural or the human-built environment. So there has to be some—you know, some visible, tangible impact that is going to happen. And then, if the Service is analyzing that effect, then it can also analyze associated economic effects associated with the tangible environmental impact. But, as has been stated, in 30 years of doing these listings, they have consistently found that there is no significant harm—environmental harm from listing an injurious species, which, of course, makes sense. So, the economic analysis is not under NEPA, it is under the other acts.

Mr. SABLAN. All right. So let me—so does the Lacey Act provide all the authorities—we need to stop the spread of invasive species in the United States. And, if not, what other authorities are necessary?

Mr. JENKINS. Yes——

Mr. SABLAN. Is the level of Federal funding for invasive species prevention adequate?

Mr. JENKINS. Thank you, Mr. Sablan. As we have heard, the Lacey Act was written 113 years ago. It is not a modern law. I would hope that this committee would take it up and really dig into the problems. Because I think we have all agreed that the Lacey Act is not a great law to be working under, it just happens to be the one that we have.

So, H.R. 996 is a bill that is in front of this subcommittee that actually is aimed directly at modernizing the Lacey Act. And I would hope that the subcommittee would take it up. It does provide a whole slew of additional authority. And, for example, it gives the criteria that Mr. Meyers wanted to see spelled out much more in detail, as far as what would be a proper listing. It gives emergency authority, disease authority, and all those sorts of things. So I urge the subcommittee to grab H.R. 996 and have a hearing on it. Thank you, sir.

Mr. SABLAN. Yes. We don't control the gavel, but we will send a suggestion upstairs. Thank you.

Dr. FLEMING. The gentleman's time is up. Mr. DeFazio has arrived, so the Chairman—yes, very good, perfect timing. So I yield 5 minutes for questioning to Mr. DeFazio.

Mr. DEFAZIO. Thank you, Mr. Chairman. The disconnect here is those who are involved in the—both in the industry as the commercial part of the industry and those who are involved in aquariums and zoos are concerned about, you know, the potential for their concerns being ignored. As I understand it with zoos and aquariums, their problem is they have already got some exceptions in law, but it takes way too long for the agency to process those exceptions, and they are worried that this could even further muddle that process. Is that correct on the part of zoos and aquariums?

Mr. MADDY. Yes, that is correct.

Mr. DEFAZIO. OK. I haven't heard anyone object to your exemptions from any perspective. So that is something that we would need to figure out a way to take care of. And as for the commercial part of the industry, the concern is that the impact on business would be ignored without the NEPA process.

I am wondering. And this is, at this point, sort of a work in progress in my head, but if we gave the agency—you know, I mean, agencies move slowly. But if we were to create some sort of new process which would allow for an emergency temporary designation that would be short-term, and then we would, after that, there would be a public process, and then you would either go into, say, the full NEPA process if the case wasn't made for the need for emergency designation—I am just trying to think of a way to thread this needle, because I think that this is really something where we can kind of work this out.

From my perspective, obviously, our goal is both to safeguard the environment and public assets, as what I talked about what happened with the Everglades. But also, you know, we are here for jobs and business, and we are certainly here for education and public recreation, in terms of those.

So I would just like everybody—if anybody up there has an idea on perhaps a different process, as opposed to saying, "Stick to NEPA," because, to be truthful, on any other day, this guy would not be supporting the idea of putting anything into a NEPA process. No offense, I mean——

[Laughter.]

Mr. DEFAZIO. But we fight about that here all the time.

Dr. FLEMING. I thank the gentleman for speaking for me today.

[Laughter.]

Mr. DEFAZIO. So—yes.

Mr. GEHAN. Thank you, Member DeFazio. One thing I would like to clarify—and just before Mr. Jenkins—you came into the room, Mr. Jenkins reiterated a point he made, that in the case of NEPA, it is concerned about economic and social impacts to the extent that they overlap or involve the environmental concerns.

And that gets to an issue that you begin to address when we are talking about animals that are and have been in trade, widely held on a national basis as pets. And that is the economic incentive created—or I should say disincentive—created by a listing.

The ban, as the Service reads the law on interstate commerce, means that if you are a pet owner and your job takes you to another State, or you are a breeder and you have a large brood stock that is—you have invested millions in, but it is very, very, very costly to maintain, that the State Association of Fish and Wildlife Agencies itself said, "We are concerned that this listing will result in releases of these animals, engender the very harm you are trying to oppose, and this will tax State resources." That is an environmental and economic concern that the Service never addressed in its environmental assessment.

So, beyond just the impacts on the industry, which have been very, very significant, we are concerned about that. And so, I think, to your question, we are looking for a way to deal with species that are pets where the—in the case of—Burmese are very—they have the broadest range of any of the nine species proposed. Everything

else is tropical. In fact, boa constrictors' range extends to Northern Mexico, but they have never moved further north, either, because it is too arid, too dry, or too cold.

And I think State-Federal partnerships are one solution, allowing the agency to prohibit import only may be a tool they could use in their toolbox, and I think there are other solutions we could think of, including public education and partnerships between the industry, the agency and Congress.

Mr. DEFAZIO. OK. Well, my time has expired, but, you know, I would like to continue the discussion. Because, I really think there are ways to divide this up a bit so that the agency feels that it has the tools it needs to prevent the importation of a new problem, and do it relatively quickly.

And then you are raising a whole other issue with dealing with things that are already in domestic commerce, and how—what sort of actions—or how should we process those.

And then, the other part we are not even talking about here, which all goes to the inadvertently—and I have dealt with this for years on Transportation with ballast water. We don't have a good solution there. I mean the stuff that is coming into this country inadvertently has actually caused the greatest harm, and we don't have great solutions there, either.

So I am really open to ideas that people have. So thank you, Mr. Chair.

Dr. FLEMING. The gentleman's time up, and I think there are some more questions, so we will have another round for the panel. And I now yield myself 5 minutes for questions.

Dr. FLEMING. These questions are specifically for the other side of the panel. I focused on the left over here, and now I am to the right. Mr. Maddy, Gehan, and Meyers.

What is the value of an environmental assessment, as mandated by the National Environmental Policy Act?

Mr. MADDY. From our perspective, the value is this opportunity to be heard, the opportunity to formally submit comments and make sure that the very specific concerns—scientific, biological, and also economic and business concerns—to make sure we have a place to get a good hearing, to work with it.

We do work well with the Service, and we have worked with the Service more recently on the issue of blanket permits for some of these accredited institutions. And back to Mr. DeFazio's comments, that might be a model that could be expanded for some of these.

Dr. FLEMING. OK. So certainly fast-tracking and exclusions can take away some valuable opportunities for community input.

Mr. MADDY. Correct.

Dr. FLEMING. How does the failure to complete an environmental impact statement, or environmental assessment, affect the likelihood of your members or clients prevailing in Federal court?

Mr. GEHAN. Thank you, Mr. Chairman. Additionally, I just want to add to your prior question that—a point I embrace in testimony. You could take the Magnuson-Stevens Fisheries Management and Conservation Act, which this subcommittee has jurisdiction over. It requires the use of best science, impacts on fishing communities, minimizing habitat, fisheries impact statements, and NEPA still

applies to all these things, but there are multiple opportunities for input and analysis that are required at multiple stages.

NEPA is the only tool that provides for public input, specifically the notice and comment rulemaking. But that makes—gives the opportunity for the public to comment on the science, the rationale that is used. And that ties directly into litigation. Nobody wants to be in litigation. But the determination as to whether a species is injurious, which Congress completely committed—didn't define committed to the agency's discretion, means that any reasonable basis for thinking it might harm agriculture, human health, or other issues, you know, no judge would be able to allow it.

But if an agency has to go through the NEPA processes, there are standards that have been created over years that lay out what the agency's duties are, and we all know what they are. And then we are talking about whether the assessment was reasonable.

Dr. FLEMING. OK. What are your specific concerns about the use of a categorical exclusion by the Fish and Wildlife Service?

Mr. MEYERS. Well, as we have testified on numerous occasions, because there are no statutory standards, no prescribed process, we really feel that this could become a shortcut, it could become a bureaucratic—lead to some bureaucratic inertia on really doing a thorough and complete NEPA-styled analysis.

We need that type of a record to be able to—really to justify and to try to figure out exactly how this will be implemented. This is a serious problem—again, going back to the weaknesses in the underlying statute. And, therefore, we look to the NEPA-styled assessments as being critical. And if they are going to be able to exclude that under categorical exclusion, where are we? We are back to being in controversy and questioning the science. And it is just going to be a bigger morass of stalling tactics, possibly by everybody.

Dr. FLEMING. Sure. Would the regulated community be less concerned about the negative impacts of a Lacey Act categorical exclusion if it was limited to species that are not here or established in the United States?

