The COMPETES Act Lacey Amendment: What Exotic Animal Industries Need to Know

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Over the past couple of months, exotic animal communities have seen a looming dark cloud on the horizon: the potential amendment of the Lacey Act. Confusion and misinformation surrounding the impacts of this potential amendment have completely dominated the online narrative. As talking points from the few industry trade groups that publicly commented on the amendment were repeated and rephrased, clarity was lost and incorrect information flooded the discussion of the legislation. This unintentional disinformation campaign was compounded by the public silence of the majority of exotic animal industry trade groups. Many people have expressed interest in advocating against the amendment, but few of them could tell you what the amendment actually proposes or even what the scope of the Lacey Act is currently. Factual accuracy is crucial to successful outreach to government officials.

This article provides an overview of the current scope of the Lacey Act, the actions of the proposed amendment, and an analysis of the issues that would arise from it. It has been informed by discussions with lobbyists and/or leadership from multiple exotic animal industry trade associations, and a current wildlife inspector with the U.S. Fish and Wildlife Service.

The Lacey Act Today

Prohibitions

The Lacey Act was passed in 1900 to protect a wide range of plants and animals from illegal use or exploitation and to "minimize the risk of invasive species introductions while providing a safeguard against the illegal harvest of native wildlife."[1] It is within the jurisdiction of the Department of the Interior, and enforced by the U.S. Fish and Wildlife Service.

The Act makes it illegal to "import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any wildlife that was taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law."[2] It also bans the transport of certain species of animals and plants specifically

designated as “injurious” into the country and its territories or properties. This is the part of the Lacey Act that this article will be addressing. (Somewhat confusingly, this section of the law is codified separately from the rest of the Act. The “trade” provisions are found in Title 16 of the United States Code, which deals with conservation; this “injurious species” provision is found in Title 18, which is the criminal code.[3]) The majority of “injurious” species either have invasive potential (e.g. zebra mussels, snakehead fishes) or are considered a disease or parasite vector and/or zoonoses risk (e.g. amphibians that might be carrying chytridiomycosis, bats). New species have been designated as injurious and added to the list restrict by the Act many times in the 122 years since it was originally passed, either through regulations promulgated by the U.S. Fish and Wildlife Service, or through additional legislative amendments. The full list of currently prohibited species can be found here.

The Lacey Act restricts the importation of these species into the continental United States, any and all United States territories, Puerto Rico, the District of Columbia, and Hawai’i. It additionally restricts movement of these species between these locations.

> 18 U.S.C. 42 a(1): “*The importation into the United States, any territory of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States, or any shipment between the continental United States, the District of Columbia, Hawaii, the Commonwealth of Puerto Rico, or any possession of the United States, of [truncated species list, see note]; and such other species of wild mammals, wild birds, fish (including mollusks and crustacea), amphibians, reptiles, (…) or the offspring or eggs of any of the foregoing which the Secretary of the Interior may prescribe by regulation to be injurious to human beings, to the interests of agriculture, horticulture, forestry, or to wildlife or the wildlife resources of the United States, is hereby prohibited.*”

The Lacey Act prohibitions specifically address species considered to be “wild” as defined in the text: importantly, the definition specifies that it is irrelevant if the animal is commonly held in captive settings if it originated/exists in the wild.

> 18 U.S.C. § 42 a(2): *“As used in this subsection, the term “wild” relates to any creatures that, whether or not raised in captivity, normally are found in a wild state; and the terms “wildlife” and “wildlife resources” include those resources that comprise wild mammals, wild birds, fish (including mollusks and crustacea), and all other classes of wild creatures whatsoever, and all types of aquatic and land vegetation upon which such wildlife resources are dependent.”*

Another section of the Code of Federal Regulations that applies to U.S. Fish and Wildlife (50 C.F.R. §14.4) contains a list of species explicitly considered to be domestic, and therefore excluded from what would be considered "wild" animals. This list includes: domestic cats, dogs, and ferrets; European rabbits; camels, llamas, and alpacas; common livestock such as goats, horses, pigs, sheep, and water buffalo; lab mice and lab rats; chickens, ducks, geese, and turkeys; domesticated pigeons; peacocks. (Notably, there are some domesticated species very commonly kept as pets in the United States missing from this list, such as guinea pigs and hamsters).