Mr. GEHAN. Well, briefly, I think that raises a lot less concern. However, USARK, you know, is in favor of just simply a blanket ban on every non-native species. You know, there are species in the European trade that aren't traded here. There may be future opportunities. I just don't think there is a substitute for an actual injurious finding, based on a record.

Dr. FLEMING. OK.

Mr. MEYERS. And in my testimony I point out that because you have been able to use it in the past on certain listings, I don't know how you can predict that that is uniformly applicable in the future for all other species. So it is—I think it is a dangerous road to walk.

Dr. FLEMING. OK. One more question. What is your reaction to Mr. Jenkins' testimony that preparing a NEPA EA is redundant? Avoiding that administrative step will help speed up listings?

Mr. GEHAN. Redundant of what? I mean there is no other law that requires the agency to do such analyses.

Dr. FLEMING. OK.

Mr. GEHAN. And I can't imagine that preparing an environmental assessment has delayed brown tree snakes for 40 years.

Dr. FLEMING. Right.

Mr. GEHAN. Or—you know, any of the others.

Mr. MEYERS. And I find it interesting, because it has been the environmental community that has enjoyed the NEPA requirements, as a club to oversee Federal activities. So I guess what is good for the goose isn't good for the gander.

Dr. FLEMING. Right. Well, my point, precisely. Cutting through red tape, cutting through bureaucracy is great. But it should be a two-way street, not simply for the environmental community or for government. These impacts, the ultimate price is paid for, often, by the private industry.

My time is up. I yield to my colleague——

Mr. SABLAN. Thank you very much, Mr. Chairman. And I want to thank you also for staying behind and probably rearranging your flights. I don't have that problem, so——

[Laughter.]

Mr. SABLAN. But Mr. Jenkins, let me ask. Even if a species is already here, isn't the Lacey Act's provision against interstate transport a powerful tool to keep invasions from spreading?

Mr. JENKINS. Yes, and I would like to address that question about somehow having different categorical exclusion, depending on whether a species is here or not here.

When I was at Defenders of Wildlife 2007, we issued a report called "Broken Screens," that actually did a FOIA on all the records the Fish and Wildlife Service has about imports. We know that there are at least 3,000 different species of non-native animals that are imported—or have been imported in the United States, according to those records. Now, the exact number could be up to 10,000. Marshall Meyers with PIJAC may tell you that their industry has imported, you know, many more than the ones that are shown in the records by species name.

The problem is, what does it mean that a species has already been imported? Are all those species going to be excluded from further analysis? No, that doesn't make sense. What does it mean that a species is here? It has been shipped into the United States once or twice, or it is already in—as somebody's pet?

Now, I agree there are concerns about the way the Lacey Act regulates people who have private pets that got later listed under the Lacey Act. And H.R. 996 would deal with that. It has a grandfathering exemption to give them a grandfathering ability to keep those species and take them across State lines without becoming a Federal felon, which I agree is a problem.

But that is an entirely different issue from NEPA. The risk that the species propose—doesn't matter if it has been imported once or twice already or not—the scientists just need to look at the risks, scientifically.

Mr. SABLAN. All right. And so I am going to come back to Mr. Hoskins.

Some of the testimony we have heard today makes it sound like this categorical exclusion gives the Service a carte blanche to list whatever species it wants to as injurious with no justification. And I don't think so, but I don't want you to do that. But—so is it true,

or will species still be reviewed on a case-by-case basis to determine if listing under the categorical exclusion is appropriate?

Mr. HOSKINS. Well, first of all, I think the threshold question is whether it would qualify for a categorical exclusion. And based on the CEQ's own guidance, we believe it is reflected in the notice that it does, because it maintains the environmental status quo, and there is a long record of environmental assessments that had found findings of no significant impact.

In addition, it does not obviate our need to comply with the Administrative Procedures Act, the requirements of the Lacey Act, the Regulatory Flexibility Act, and Executive Order 12866, as reflected in my testimony.

And, finally, to address your specific question, we would continue in that context to assess whether a species qualifies for injurious listing under the provisions of the Lacey Act and the APA.

Finally, in circumstances that are deemed extraordinary, there would be an obligation on the Service at that point to invoke the normal EA requirement.

Mr. SABLAN. So you are talking the bureaucracy—so let me ask you this now. Will the science behind any listing proposal under the categorical exclusion still be cited in the *Federal Register* for all of us to see?

Mr. HOSKINS. We would explain, in the context of the proposed listing, why the action is necessary, and the effect that the action is expected to have on the public. It also would provide opportunities for comment. And that would include looking at the science that underpins the decision whether to list that species as insurance under the Lacey Act.

Mr. SABLAN. So, the proposed rule—does the proposed rule eliminate any avenues for judicial review of decisions made by the Service? Will the proposed listing of species under the categorical exclusions still be subject to public notice and comment?

Mr. HOSKINS. It would still be subject to public notice and comment if it is a regulatory action under the APA.

Mr. SABLAN. And the judicial review?

Mr. HOSKINS. They would also be subject to judicial review.

Mr. SABLAN. All right, thank you. Mr. Chairman, I yield back my time.

Dr. FLEMING. The gentleman yields back. Are there any further questions?

Mr. SABLAN. No, sir.

Dr. FLEMING. OK. Well, I want to thank the members of our panel for a very important, very enlightening, educational discussion today.

Members of this subcommittee may have additional questions for the witnesses, and we ask you to respond to these in writing. The hearing record will be open for 10 days to receive these responses.

Before closing, I would like to ask unanimous consent to submit for the record a letter I wrote, along with our colleagues, Rob Bishop, Don Young, and Steve Southerland, to Director Dan Ashe, asking him to withdraw the proposal, and the recent response of the Fish and Wildlife Service.

Dr. FLEMING. No objection? So ordered.

[The letter and response provided by Dr. Fleming for the record follows:]

LETTER TO U.S. FISH AND WILDLIFE SERVICE

U.S. HOUSE OF REPRESENTATIVES,
WASHINGTON, DC,
JULY 24, 2013.

Hon. DANIEL M. ASHE, *Director*,
U.S. Fish and Wildlife Service,
1848 C Street, N.W.,
Washington, DC 20240.

DEAR DIRECTOR ASHE:

On July 1, 2013, the U.S. Fish and Wildlife Service announced in the Federal Register its intention to implement a Categorical Exclusion under the National Environmental Policy Act (NEPA) for the addition of species to the "injurious wildlife" list under the Lacey Act.

While invasive species pose a growing challenge to the Fish and Wildlife Service (Service), the public has an interest in the Service continuing to conduct Environmental Assessments to determine whether a particular species or group of species merits inclusion on the "injurious wildlife" list. This is particularly important in light of the fact that the Service has recently been listing species causing major economic impact on thousands of small businesses in the United States. Those Americans who will potentially be affected in the future deserve a full examination of the environmental, economic and social impacts of such a listing.

In particular, on March 20, 2012, the Service proposed to list nine species of nonnative constrictor snakes. After nearly 2 years of careful analysis of the Environmental Assessment by the Small Business Administration and the Office of Management and Budget, the Service decided to only list four of the nine snake species. At that time, Secretary Ken Salazar said his decision was to "strike a balance" between economic and environmental concerns. This careful review would not have occurred with a NEPA Categorical Exclusion.

The Service has not made a sufficient case to establish the necessity of a categorical exclusion for the Lacey Act. Further, we are not aware that the Service even publicly mentioned this idea prior to July 1, 2013. Therefore, we request that the Service immediately withdraw this ill-timed proposal.

As you know, the Natural Resources Committee is currently in the process of holding a series of oversight hearings on the Lacey Act. Once the proposal has been withdrawn, we will invite the Service to testify in a public hearing to the justification, rationale and need for this fundamental change in the application of the National Environmental Policy Act.

Mr. Director, we would be pleased to discuss this with you further at any time and look forward to hearing from you at your earliest convenience.

Sincerely,

JOHN FLEMING,
ROB BISHOP,
STEVE SOUTHERLAND,
DON YOUNG,
Committee on Natural Resources.

RESPONSE LETTER FROM U.S. FISH AND WILDLIFE SERVICE

U.S. DEPARTMENT OF THE INTERIOR,
FISH AND WILDLIFE SERVICE,
WASHINGTON, DC 20240,
AUGUST 28, 2013.

Hon. JOHN FLEMING,
U.S. House of Representatives,
Committee on Natural Resources,
Washington, DC 20510.

DEAR REPRESENTATIVE FLEMING:

Thank you for your letter of July 24, 2013 regarding the proposed Categorical Exclusion under the National Environmental Policy Act (NEPA) for the Administrative listing of species to the injurious wildlife list under the Lacey Act (18 U.S.C. 42).

The proposed Categorical Exclusion (CE) would affect only one small part of a much larger and more complex regulatory procedure. It would simply provide the U.S. Fish and Wildlife Service (Service) with the flexibility to use a CE when appropriate for a given injurious wildlife listing procedure, which means we would not necessarily have to prepare an Environmental Assessment (EA). Just as with all promulgations of Federal regulations, injurious wildlife listings would still be subject to NEPA, and the Service would have to make a determination for each one as to whether or not its circumstances fit the conditions of the CE.

All other statutory requirements for establishing Federal regulations would remain in place, including those under the Administrative Procedure Act (APA), Executive Order 12866, and the Regulatory Flexibility Act (RFA). These laws impose the bulk of public participation and analysis that you mention in your letter. As they did with the constrictor snake rule, these statutes provide for the preparation of rules that contain an evaluation of each species proposed for listing, including the biological and risk assessments (which include environmental effects), as well as economic and regulatory flexibility analyses. Under the APA, we will also continue to offer the public an opportunity to review and comment on any proposed listing under the Lacey Act. All of these actions are conducted separately from the EA.

The EA for the constrictor snake rule resulted in a "Finding of No Significant Impact". The only comments we received on that EA, per se, stated that the Service should consider impacts of harvesting these snake species in their native ranges. The Small Business Administration (SBA) did not provide any comments on that EA, but the SBA did provide comments on the economic analysis and regulatory flexibility analysis, which were prepared under Executive Order 12866 and RFA. The Service addressed SBA's comments in the final versions of the economic analysis and the regulatory flexibility analysis in January 2012.

The case made by the Service for the proposed action consists of three justifications that uphold the Council on Environmental Quality's (CEQ) guidelines for a CE: (1) maintaining the environmental status quo, meaning the listing action does not cause the condition of the environment to change; (2) history of findings of "no significant impact"; and (3) the proposed CE would be consistent with existing CEs. CEQ reviewed and approved this notice prior to publication. In response to your concerns, the Service has reopened the public comment period for an additional 60 days, closing on October 15, 2013, to give the public more time to provide input on the proposal. We have provided the *Federal Register* notice and other related information on our website at http://www.fws.gov/injuriouswildlife/catex.html. When we review and address public comments from the current notice, we will again coordinate with CEQ on a final determination.

The Service agrees with your observation that invasive species pose a growing threat to our Nation. By working proactively to reduce this threat through implementation of the Lacey Act's injurious wildlife provisions, we are striving to reduce the long-term economic and environmental burden on the public by preventing irreversible harm to natural resources from invasive species.

Thank you for the opportunity to respond and address your concerns. If you have any further questions, please contact me personally, or have your staff contact the Service's Assistant Director for Fish and Aquatic Conservation, Mr. David Hoskins, at (202) 208–6393.

Sincerely,

ROWAN W. GOULD, DEPUTY DIRECTOR,
Fish and Wildlife Service.

Dr. FLEMING. I find it fascinating that there has not been more outrage from the environmental community, who never hesitates to demand full NEPA compliance, but is strangely quiet in this particular case.

In the final analysis, I am pleased that the Service decided to extend the public comment period until October 15. However, the case has not been made for the categorical exclusion. And I agree with the Small Business Administration's office of advocacy, who, in their comments on the proposal, wrote that—and quote—"It is

unclear why the Interior would propose a categorical exclusion for FWS's listing under the Lacey Act, based upon the premise that those listings will have no environmental impact when, by statute, all wildlife that is proposed to be listed under the Lacey Act must be shown to have an injurious environmental impact."

I want to thank Members and their staff for their contributions today for this hearing. If there are no further business, without objection, the subcommittee stands adjourned.

[Whereupon, at 12:55 p.m., the subcommittee was adjourned.]

[ADDITIONAL MATERIALS SUBMITTED FOR THE RECORD]

QUESTIONS SUBMITTED FOR THE RECORD BY CHAIRMAN FLEMING TO THE U.S. FISH AND WILDLIFE SERVICE

Question. Did you consult with the Council on Environmental Quality on the proposed Categorical Exclusion? Please provide the Subcommittee with copies of your correspondence to them.

Answer. Pursuant to section 1507.3(a) of Council on Environmental Quality (CEQ) Regulations, the Service must consult with and receive approval from the CEQ before establishing a new or revised categorical exclusion. For this categorical exclusion, the Service coordinated with CEQ through the Department's Office of Environmental Policy and Compliance (OEPC).

Question. In the future, how will the regulated community know when the Service used a Categorical Exclusion? Is there a requirement to print its use in the Federal Register?

Answer. In the future, when the Service uses a categorical exclusion in a rule to list a species as injurious, the Service will include that information when it publishes its proposed and final rules in the Federal Register. This information is required and will be found under the heading "Required Determinations" and the subheading "National Environmental Policy Act", where each published injurious wildlife rule will include information on how the Service addressed NEPA and whether the Service relied upon a categorical exclusion.

Question. If the Categorical Exclusion is utilized, what sort of record will the Service's decision be based on and will such record be provided to the public?

Answer. If the Service uses a categorical exclusion, we must document our decision with an Environmental Action Statement (form 550 FW 3, Exhibit 4). That form will be part of the broader Administrative Record for the injurious wildlife rulemaking and will be made available to the public.

Question. Will the Service's "extraordinary circumstances" analysis be published, either in the record or in the Federal Register notice?

Answer. In determining whether to utilize the categorical exclusion, the Service will consider whether any of the "extraordinary circumstances" set forth in 43 CFR 46.215 applies to the proposed action, and will document that determination in the Environmental Action Statement and injurious wildlife rulemaking administrative record.

Question. What is a normal time-frame to complete an Environmental Impact Statement (EIS)? What about the costs to the agency?

Answer. Time-frames and costs for environmental impact statements vary widely with the complexity of each proposed action. Preparation times for environmental impact statements among Department of the Interior bureaus have ranged from 18 months to 5 years at costs ranging from around $500,000 to $2 million.

Question. How long does it take to complete an Environmental Assessment? How is it fundamentally different from an EIS? What are the cost differences between the two?

Answer. Environmental Assessments (EAs) may take up to 1 year to complete, but we have no cost estimates for them. The content requirements for an EIS are more extensive than for an EA and are set forth in Council on Environmental Quality regulations at 40 CFR §§ 1502.10 through 1502.25. In contrast, environmental assessments include brief discussions of the proposal, the need for the proposal, alternatives, environmental impacts of the proposed action and the alternatives, and a list of agencies and persons consulted (40 CFR § 1508.9 and 43 CFR § 46.310),

Question. What is the value of these environmental assessments?

Answer. Under NEPA regulations, the purpose of an environmental assessment is to determine whether the proposed action has the potential to cause significant impact on the human environment and to inform the decisionmaker and the public of such environmental determinations. The EA is used to determine whether to prepare an environmental impact statement or to make a finding of no significant impact (FONSI). Its value lies in saving an agency from having to prepare a very lengthy document (EIS) when there is reason to believe that an EIS will not be necessary.

Question. When the Fish and Wildlife Service proposes to administratively establish a new national wildlife refuge does it conduct an Environmental Impact Statement or an Environmental Assessment? Who makes that decision?

Answer. The Service routinely completes an EA for refuge establishments and major refuge expansions, unless circumstances warrant the completion of an EIS. The regional director decides if an EIS is to be completed at the outset, rather than an EA, based on a review of known or reasonably foreseeable, potential impacts on the human environment or that controversy over the environmental effects exists. The assessment made through the development of the EA may result in a determination that an EIS is necessary. In either case, with respect to refuge establishments and major refuge expansions, developing an EIS has been rare. For example, every establishment and major refuge expansion in the Southeast Region over the past 25 years has been accomplished through the completion of an EA with the exception of the establishment of Waccamaw National Wildlife Refuge (NWR) in 1998. The Waccamaw establishment was completed through an EIS at the request of State elected officials and because of the level of environmental controversy associated with the proposed project.

Question. In the case of the Everglades Headwaters National Wildlife Refuge, the Fish and Wildlife Service conducted an Environmental Impact Statement. Why was this considered a major Federal action?

Answer. The Service did not find the establishment of Everglades Headwaters NWR to be a major Federal action under NEPA requiring preparation of an EIS. An EA for the establishment of Everglades Headwaters NWR was prepared, and it was published in January 2012. The EA resulted in a Finding of No Significant Impact, which negated the need to prepare an EIS.

Question. Conversely, when the Fish and Wildlife Service proposed to increase the size of the Chickasaw and Lower Hatchie National Wildlife Refuges in Tennessee, which would be more than twice the number of acres acquired by fee title in Central Florida, the Service used an Environmental Assessment. What was the difference?