Interstate Transport

For most of the history of the Lacey Act, it was assumed that the language of the prohibitions meant that its jurisdiction included transport across state lines within the continental United States. It appears that this was the intention of the bill when it was written, and for a long time it wasn't called into question in a way that required scrutiny. This piece of the law is commonly referred to as the "shipment clause."

This changed in 2017 with the final ruling in a case called USARK v. Zinke. Back in 2012, U.S. Fish and Wildlife passed a rule designating a number of large constrictors as injurious; the United States Association of Reptile Keepers (USARK) sued them over it in late 2013. The issue at hand was language in the posted final rule explicitly stating that the listing prohibited transport between the continental U.S. states in addition to the stated prohibitions in the text of the Act.[4] The case continued for a number of years as more constrictor species were listed as injurious and USARK updated its lawsuit to reflect the changes. In 2015, the D.C. District Court decided that even though Fish and Wildlife had long assumed that interstate transport was part of their jurisdiction, the Lacey Act's prohibitions as written actually didn't contain it. The government appealed the decision, but in 2017 the D.C. Court of Appeals upheld the original decision. The resulting conclusion was that "[the Lacey Act] does not prohibit transport of injurious wildlife between States within the continental United States." The U.S. Fish and Wildlife Service still has the authority to prohibit all importation or movement of injurious wildlife into or between the continental United States and its territories or properties - only *interstate* transport was impacted the the change. This is currently the interpretation of the law and the "shipment clause" as it exists today.

Permitting and Exemptions

The Lacey Act allows the Secretary of the Interior to grant permits that allow for the importation and transport of injurious species in specific instances. These can be

granted to businesses or individuals for one of four purposes: zoological, educational, medical, and scientific.[5]

The prohibitions on import of injurious species also do not apply to Federal agencies (as long as the animals are for their own use) or natural history specimens for museums or scientific collections (because they're dead). In a somewhat odd exemption, the Lacey Act also does not impact the importation of domesticated canaries, psittacines, or other species the Secretary of the Interior designates as "cage birds."

The COMPETES Act Amendment

The proposed Lacey Act amendment in the America COMPETES Act (H.R. 4521) would change three main things.

1. The first thing the amendment would do is give the Department of the Interior an "emergency listing" power.
   Currently, to add a new species to the list of "injurious" species, either a) Congress has to pass an amendment specifically adding them or b) it has to go through the bureaucratic process that U.S. Fish and Wildlife uses to promulgate new regulations. The problem is that that regulatory process can take *years* (one source I found said it has taken up to six years to reach completion in some cases)[6], which is not very useful if something is going on that is time sensitive.
   The new proposed power would allow the Secretary of the Interior (realistically, this is still U.S. Fish and Wildlife actually doing it) to temporarily list any species as "injurious" in order to deal with an emerging situation. Interest in creating this power appears to have first arisen during the beginning of the COVID-19 pandemic - it's something Dan Ashe, a previous director of U.S. Fish and Wildlife and the current President and CEO of the Association of Zoos and Aquariums, advocated for in congressional testimony[7] back in 2020. It is not an unlimited power: as written, the listing must have an effective (start) date no later than 60 days after being announced, and would last for no more than three years.

> "*(C) by inserting after the first sentence the following: "Notwithstanding any other provision of law, the Secretary of the Interior may prescribe by regulation an emergency designation prohibiting the importation of any species of wild mammals, wild birds,*

fish (including mollusks and crustacea), amphibians, or reptiles, or the offspring or eggs of any such species, as injurious to human beings, to the interests of ag-riculture, horticulture, forestry, or to wildlife or the wildlife resources of the United States, for not more than 3 years, under this subsection, if the Secretary of the Interior determines that such regulation is necessary to address an imminent threat to human beings, to the interests of agriculture, horticulture, forestry, or to wildlife or the wildlife resources of the United States. An emergency designation prescribed under this subsection shall take effect immediately upon publication in the Federal Register, unless the Secretary of the Interior pre- scribes an effective date that is not later than 60 days after the date of publication. During the period during which an emergency designation prescribed under this subsection for a species is in effect, the Secretary of the Interior shall evaluate whether the species should be designated as an injurious wildlife species under the first sentence of this paragraph"

2. The amendment would alter the language of the Lacey Act to ensure that U.S. Fish and Wildlife has jurisdiction over interstate transport for listed species. As discussed earlier, it was thought for a long time that U.S. Fish and Wildlife had the ability to prohibit the interstate transport of injurious species within the continental United States, and in response to the ruling in USARK v Zinke on the "shipment clause," legislators are choosing to make a change that makes that jurisdiction explicit.