Answer. Similar to the establishment of Everglades Headwaters NWR, the Service has drafted an EA in the proposed boundary expansions of Lower Hatchie and Chickasaw NWRs. The draft EA is not yet final.

Question. Does the Fish and Wildlife Service use an Environmental Impact Statement or Environmental Assessment for the completion of a statutory required refuge Comprehensive Conservation Plan? Wouldn't it be much more efficient to simply seek a Category Exclusion for the completion of these plans?

Answer. Similar to the land acquisition planning process, the decision to complete an EIS or EA for a refuge's Comprehensive Conservation Plan (CCP) is usually based on a review of known, reasonably foreseeable potential impacts of the project on the human environment or environmental controversy that exists at the outset of determining the need for the action. According to Service Manual 602 FW 3, each CCP must comply with NEPA through the concurrent preparation of an EA or EIS for the completion of the plan. A CCP describes the desired future conditions of a refuge and provides long-range guidance and management direction to achieve refuge purposes, as well as compliance with various laws and executive orders. Given the nature of a CCP, the variability between needs and management approaches at each NWR, and the often complex environmental and sociological issues involved, either an EA or an EIS is appropriate for the completion of a CCP.

The Service may use only categorical exclusions that have been approved. There is no categorical exclusion on record for the CCP, and the Service does not believe this activity fits the guidelines for establishing categorical exclusions.

Question. Has the Fish and Wildlife Service previously sought a Categorical Exclusion for Lacey Act listings in the past?

Answer. Although the Service has utilized an existing NEPA Categorical Exclusion (see response to Question 16), it has not previously sought the addition of a new Categorical Exclusion for the listing of injurious wildlife under the Lacey Act.

Question. If you have not, what has dramatically changed that cries out for this fundamental change? After all, you are already doing just an Environmental Assessment on these species. is that not correct?

Answer. The Service implements 18 U.S.C. 42 to protect United States interests from the harm such species can cause to the Nation's economic, environmental, and human interests. This statutory tool protects these interests by preventing harmful species from being imported into the Nation or from being transported over State lines without a permit. However, the administrative process for listing injurious wildlife can be protracted and complex, reducing its effectiveness. We are seeking opportunities available under the regulatory process to expedite the listing process and, in so doing, support the purposes of the Lacey Act's injurious wildlife provisions.

Question. Under a Categorical Exclusion is the Fish and Wildlife Service required to conduct any environmental analysis? Please describe in detail.

Answer. For the purposes of rulemaking, the Administrative Procedure Act (APA) requires the Service to explain in our listing rules the basis for our determination. For each proposed injurious wildlife listing, we also present risk and biological assessments of the proposed species for injuriousness in the listing rule as part of our analyses that we use in the decisionmaking process to justify listing species under the Lacey Act. The risk and biological assessments are not specifically required in the law, but the Service provides them as a part of our explanation for the basis of our determinations.

If a categorical exclusion is applied to a Federal action, an Environmental Action Statement is prepared. The Service explains why the proposed rule qualifies for the categorical exclusion under NEPA and also considers whether any of the "extraordinary circumstances" found at 43 CFR 46.215 apply.

Question. Is the Fish and Wildlife Service required to complete an economic analysis under a Categorical Exclusion? Please describe in detail.

Answer. Under NEPA, an economic analysis is not required, but it may be carried out as part of an Environmental Assessment in order to assess the economic impacts generated by the impacts of a Federal action on the human environment. If a Federal action is eligible for a categorical exclusion, it has no significant impacts on the quality of the human environment, and therefore no economic analysis is carried out for that purpose.

However, as part of the rulemaking process, the Regulatory Flexibility Act (RFA) requires Federal agencies to analyze the effect of their regulatory actions on small entities (small businesses, small non-profit organizations, and small jurisdictions of government) and consider less burdensome alternatives, if the regulatory effect is likely to be "significant," affecting a "substantial number" of these small entities. The economic analysis conducted by the Service under the RFA is independent of any requirements or process under NEPA.

Also part of the rulemaking process, Executive Order 12866 for Regulatory Planning and Review Looks at whether: (1) the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government; (2) the rule will create inconsistencies with other Federal agencies' actions; (3) the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients; or (4) the rule raises novel legal or policy issues. Significant rulemakings under EO 12866 are required to assess the potential costs and benefits of the regulatory action, which would extend to impacts beyond the scope of analyses pursuant to RFA. Any "economically significant" rulemakings under section 3(f)(1) of this Executive Order must include not only an assessment of costs and benefits but also reasonably feasible alternatives. The Service will continue to conduct economic analyses, where appropriate, under this Executive Order, for injurious wildlife listing actions, regardless of whether or not the proposed categorical exclusion is finalized.

Question. In 2002, the Service utilized the Department's Categorical Exclusion to list the brushtail possum and snakehead fish. Why is it no longer appropriate to utilize this existing authority?

Answer. In 2002, the Service used an existing departmental categorical exclusion: "Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case" [(43 CFR 46.210(i)] in the listing actions for the brushtail possum and snakehead fish species, The Service stated in its proposal for the categorical exclusion at issue: "Upon further review, the Service believes that this is not the best description of why injurious species listings do not have a significant effect on the human environ-

ment. Therefore, the Service is pursuing the addition of a new categorical exclusion for the listing of injurious species under the Act."

Question. In its comments on the proposed Categorical Exclusion, the United States Association of Reptile Keepers claims the Environmental Assessment the Service prepared for this listing failed to address significant scientific issues and to respond to significant environmental issues raised by environmental groups, State wildlife officials, the zoo and aquarium community, academic and private conservation researchers during the comment period. How were these issues addressed in the NEPA documents?

Answer. Many of the comments raised by United States Association of Reptile Keepers (USARK) for the Service's listing of several constrictor snakes as injurious wildlife were for subjects not relevant to NEPA. They were addressed in responses published in the final rule.

Question. Of the previous 230 Lacey Act listing, how did the constrictor snake case compare and contrast with those efforts? Isn't this the first time that a widely held species was listed as injurious?

Answer. One example of how the listing of injurious wildlife has differed in some cases from the 2012 listing of large, constrictor snakes is by virtue of some prior listings having been completed through the legislative process. Reasons for listing by the Service may vary, depending on a range of factors that may include how the species may enter the United States or be transported between States, its natural history, and how it impacts the specified statutory interests, However, all injurious wildlife listings completed through the rulemaking process are consistent with all applicable Federal laws. Bighead carp, a species commonly kept and traded in the aquaculture industry and listed by Congress in 2010, was also a widely held injurious wildlife species at the time of listing, albeit not by individuals as pets.

Question. Does the Service intend to use a Categorical Exclusion for the remaining five constrictor snakes that Secretary Salazar decided not to list 20 months ago?

Answer. The proposed categorical exclusion (published in the Federal Register July 1, 2013) will not be applied in the Service's consideration of injurious wildlife listing for the remaining five species of large, constrictor snakes proposed for such listing in March of 2010.

Question. When will a decision be made on these species? It strikes me that it is fundamentally unfair that these species have been treated as defacto listings for the past 20 months.

Answer. The status of the remaining fives species is under consideration and review, and we anticipate that a decision will be made in early 2014.

Question. What other species are pending a decision on whether they qualify as injurious wildlife? Please explain the delay.

Answer. The Service received a petition in September 2009 to list all amphibians as injurious unless they are accompanied on import or interstate transport by a certificate declaring them as free of *Batrachochytrium dendrobatidis* (amphibian chytrid fungus). The Service published a Notice of Inquiry in the Federal Register in September 2010, and the petition is currently still under consideration. The Service also received a petition on May 28, 2003, from the North American Brown Tree Snake Control Team requesting that the entire Boiga genus of snakes be considered for inclusion in the injurious wildlife regulations. The Service published a Notice of Inquiry in the Federal Register on September 12, 2003. We received public comments and started the process for preparing a risk assessment for the Boigas. The delay for the listing process for these petitions is primarily due to their complexity, competing priorities, and limited available resources.

Question. Under current law, the Fish and Wildlife Service can petition itself to list a species as "injurious wildlife". By making it easier or in the words of the agency "more efficient", are there any limits on what the Service could list under the Lacey Act? Could the agency simply decide to list all non-native species?

Answer. The Service may list species as injurious wildlife only to the extent allowed by existing Federal law. For example, the Lacey Act authorizes only specific taxonomic groups that may be listed as injurious (wild mammals, wild birds, fish, reptiles, amphibians, mollusks, and crustaceans). In addition, we must justify that they are injurious to the health and welfare of human beings, to the interests of forestry, agriculture, and horticulture, or to wildlife or wildlife resources of the United States. New efficiencies captured by the Service in the regulatory listing process must also conform to existing Federal laws. Making the process more efficient means that the Service will be able to expedite the injurious wildlife listing process, allowing it to tackle major threats to the American people and economy

more cost-effectively, while also continuing to ensure that listings remain scientifically accurate and promote public transparency and accountability.

Question. Does the Fish and Wildlife Service believe that the listing of non-native species as "injurious wildlife" is a priority program within the agency?

Answer. The Service considers the listing of harmful species as injurious wildlife one of many priorities within the agency.

Question. If yes, how many FTEs and how much money is dedicated to the listing program each year? Please provide to the Subcommittee an annual breakdown over the past 20 years on the number of FTEs that have worked on the listing process.

Answer. The Service currently employs two FTEs for injurious wildlife. Prior to 2000, listing of injurious wildlife activities were carried out as part of the duties of staff also assigned to other work in the Fish and Aquatic Conservation Program. From 2000 until 2009, the Service dedicated one FTE for injurious wildlife listing. A second FTE was added in 2010. Funding for the listing program supports the FTEs (estimated at $150,000 per FTE per year) and includes some additional funds to support administering listings, such as Federal Register printing costs and related technical work, such as conducting risk assessments.

Question. By contrast, the Fish and Wildlife Service has 1,139 employees working on the Endangered Species Act, 89 employees working in the Realty Division, and 105 employees in the Federal Aid to Sport Fish and Wildlife Program who calculate and distribute excise taxes collected by the Department of the Treasury to the States. Can you honestly tell me that 2 Federal employees who must decide whether to list or not list a species demonstrates a commitment to remove the threats of invasive species?

Answer. While the Service agrees that removing the threat of invasive species through the listing of injurious wildlife is important, the agency has no specific appropriation to carry out this work. Many statutory obligations and commitments are also considered in our allocation of limited discretionary funds, and most of our resources are appropriated for a specific purpose, such as Land Acquisition or the Sport Fish and Wildlife Restoration programs. The law prevents the Service from using specifically appropriated funds for purposes other than as intended by Congress.

LETTER SUBMITTED FOR THE RECORD FROM IMPERIAL IRRIGATION DISTRICT

IMPERIAL IRRIGATION DISTRICT
IMPERIAL, CA 92251
OCTOBER 3, 2013.

Hon. JOHN FLEMING, *Chairman*,
Hon. GREGORIO KILILI CAMACHO SABLAN, *Ranking Member*,
Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs,
Committee on Natural Resources,
Washington, DC 20515.

Re: Statement for the record of the hearing on The Department of the Interior's proposal to use a Categorical Exclusion under the National Environmental Policy Act (NEPA) for adding species to the Lacey Act's list of injurious wildlife

DEAR CHAIRMAN FLEMING AND RANKING MEMBER SABLAN:

The Imperial Irrigation District of California respectfully requests that this letter be included in the record of the Subcommittee's hearing on *The Department of the Interior's proposal to use a Categorical Exclusion under the National Environmental Policy Act (NEPA) for adding species to the Lacey Act's list of injurious wildlife.*

IID is seriously concerned that the U.S. Fish and Wildlife Service's (USFWS) proposal to forgo a full NEPA review of proposed additions to the Lacey Act's list of injurious species, specifically the possible addition of the invasive quagga mussel, would not allow for proper consideration of the potential adverse effects that such a listing would have on existing and future interstate water supply operations and water transfers.

IID is a public agency that diverts 3.1 million acre-feet of water annually from the Colorado River to irrigate 520,000 acres of highly productive farm land in California's Imperial Valley. IID's water supplies are conveyed through the federally owned Imperial Dam and All-American Canal, which IID operates and maintains under contracts with the Department of the Interior, and through IID's own system

of more than 3,000 miles of canals and drains. Additionally, IID distributes electricity generated by hydroelectric facilities built along the All-American Canal.

IID is well aware of the threat posed by aquatic invasive species, including the quagga mussels in the Colorado River water supply, and we support the intensive state and local efforts already under way to prevent and control the spread of these destructive invasives.

However, IID is concerned by the proposal to adopt a blanket categorical exclusion for NEPA review on new additions to the Lacey Act list, particularly in light of the USFWS use of the Lacey Act to curtail water supply and transfer operations on Lake Texoma in Texas. In the Texas case, the USFWS invoked the Lacey Act to halt a critical water supply project because of the presence of invasive zebra mussels in the lake, even though the transfer project included special provisions to prevent the spread of the mussels. The 112th Congress had to enact legislation (PL 112–237) to allow the Texas water project to continue operation.

Zebra mussels are listed as "injurious" under the Lacey Act, while the similarly destructive quagga mussels are not listed under the Act. Quagga mussels are present in the Colorado River. If quagga mussels are added to the Lacey Act list, the Act's strict restrictions on interstate transport of listed invasive species could be applied in a manner that would disrupt vital water supply operations on the Colorado River, including water transfer agreements to which IID is a party.

For this reason, IID and other public agencies in the Lower Colorado River Basin asked for a 60-day extension of the initial 30-day comment period on the USFWS categorical exemption proposal so that the potential effects on Colorado River operations and transfers can be more fully considered. In response to these requests, the USFWS reopened the comment period for 60 days, ending October 15.

IID believes that a categorical exclusion is inappropriate when additional Federal regulation of the species proposed for listing would have potentially significant adverse impacts on water supply and hydroelectric operations vital to the regional economy and the well-being of millions of citizens.

Actions taken under the Lacey Act to alter, delay or halt Colorado River operations—as the USFWS did at Lake Texoma—would disrupt both the human and environmental status quo and could be expected to significantly affect highly productive agricultural lands and fish and wildlife habitat (including ongoing efforts to improve conditions at the Salton Sea), Further, such actions would be highly controversial, would likely have unforeseen consequences, could conflict with existing inter- and intrastate agreements, and may undermine the authorized purposes of the Federal Government's water storage and distribution facilities in the Lower Colorado River Basin.

For these reasons, IID believes that the USFWS should not apply a categorical exclusion to proposed Lacey Act listings when such a listing would likely affect interstate water supply operations, hydroelectric operations or water transfers. Potential impacts to these operations must be thoroughly examined in a transparent, public process before a new listing is made.

IID greatly appreciates the Subcommittee's oversight of the USFWS proposal and its potential consequences. Thank you for considering IID's views on this important matter.

Sincerely,

KEVIN E. KELLEY,
General Manager.

PREPARED STATEMENT OF NORTH TEXAS MUNICIPAL WATER DISTRICT

The North Texas Municipal Water District [NTMWD] wishes to express its appreciation for the hearing which you conducted on September 20, 2013 concerning the categorical exclusion, which is being proposed by the United States Fish and Wildlife Service [FWS] for listing a species under the Lacey Act. During this hearing, FWS Assistant Director David Hoskins testified that implementation of a categorical exclusion would allow the Service to, ". . . bypass the completion of an EA or an EIS when undertaking actions that a Federal agency identifies that, under normal circumstances, do not have a potentially significant environmental impact, either individually or cumulatively."

NTMWD is deeply concerned over the issue of listing species under the Lacey Act, particularly with regard to invasive mussels. Nearly 4 years ago, zebra mussels were discovered in Lake Texoma, a water supply reservoir that provides 28 percent of the water supply for NTMWD's 1.7 million customers. This Subcommittee is well

aware of the subsequent steps that were necessary to restore this essential water supply, including the introduction and passage of H.R. 6007, the "North Texas Zebra Mussel Barrier Act of 2012" which subsequently became P.L. 112–237. This effort also required NTMWD to spend over $300 million of our customers' money to construct a 46-mile long closed pipeline from Lake Texoma to our water treatment plant in Wylie, Texas. The closed pipeline ensures that zebra mussels, although technically transported across the Oklahoma/Texas border will not be spread by the NTMWD into the waters of Texas.

The Subcommittee will also recall that while FWS did not question whether our proposed plan essentially eliminated the spread of zebra mussels, they opposed the North Texas Zebra Mussel Barrier Act of 2012 based on their rigid interpretation of the Lacey Act, which prohibits any possession or transport of a listed species, regardless of whether a critical water supply for an entire region would be put at risk. The counteroffer of FWS for a 5-year moratorium on prosecution under the Lacey Act would have required us to enter into a non-prosecution agreement with the U.S. Attorney for the Eastern District of Texas. It also required the formal approval of numerous Federal and State agencies in both Texas and Oklahoma and had to be renewed every 5 years. Given the fact that NTMWD's need to deliver water is ongoing and cannot be broken down into 5-year cycles, it would have been irresponsible for NTMWD to agree to a plan that would have exposed 28 percent of its water supply to repeated interruption.