"(1) in subsection (a)(1)—

(A) in the first sentence, by striking "shipment between the continental United States" and inserting "transport between the States";

(B) in the first sentence, strike "Hawaii"

The amended text of the act would read as follows (insertions are **bold**, deletions are ~~struck through~~):

"The importation into the United States, any territory of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States, or any **transport between the States,** ~~shipment between the continental United States~~, the District of Columbia, ~~Hawaii~~, the Commonwealth of Puerto Rico, or any possession of the United States, (…) is prohibited."

3. The third part of the amendment is the one that would have the greatest impact: it would change the listing process from species effectively being "innocent until proven guilty" of being injurious to the exact opposite. The specific goal of this "presumptive prohibition" clause section seems to be preventing the transport (and subsequently, accidental spread) of invasive species. As a result, all non-native wildlife species not currently listed as injurious would be presumptively banned from import or transport unless one of two conditions was met. This has been referred to by industry lobbyists as effectively creating the need for a "whitelist" instead of the extant "blacklist." The clause restricts the non-native wildlife species that are eligible for the whitelist that would be created to those that fall into one of two categories. First, species that had been imported or transported into the relevant localities in a certain quantity in the year prior to the effective date of the amendment, or second, those that had been determined by the U.S. Fish and Wildlife to not have invasive potential. The former appears to be something that would happen automatically; the latter is a regulatory process that explicitly requires the inclusion of a public comment period.

'(d) PRESUMPTIVE PROHIBITION ON IMPORTATION.—

"(1) IN GENERAL.—Importation into the United States of any species of wild mammals, wild birds, fish (including mollusks and crustacea), amphibians, or reptiles, or the offspring or eggs of any such species, that is not native to the United States and, as of the date of enactment of the America COMPETES Act of 2022, is not prohibited under subsection (a)(1), is prohibited, unless—

"(A) during the 1-year period preceding the date of enactment of the America COMPETES Act of 2022, the species was, in more than minimal quantities—

"(i) imported into the United States; or

"(ii) transported between the States, any territory of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States; or

> *"(B) the Secretary of the Interior determines, after an opportunity for public comment, that the species does not pose a significant risk of invasiveness to the United States and publishes a notice in the Federal Register of the determination."*

It is this third "presumptive prohibition" section that is the most concerning and problematic. Not only are key terms missing definitions, but because the new strictures appear overly broad and lacking in precision, it can be extrapolated that the implementation process would create a massive strain on the bureaucratic system, and that it would be almost completely unenforceable once promulgated.

Definition and Scope Issues

The first and most obvious issue is the fact that the amendment does not contain a definition for the phrase "minimal quantities" as it applies to determining what species could potentially be whitelisted. Without knowing the definition of that key term, it is impossible for stakeholders to assess what species, and therefore businesses, would be impacted by the amendment.

Another missing piece of information that requires clarification is the lack of specificity regarding the breadth of the "presumptive prohibition" clause. The Lacey Act regulates the transport and importation of both live and dead specimens as well as any eggs or offspring of those specimens; the regulations within 50 C.F.R. §16.11-16.15 specify which categories apply to each species or taxa listed as injurious. The "presumptive prohibition" clause does not provide similar specificity, and as such could be interpreted as prohibiting the importation or transport of all deceased non-native wildlife specimens in addition to living ones.

Bureaucratic Burden Issues

Implementing the blacklist/whitelist concept as written would result in a drastic and highly prohibitive increase in the amount of time, manpower, and financial resources needed by U.S. Fish and Wildlife. The "presumptive prohibition" clause does not allow for the automatic whitelisting of species that are already imported in appropriate quantities: each species would have to go through an individual review to assess invasive potential, including a public comment period, before a final rule whitelisting them could be published. It is plausible that officially determining the status of all of the species currently imported in appropriate quantities would take years. It is unclear if this process would begin before or after the amendment would be enacted; in the case of the latter, it seems probable that wildlife inspectors would end up treating all commonly

imported species as whitelisted until officially listed otherwise in order to simply be able to continue doing their jobs.