FWS has identified more than 4,400 invasive species which inhabit their National Wildlife Refuge System. Each of these species is a candidate for listing under the Lacey Act, with that process shortened by implementation of a categorical exclusion. There is also an effort in the 113th Congress to legislatively mandate that quagga mussels be listed as an invasive species under the Lacey Act. The use of a categorical exclusion that removes the requirement for either an Environmental Assessment or an Environmental Impact Study has the potential to greatly speed this listing process based on a congressional mandate. Given the current state of FWS policy with regard to enforcement of the Lacey Act, the question must be asked how this expedited process would impact the water supply of tens of millions of people throughout the Southwest.

Zebra mussels were the subject of the Non-Indigenous Aquatic Nuisance Prevention and Control Act of 1990 and were formally listed as an invasive species under the Lacey Act on November 7, 1991. This was a reasonable response to a problem that was at that time confined to the Great Lakes and had been traced to contaminated ballast water. But, over the next 20 years, and despite the efforts of Federal agencies like the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service, and a host of State agencies, zebra mussels inexorably spread throughout the eastern half of the United States. They reached the border of Texas and NTMWD's Lake Texoma water supplies in 2009. Despite the fact that NTMWD stopped its pumping activities upon discovering that zebra mussels were present in this reservoir, the mussels have recently been discovered by the Texas Parks and Wildlife Service in lakes hundreds of miles south of the Oklahoma/Texas border.

The Federal Government could not stop the march of the zebra mussel from the Great Lakes to Lake Texoma. Nor did NTMWD have anything to do with spreading the mussel throughout Texas. This likely occurred through the movement of boats among various reservoirs as well as birds and animals which are well-known as contributors to the spread of zebra mussels. But, the prohibitions of the Lacey Act against moving an invasive species over a State line have been fully brought to bear on NTMWD's water supplies despite the fact that the mussels are already well established in Oklahoma and increasingly in Texas.

We trust the Committee will remember its experience in helping NTMWD deal with FWS and the Lacey Act, and consider the potential impact of a categorical exclusion with regard to the quagga mussel without an Environmental Assessment or an Environmental Impact Statement. Would this lead to a quick listing of quagga mussels? If this occurs, would FWS implement the same policies it has with NTMWD, despite the fact that quaggas are already well established from Colorado to California, including the Colorado River aqueduct? Would it matter that water resource agencies which depend upon the Colorado River for their water needs have already established aggressive programs to remove quaggas, ranging from scrapping them off of intake and pumping facilities to the use of chlorine to prevent their colonizing in holding areas.

The criteria under 43 CFR 46.215, "Extraordinary Circumstances Not to Do a Categorical Exclusion," should be clarified to specifically address and include water transport, whether in North Texas or anywhere in the Nation. To limit delays in adding species to the Lacey Act, this request should be further bracketed to apply only to adding species that already exist in the waters of the United States. Without

recognition of water transfers in the West as exceptional circumstances, the proposed categorical exclusion raises the larger issue of how the Lacey Act and its prohibitions of transporting or possessing a listed species can be made to work in conjunction with long-established water transfers, which are essential to regional water supplies. In the case of NTMWD, adding quagga mussels to the Lacey Act and subsequently finding a single quagga in Lake Texoma could negate a $300 million investment to restore 28 percent of NTMWD's water supply from Lake Texoma.

Because of these complicating issues, NTMWD opposes a categorical exclusion for listing species under the Lacey Act, until additional clarification can be developed by FWS with regard to how it proposes to administer the Act's provisions while not interrupting the delivery of critical water supplies. NTMWD's closed conveyance system now nearing completion was opposed by the Service and required congressional legislation for our district to restore 28 percent of the water supply of 1.7 million people. What is essential to remember is that stopping cross border water transfers of a species that is already well established is not an effective policy in implementing the Lacey Act.

When listing aquatic species which impact interstate water supplies, it is essential that FWS prepare an EA and an EIS during the listing process, addressing the substantial social and economic impacts that accrue to the extraordinary circumstances of water supply transfers. We also urge that the criteria under 43 CFR 46.215 "Extraordinary Circumstances Not to Do a Categorical Exclusion," needs to be clarified and expanded to specifically address water transports. In conclusion, NTMWD wishes to thank the Subcommittee once again for its attention to these very important issues.

MOU SUBMITTED BY THE U.S. FISH AND WILDLIFE SERVICE

MEMORANDUM OF UNDERSTANDING
between
the UNITED STATES FISH AND WILDLIFE SERVICE and
the PET INDUSTRY JOINT ADVISORY COUNCIL and
the ASSOCIATION OF FISH AND WILDLIFE AGENCIES
to COLLABORATE
ON THE DEVELOPMENT OF NONREGULATORY
APPROACHES TO REDUCE THE RISK OF INTRODUCING
POTENTIALLY INVASIVE SPECIES
THROUGH INTERNATIONAL TRADE AND
TO PROMOTE VOLUNTARY NO-TRADE
IN CERTAIN SPECIES NOT PRESENTLY IN TRADE

This Memorandum of Understanding (MOU) is entered into by the Pet Industry Joint Advisory Council (PIJAC) (hereinafter referred to as "nongovernmental parties") and the following Federal agencies, hereinafter referred to as the "agencies" or by their name or initials:

United States Fish and Wildlife Service (FWS)

and the following State Government Trade Associations, hereinafter referred to as "Associations" or by their name or initials:

Association of Fish and Wildlife Agencies (AFWA)

I. PURPOSE

The purpose of this MOU is to establish a general framework for cooperating and collaborating among FWS, the States (via their Associations), industry, and other nongovernmental parties to promote nonregulatory approaches with the goal of reducing the risks of potentially invasive, nonnative species being introduced into the United States. The parties to this MOU desire to explore a variety of voluntary risk-management approaches that can be implemented collaboratively by industry and Federal and State governments. Under this Federal, State, and industry partnership, species that are not currently in trade and not currently found in the United States, but that are determined by FWS under section VIII to be of high or uncertain ecological risk to the United States, would voluntarily not be imported or traded, or if they enter the United States, such entry would be conducted only through voluntary biosecurity and mitigation practices designed to minimize the likelihood

of release and establishment consistent with pledges made by companies, individuals, or other entities. While this approach is voluntary and therefore cannot guarantee that the trade of such species will not occur, the non-Federal parties to this MOU will endeavor to educate the respective industries on the benefits of preventative action.

II. AUTHORITIES

1. Fish and Wildlife Programs Improvement and National Wildlife Refuge System Centennial Act of 2000, Public Law 106–408;
2. Fish and Wildlife Coordination Act, 16 U.S.C. 661 *et seq.*;
3. Take Pride in America Act, Public Law 101–628;
4. Executive Order 13112 on Invasive Species, Executive Orders. February 8, 1999;
5. Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990, as amended (16 U.S.C. 4701 *et seq.*);
6. Lacey Act, as amended (18 U.S.C. 42);
7. Endangered Species Act of 1973, as amended (16 U.S.C. 1531–1544); and
8. National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*).

III. DEFINITIONS

For the purposes of this MOU, the following definitions are used:

1. Alien species: ". . . with respect to a particular ecosystem, any species, including its seeds, eggs, spores, or other biological material capable of propagating that species, that is not native to that ecosystem."[1] For the purposes of this MOU, this does not include nonnative species in such States where they are being managed under the authority of State Fish and Wildlife agencies.
2. Biosecurity: utilizing a combination of measures designed to protect the environment by preventing the escape to or establishment of species in the natural environment. Measures include, but are not limited to, preventing high-risk species from coming in contact with the natural environment by ensuring containment in facilities that are designed to maintain the species in closed systems in which effluent discharge and other waste materials are treated to prevent to prevent the release of live organisms.
3. Invasive species: ". . . an alien species whose introduction does or is likely to cause economic or environmental harm or harm to human health."[2] While current funding is limited to aquatic species, the MOU applies to any species.
4. Risk management: The process of identifying, evaluating, selecting, and implementing actions to reduce risk (Anderson *et al*. 2004);[3] can include voluntary and regulatory approaches that prevent invasive species from entering the U.S. by limiting or prohibiting the importation of species classified as either high risk or uncertain risk.
5. Risk screening: a risk assessment system designed to rapidly evaluate the invasiveness (establishment and impact) potential of a nonnative species.

IV. THE PARTIES

1. The Pet Industry Joint Advisory Council (PIJAC) is a nonprofit, service-oriented organization composed of members from every segment of the pet industry. These include importers and exporters of live organisms, retail pet stores, product manufacturers, other industry trade associations in the United States and other countries, as well as hobby clubs and aquarium societies. PIJAC, a nonprofit corporation organized pursuant to the laws of the District of Columbia, enters into this MOU pursuant to the approval of its Board of Directors.
2. The Association of Fish and Wildlife Agencies (AFWA) is a nonprofit trade association representing North America's State and territorial fish and wildlife agencies, promoting sound management and conservation policy that speaks with a collective voice at the national level.

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[1] Executive Order 13112, February 8, 1999.
[2] Executive Order 13112, February 8, 1999.
[3] Andersen, M.C., H. Adams, B. Hope, and M. Powell, 2004. Risk Assessment for Invasive Species. Risk Analysis 24(4):787–793.

3. The mission of the Fish and Wildlife Service includes working with others to conserve, protect, and enhance fish, wildlife, and plants and their habitats for the continuing benefit of the American people. The vision of the FWS is to continue to be a leader and trusted partner in fish and wildlife conservation, known for its scientific excellence, stewardship of lands and natural resources, dedicated professionals, and commitment to public service. The conservation principles of FWS include:

"Science—Our work is grounded in thorough, objective science.

Stewardship—Our ethic is to conserve natural resources for future generations.

Service—It is our privilege to serve the American people.

Professionalism—We hold ourselves to the highest ethical standards, strive for excellence and respect others.

Partnerships—We emphasize creative, innovative partnerships.

People—Our employees are our most valued asset.

Legacy—We ensure the future of natural resource conservation by connecting people with nature."

V. STATEMENT OF MUTUAL INTERESTS AND BENEFITS

1. FWS manages 150 million acres in 556 national wildlife refuges and other units of the Refuge System, owns or manages 38 wetland management districts, and includes nearly 16,000 acres of lands and waters in the National Fish Hatchery System. FWS's responsibilities include conservation of threatened and endangered species, migratory birds, fisheries, and native habitats both on and off refuge lands.
2. AFWA represents the State and district fish and wildlife agencies charged with the management of fish and wildlife resources in the public trust.
3. Each of the parties participating in this MOU is a national entity with an interest in fostering environmental stewardship within its respective community, including protecting the environment from the release of nonnative invasive species.
4. Each of the parties acknowledges that the introduction of various invasive, nonnative species may be detrimental to, and not in the best interests of, their respective communities and the natural resources of the United States.
5. The parties recognize that the most effective way to manage invasive species is to prevent importation, and that nonregulatory methods of prevention are beneficial.
6. All parties would benefit from the development of science-based assessments of the likely adverse ecological effects of potentially invasive species that could guide their internal management or policy decisions.

VI. PRINCIPLES

The parties agree that invasions by nonnative, species imported for the live animal and plant trade can cause the United States incalculable environmental and human harm as well as financial losses every year. Stopping initial importation of risky, nonnative species is the most effective way of preventing these invasions in the United States. The industries that trade in live, nonnative species can take a voluntary, responsible, proactive approach to assist the regulatory agencies in preventing these introductions.

Coordination of these voluntary actions will be facilitated by the nongovernmental parties with FWS as described in section VII.

VII. IMPLEMENTATION

To the extent authorized by law and consistent with agency management objectives, all of the parties to this MOU agree:

1. To provide consistent and effective communication among the MOU parties, the non-Federal entities shall appoint representatives to a steering committee of no fewer than three or greater than nine, where committee members may be asked to complete assigned tasks and to discuss and consider new activities as appropriate that may be pursued under this MOU.
2. To develop a work plan (through the steering committee) that includes, but is not limited to:

a. Participating in scheduled Steering Committee meetings and conference calls;

b. Participating in an annual strategic planning meeting of the Steering Committee and identifying goals and objectives as appropriate under this MOU;

c. Reviewing the Ecological Risk Screening protocol and standard operating procedures and providing recommendations with respect to its application and implementation;

d. Explaining how FWS would logistically receive species nominations from individual representatives on the steering committee of species that would be covered by the MOU;

e. Developing and implementing a collaborative communication strategy to increase public awareness about the need to prevent the introduction of living organisms that the parties have identified as species of high or uncertain ecological risk to the United States and that may present a high or uncertain risk of becoming an invasive species.

3. The parties agree that the highest priority is to promote a collaborative and comprehensive voluntary approach to prevent the introduction into the United States of species not present in the United States that have been demonstrated through ecological risk screening procedures to possess a high or uncertain risk of becoming an invasive species if introduced into the United States. Furthermore, the parties agree to similarly address low risk species as resources permit.

4. The parties will explore the alternatives of industry-supported initiatives that may include: (a) no-trade, (b) implementation of mitigation measures or best management practices, and (c) regionally based trade through which an ecological risk screening procedure identifies species that are of low risk of population establishment, spread, and harm. The companies, individuals, or other entities may pledge to refrain from trading (see (a) of this paragraph). The species determined to be high or uncertain risk through the Ecological Risk Screenings are listed on FWS's website, which may be amended as appropriate.

5. The parties recognize and acknowledge that the collaborative voluntary approach implemented pursuant to this MOU in no way preempts the FWS from listing a species as injurious wildlife under Title 18 of the Lacey Act or other applicable statutes or regulations, or precludes any State or Territory from enforcing existing, or implementing new, statutes or regulations concerning nonnative or invasive wildlife species. The Service retains all existing discretion and authority under applicable laws.

VIII. TO THE EXTENT AUTHORIZED BY LAW AND CONSISTENT WITH AGENCY MANAGEMENT OBJECTIVES, THE ASSOCIATIONS AND THE AGENCIES AGREE TO:

1. FWS agrees to:

a. Provide background materials to the parties, including protocols and standard operating procedures, associated with the "Ecological Risk Screening" process being utilized by the FWS to evaluate nonnative species;

b. Provide a public FWS website with:

1. all completed Ecological Risk Screening Summaries;
2. an email address for the general public to provide information and observations on the Ecological Risk Screening Summaries that will be provided to the author(s) for consideration; and
3. the revised Ecological Risk Screening Summaries;

c. Work with the parties to foster integration of regulatory and nonregulatory approaches to reduce the risks or invasive nonnative species affecting the United States;

d. Conduct an Ecological Risk Screening for species that are nominated by individual representatives of the steering committee, within available funding or personnel constraints;

e. Conduct an Ecological Risk Screening for species that are nominated by the public through the PWS website soliciting public input, within available funding or personnel constraints;

f. Inform the Steering Committee of additional Ecological Risk Screenings conducted based on FWS's scientific knowledge; and

g. Provide a list of species of low, uncertain, and high risk that will be posted online at a publicly available FWS website and provided to the Steering Committee, along with explanations for the risk categories (found in the Standard Operating Procedures being posted on FWS's website).

2. AFWA, in its role in providing a national forum for coordinated action among State and territorial fish and wildlife agencies, agrees to:

a. Facilitate compilation of responses to data requests by State and territorial members of the AFWA Invasive Species Committee (and other committees as relevant and appropriate) as requested by one or more of the parties, within available personnel and resource constraints;

b. Coordinate review by State and territorial agencies of ecological risk screening procedures, best management practices, or other related reports and policies through the AFWA Invasive Species Committee (and other committees as relevant and appropriate), within available personnel and resource constraints;

c. Provide a foundation for discussion and development of strategic prioritization of invasive species threats through the AFWA Invasive Species Committee; and

d. Inform its State and territorial members of opportunities to engage in educational and outreach campaigns being conducted by one or more of the parties, and inform the parties of such campaigns that any of its State and territorial members may be conducting.

3. Each of the nongovernmental parties agrees to:

a. Take steps to engage members within their respective communities to conduct proactive public outreach and education campaigns that promote awareness of species determined to be of high or uncertain ecological risk to the United States;

b. Evaluate various voluntary mitigation practices that include sterilization, single sex trade, facility biosecurity protocols, rating systems for certain species that may be appropriate by region of the country, and other best management practices;

c. Encourage their members to review and consider the environmental covenant pledge in the Appendix; and

d. Provide to its respective Steering Committee representative nominations for species to be screened by FWS.

IX. PRINCIPAL CONTACTS

The principal contact for the Fish and Wildlife Service concerning this MOU is:

Name: Jeff Underwood (Acting)
Title: Assistant Director, Fish and Aquatic Conservation
Address: MS 3043, 1849 C Street, NW, Washington, DC 20240
Telephone: 202–208–6393

The principal contact for the Pet Industry Joint Advisory Council concerning this MOU is:

Name: Marshall Meyers
Title: Senior Advisor
Address: 1620 L Street, NW, Suite 610, Washington, DC 20016
Telephone: 202–256–6726

The principal contact for the Association of Fish and Wildlife Agencies concerning this MOU is:

Name:
Title:
Address:
Telephone:

The principal contact information for other agencies or nongovernmental parties shall be indicated in an Addendum to this Agreement.