The bureaucratic burden created by the “presumptive prohibition” clause would be far greater than just determining what species to whitelist, however. The combination of that clause with the fix to the “shipment clause” would cause an exponential uptick in the number of Lacey Act permits requested each year. The zoo industry alone - only an approximate 500-600 facilities[8] - would likely generate thousands of requests annually in order to facilitate animal acquisitions, dispositions, and conservation breeding programs. This does not take into account the volume of requests from the thousands of other businesses within the United States that deal with the importation, transport, or sale of live and/or deceased non-native animal species.

The volume of permit requests is only the beginning of the problems caused by implementation of this amendment while utilizing the current permitting system. As discussed earlier, there are only four purposes for which persons would be granted a permit to import or transport a listed injurious species interstate: zoological, educational, medical, and scientific. These four categories are simply named within 18 C.F.R. §42 and not further defined within the text (the closest definition in 50 C.F.R. §14.4 covers “accredited scientific institutions,” but does not address any similar concept to the other four)[9]. United States exotic animal exhibition industry is highly diverse, with a wide variety of unique business types, and many businesses that regularly deal with non-native wildlife do not fit neatly into one of the four extant categories. Currently the determination of what businesses fit into which category is up to the discretion of U.S. Fish and Wildlife: without explicit definitions of each permit category, there is no guarantee that many exotic animal businesses would be able to qualify for the permits required to maintain their normal business operations.

Many conservation breeders may fall into that gray area. For a theoretical example, consider a non-exhibiting, privately owned ranch in Texas that focuses on breeding and reintroducing endangered African antelope populations. It could be argued that such a facility would not qualify for any of the four permit categories: they do not need animals for a “zoological” purpose, as the facility is not open to the public; without exhibition or outreach programs, they might not qualify as needing the animals for an “educational” purpose; their operations are not relevant to “medicine”; while often much is learned about species while caring for them, the facility doesn’t run specific research programs and therefore could be considered to not be needing animals for “scientific” purposes either. In such a situation like this, U.S. Fish and Wildlife might decide to expand their internal guidance to count facilities similar to our theoretical one as “zoological” in order

to address permitting issues, but this action cannot be guaranteed unless the text of the law mandates the inclusion.

Another concerning example, regarding both to categorization and permitting frequency, is that of traveling ambassador animal businesses (those that transport exotic or native animal collections to alternate locations to conduct programming). According to many in the zoological industry, these businesses would obviously qualify as having "educational" purposes. It is unknown, however, if the federal government would hold the same opinion; multiple state and municipal legislatures have considered banning these businesses as "entertainment" alongside circuses in recent years. Assuming these businesses would be considered eligible for permits to transport their injurious species, there would still be a question about the frequency and quantity for which they would be needed. Many of these businesses travel across state lines frequently. In certain areas of the country with smaller states, some businesses travel between states more than once in a single day. It is plausible that under the current system a permit would be required for each individual "trip," or each individual out-of-state definition. It is also unclear how permitting would work for such a moving collection if the majority of the animals within it were to be listed as injurious: a separate permit might be required for each individual animal, or perhaps the movement of a discrete collection of injurious animals could be permitted as a whole. The impact of having to navigate the permitting process is likely to have deleterious impacts on the continued operations of ambassador animal businesses if turn-around time is slow due to bureaucratic overload or if any delays or errors occur.

Enforcement Issues

With such a sudden and extensive change in the number of listed injurious species, enforcement will prove challenging. Wildlife inspectors would have to memorize new lists of injurious and whitelisted species, as well as learn to visually identify an enormous list of species and subspecies in a very short period of time. Due to the duration of time whitelisting species will require, these lists would not be static, and inspectors would also need to keep track of the changing legal status of all the species on them. Wildlife agents and wildlife inspectors are already understaffed and struggle to enforce current laws due to lack of physical manpower. The proposed amendment does not designate any additional financial resources to be put towards enforcement, so the current number of officials would be spread even thinner covering interstate checkpoints as well as the current federal ports of entry. It seems probable that in practice, with such constantly changing lists of approved and prohibited species, overworked inspectors might assume everything commonly traded would be whitelisted and operate accordingly.

Inconsistent Oversight Issues

While on paper the proposed amendment would create a blanket ban on the interstate transport of injurious species, in practice such an attempt is likely to create a patchwork of oversight and enforcement.