X. MISCELLANEOUS PROVISIONS

1. The parties will carry out their own activities related to this MOU and use their own resources, including the expenditure of their own funds, in pursuing the objectives outlined in this MOU.
2. In implementing this MOU, each Party will operate under its own applicable laws, regulations, and policies, subject to the availability of funds and personnel constraints.
3. Nothing in this MOU authorizes any of the parties to obligate or transfer funds. Specific projects or activities that involve the transfer of funds, services, or property among the parties requires execution of separate agreements and are contingent upon the availability of funds. These activities must be independently authorized as appropriate. Negotiation, execution, and administration of these agreements must comply with all applicable laws.
4. Other than the agencies' and Associations' support of the principles in this MOU, nothing in this MOU constitutes or shall be interpreted to imply an endorsement by the United States of any product, service, or opinion of any of the nongovernmental parties.
5. Nothing in this MOU is intended to alter, limit, or expand the agencies' or States' statutory and regulatory authorities.
6. This MOU in no way restricts any of the parties from participating in similar activities with other public or private agencies, organizations, and individuals.
7. This MOU is not intended to (nor does it) create any rights, benefits, or trust responsibilities, substantive or procedural, enforceable by law or equity, by a party against the United States and its individual States or territories, its agencies, its officers, or any person.
8. Each nongovernmental party recognizes and acknowledges that the MOU does not provide immunity from Federal or State antitrust laws.
9. Each party represents that its participation in the MOU, and any action it takes relating to the MOU (including the nomination of species to be included in this agreement), is independent and voluntary, is not conditioned upon the participation or actions of any other entity, and is not the result of any agreement or understanding with any actual or potential competitor.
10. Each party represents that, in conducting activities relating to the MOU, it shall not disclose directly or indirectly to another party any information regarding its business plans, strategies, costs, production, inventories, prices, sales, customers, or other competitively sensitive information.
11. Pursuant to Federal Law, no member of, or delegate to, Congress may benefit from this MOU either directly or indirectly.
12. Any information furnished to the agencies or States (via their representative Associations) under this MOU is subject to the Freedom of Information Act, 5 U.S.C. Section 552.
13. All parties will Comply with the Federal Advisory Committee Act to the extent that it is applicable.
14. Other Federal agencies and nongovernmental entities may be added to this MOU with the unanimous written concurrence of all of the parties.
15. This MOU takes effect on the date it is fully executed and will expire 10 years from its effective date. This MOU may be extended or amended upon written agreement of all of the parties.
16. Either the Federal agencies collectively, Associations collectively, or the nongovernmental parties collectively may terminate this MOU 60 days after written notice. Any individual party may terminate its participation in the MOU 60 days after written notice to the other parties.

PREPARED STATEMENT OF THE WESTERN COALITION OF ARID STATES (WESTCAS)

The Western Coalition of Arid States represents municipalities, regional water and wastewater agencies, irrigation districts, water resource agencies, counties, engineering firms and law firms in Arizona, California, Colorado, New Mexico, Nevada, and Texas. Our goal is to promote policies, laws, and regulations that help ensure sustainable water quality in the Arid West.

WESTCAS wishes to provide its thoughts and perspectives with regard to your hearing of September 20, 2013 to consider a proposal by the U.S. Fish and Wildlife Service to implement a categorical exclusion from the National Environmental Policy Act (NEPA) process for adding species to the injurious wildlife list under the Lacey Act. It also proposes that the application of this categorical exclusion for each listing action would include the review of all "extraordinary circumstances" under 43 CFR 46.215, which we agreed should be conducted. In this regard, *WESTCAS believes it is essential that the extraordinary circumstances associated with existing and future managed water supply transfers across State lines in the Western United States be a part of the categorical exclusion process.*

We appreciate that a fast-track process for the Service to use in adding a species to the Lacey Act could enable the Fish and Wildlife Service to stop a species before it becomes "irrevocably invasive." However, we are concerned that the extraordinary circumstances of these water transfers is not or will not be fully recognized in the proposed categorical exclusion to the Department's Manual (DM).

REQUEST

For the reasons cited above, WESTCAS requests that when the Fish and Wildlife Service is considering an aquatic species for addition to the injurious list, that the Department of Interior Manual recognize Western water transfers as an *exceptional circumstance*. We urge that the criteria under 43 CFR 46.215 "Extraordinary Circumstances Not to Do a Categorical Exclusion" be clarified and expanded to specifically address and include Western water transport. To limit delays in adding species to the Lacey Act, this request can be further bracketed to apply only to adding species that already exist in the waters of the United States.

ANALYSIS

Without recognition of water transfers in the West as exceptional circumstances, the proposed categorical exclusion raises the larger issue of how the Lacey Act and its prohibitions of transporting a listed species across a State line can be made to work in conjunction with long-established water transfer arrangements that are essential to the water supply of much of the Arid West. Our concerns are centered upon the zebra mussel, which is already a listed species under the Lacey Act and also the quagga mussel which is not listed but already present throughout most of the Western States and is the subject of pending Congressional Legislation which would require the Service to add this species to the Lacey Act.

Water supply transfers in the West are critical to a sustainable water supply that benefit not only human health and welfare but also underpin the economy and provide crucial environmental flow. The Department of Interior through the Bureau of Reclamation plays a major role in transporting water over State lines through its water supply and water transfer facilities. Unless accompanied with an extraordinary circumstances definition that it applied to cross-border water supply transfers, the proposed categorical exclusion may be inconsistent with the Bureau of Reclamation operations or policies. Time limits on responding to the Notice have prevented WESTCAS from a thorough review of this concern.

Western water agencies are working actively to control the spread of invasive species. In the case of zebra mussels, this includes a $300 million closed-pipeline currently under construction by the North Texas Municipal Water District that will carry zebra mussels from over the Oklahoma-Texas State line to a treatment plant where all mussels will be removed. The treatment process is so thorough that although zebra mussels will technically be moved over a State line, they will not be spread to the waters of Texas.

With regard to quagga mussels, the Metropolitan Water District of Southern California employs scuba divers 24 hours a day, 7 days a week to scrape quagga mussels off of its intake and pumping structures. The Coachella Valley Water District has adopted special treatment strategies designed to prevent quagga mussels from colonizing its distribution system. Coachella has also prohibited boating activities on its water conveyance and storage facilities and also actively supports Federal and State boat inspection programs. The San Juan Water Commission in New Mexico has already implemented policies ranging from early detection of quagga mussels to enhanced inspection partnerships with Federal and State agencies.

Western water resource agencies are united in their efforts to try and control the spread of invasive species, especially aquatic varieties. But the fact remains that the population centers and the agricultural production of the Arid West, including helping sustain the intervening aquatic habitat, are dependent upon the long-established movement of water supply across State boundaries. This frequently involves formal partnerships with the U.S. Army Corps of Engineers and the Bureau of Reclamation. Providing an uninterrupted water supply is a challenge that can require

finding compatibilities rather than inflexible prohibitions. While Western water transfer arrangements may involve the transport each day of zebra or quagga mussels across a state line, the interruption or suspension of water transfers would create chaos with the water supply of millions of people as well as with important segments of the agricultural industry.

Because of this complicating feature, WESTCAS opposes a categorical exclusion for the Service for listing species under the Lacey Act until additional clarification can be developed by the Service with regard to how it proposes to administer the Act's provisions while not interrupting the delivery of water supply in the Arid West. The closed conveyance system proposed by the North Texas Municipal Water District was vigorously opposed by the Service and required Congressional Legislation for the District to restore 28 percent of the water supply of 1.7 million customers.

Western water agencies are mounting determined efforts to control the spread of quagga mussels. But their efforts do not embrace outright bans on interstate water transport. It would take many billions of dollars to build and operate closed conveyance treatment systems throughout the Arid West. It must be recognized that species such as quagga mussels and zebra mussels are already well established in the water supplies of multiple states. *Stopping cross border water transfers would not stop the spread of these mussels.*

CONCLUSION

When listing aquatic species which impact interstate water supplies, WESTCAS believes that is essential that the Service prepare an EA and an EIS during the listing process, including the substantial social and economic impacts that accrue to the extraordinary circumstances of water supply transfers. We also urge that the criteria under 43 CFR 46.215 "Extraordinary Circumstances Not to Do a Categorical Exclusion" needs to be clarified and expanded to specifically address and include Western water transport related issues. WESTCAS strongly supports the implementation of NEPA requirements for EA's and EIS's as an essential part of the listing process any time a cross-border water transfer could be impacted by the Lacey Act.

While WESTCAS appreciates the opportunity to submit these comments, due to the limited time available, we were not able to fully develop our concerns. If the comment period is extended, WESTCAS may elect to supplement or more fully support these comments.

Thank you for the opportunity to provide our perspectives with regard to this issue.

[LIST OF MATERIAL RETAINED IN COMMITTEE'S OFFICIAL FILES]

—Letter from Kelley Drye & Warren LLP on behalf of the United States Association of Reptile Keepers (USARK) submitted to Mr. Daniel M. Ashe, Director, U.S. Fish and Wildlife Service.

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