The exotic animal hobbyist community has been very concerned about the proposed Lacey Act amendment prohibiting their ability to move to another state with their exotic pets. It cannot be determined at this point what the exact outcome would be, but it can be expected that on paper there would likely be a gradient of impacts: more commonly owned and traded species might be automatically whitelisted; rarer and less commonly imported species might eventually be whitelisted after a regulatory delay and public comment period; animals with the propensity for surviving on their own overwinter anywhere in the United States are likely to be left listed as injurious and prohibited from interstate transport as a result. The functional impact of these legal changes would certainly be impacted by priorities of individual states. Certain states might choose to heavily enforce the new prohibitions and follow up on any transport of listed injurious or presumptively prohibited species across their borders - other states might choose not to dedicate the manpower or budget to that oversight and simply look the other way.

The hobbyist community is also highly concerned about maintaining access to veterinary care for their legally acquired animals. Knowledgeable exotic vets are few and far between, and many hobbyists travel to get their animals care - but veterinary offices must keep records, which include the residential address of the pet owners. It is plausible that veterinary professionals might refuse to treat animals brought illegally across state lines, as it might put their license at risk to be considered accomplices to violations of the Lacey Act.

Privacy and Bias Issues

The issues discussed in previous sections have amount to a situation in which the proposed amendment could result in biased implementation of new prohibitions and serious privacy concerns for entities importing or transporting injurious or presumptively prohibited species. The ambiguities involved in the permitting process could result in permits being accepted or rejected based on an individual’s opinions of specific businesses, rather than the validity of their qualification for the permit. Additionally, all Lacey Act permits applications are discoverable. While entities subject to Freedom of Information Act requests are given the opportunity the request redactions, it is unclear how much identifying or sensitive information about a business or their animals could be accessed in this manner. Among other things, information

gathered from FOIA requests could be used to reconstruct patterns of animal movement between facilities and identify the routes used by transport companies, leading to increased security concerns.

The proposed amendment to the Lacey Act in the America COMPETES bill is overly broad and written without important specificity. While the emergency listing power is likely an important tool for preventing and stopping future disease outbreaks, and the amendment to the "shipment clause" is not inherently unreasonable, the "presumptive prohibition" clause is a huge problem. However, the issues that deserve attention are the deleterious impacts it would have on all businesses that hold non-native wildlife and the bureaucratic nightmare it would cause for the U.S. Fish and Wildlife.

Unfortunately, because the messaging around this bill has been dominated by concerns about pet and private ownership, the severity of the problems this amendment could cause for legitimate industry businesses have gone undiscussed. The odd silence from relevant trade associations and membership groups has left a large number of stakeholders in the dark; worse, other entities appear to be assuming that there is no problem with the proposed amendment because credible organizations have not been speaking out against it.

It is important for businesses that deal professionally with non-native wild animal species to contact their legislators regarding the problems with this amendment. It is highly unlikely that they understand why "presumptive prohibition" clause would be so extensively problematic, and obviously they lack perspective on how it would hurt the businesses and private hobbyists within their constituency.

This article was updated 3/9/2022 to correct an error regarding interstate transport whitelist eligibility.

1
https://wildlife.org/wp-content/uploads/2014/11/Policy-Brief_LaceyAct_FINAL.pdf

2
16 U.S.C. §3371

3
https://nationalaglawcenter.org/wp-content/uploads/assets/crs/R43170.pdf

4
https://fws.gov/node/266041

5
18 U.S.C. §24 a(3)

6
https://nationalaglawcenter.org/wp-content/uploads/assets/crs/R43170.pdf

7
"In a moment when our nation and world is in rapt attention, closeted in our homes, and businesses focused on survival, we need calm, thoughtful and focused action. In this moment, the United States can do what it has historically done best in moments of necessity—lead.

And that leadership should begin by –

Amending the Lacey Act to strengthen the government's ability to identify, designate and stop injurious species, including dangerous pathogens from entering the United States, and from moving in interstate commerce if and when they arrive here. The Lacey Act is one of our nation's earliest and most enduring wildlife conservation laws. It should be amended to specifically convey emergency listing authority; explicitly authorizing listing of human pathogens as injurious species; and authorizing the regulation of interstate commerce in listed injurious species."

8
Garner, R. (2017). How many zoos are there in the United States?, Why Animals Do The Thing; Richard, Hilary. (2021) Zoo and Aquarium All Hazards Partnership, AZA Connect

9
50 C.F.R. §14.4 - accredited scientific institution definition