

Subcommittee on Water, Power and Oceans
Doug Lamborn, Chairman
Hearing Memorandum

May 15, 2018

To: All Subcommittee on Water, Power and Oceans Members

From: Majority Committee Staff, Subcommittee on Water, Power and Oceans (x5-8331)

Subject: **Oversight Hearing on “Federal Impediments to Commerce and Innovative Injurious Species Management”**
May 17, 2018, at 10:00 AM; 1324 Longworth House Office Building

Policy Overview:

- This hearing will examine the intended and unintended consequences of the Lacey Act of 1900 (16 U.S.C. 3371-3378) on interstate commerce.
- Oftentimes the Lacey Act ensnares otherwise legitimate commerce in the technical aspects of State or foreign laws without advancing substantial conservation benefits.
- This hearing will examine challenges to commerce and modest solutions that promote commercial activity and may better account for the realities of injurious species and trade.

Invited Witnesses (listed in alphabetical order):

Mr. Alexander von Bismarck
Executive Director, Environmental Investigation Agency
Washington, D.C.

Mr. Mike Freeze
Vice-President, Keo Fish Farm, Inc.
Keo, Arkansas

Mr. Mike Rickman
Deputy Director, Operations and Maintenance, North Texas Municipal Water District
Wylie, Texas

Background

The Lacey Act of 1900

The Lacey Act (Act), originally enacted in 1900 and amended thereafter, makes it unlawful to import, export, sell, acquire, or purchase fish, wildlife or plants that are taken, possessed, transported, or sold in violation of federal, State, tribal or foreign law or treaty.¹ Congress originally enacted this law in response to concerns over the health of native species and competition from nonnative species.² The Act authorized the Secretary of Agriculture to reintroduce or bolster native “game, song, and insectivorous birds” to the benefit of U.S. agriculture.³ Secondly, the Act authorized the Secretary of Agriculture to prevent the introduction of foreign wildlife.⁴ Finally, the legislation sought to supplement State laws for the protection of game and birds, by preventing wildlife traffickers from harvesting species illegally in one State and transporting them for sale in States where similar prohibitions do not exist.⁵

Congress approved significant amendments to the Lacey Act in 1969, 1981, 1988 and 2008, among numerous smaller amendments made since the law’s enactment.⁶ The 1969 amendments expanded the Act to include amphibians, reptiles, mollusks and crustaceans.⁷ The 1981 amendments were more comprehensive in nature and focused on increasing civil and criminal penalties while lowering the threshold for an individual’s knowledge of wrongdoing required for convictions under the Act.⁸ The 1988 amendment made prohibitions on wildlife sold in violation of federal, tribal, State or foreign laws uniform throughout the law.⁹ This amendment further strengthened prohibitions and penalties on mislabeling shipments of fish, wildlife, and plants.¹⁰ The 2008 amendment extended the Act’s prohibitions to cover nonnative plants and violations of foreign law. This significant expansion imposed broad compliance requirements for importers covering virtually all global plant species, in the name of curbing international illegal logging.¹¹ There is no evidence that this legislation was effective in its goal of reducing illegal logging.¹² The U.S. Departments of the Interior, Commerce, and Agriculture, acting through the

¹ <https://www.fws.gov/international/laws-treaties-agreements/us-conservation-laws/lacey-act.html>.

² Act of May 25, 1900, §1, 31 Stat. 188.

³ H. Rep. No. 56-474, at 1 (1900).

⁴ Id. at 2.

⁵ Id.

⁶ <https://www.animallaw.info/article/overview-lacey-act-16-usc-ss-3371-3378>

⁷ S. Rep. No. 91-526, at 1(1969).

⁸ [Anderson, R.S. \(1995\). The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking \(16 Pub. Land L. Rev. 27\)](#), at 50.

⁹ Id. at 52.

¹⁰ Id at 52-53.

¹¹ [H. Rep. 110-627 at 893.](#)

¹² [Animal and Plant Health Inspection Service, U.S. Department of Agriculture, Report to Congress with Respect to Implementation of the 2008 Amendments to the Lacey Act, at 25 \(May 2013\).](#)

U.S. Fish and Wildlife Service (USFWS), National Marine Fisheries Service (NMFS) and Animal and Plant Health Inspection Service (APHIS) respectively, enforce the Lacey Act in its current form.¹³

Enforcement and Interpretation of the Lacey Act

Over the years, the thrust of the amendments to the Lacey Act has been increased restrictions and increased penalties. Critics of the Act argue that it imposes foreign laws on American citizens and that enforcement priorities often mire legitimate commercial activity without advancing global conservation.¹⁴ The federal government does not have a centralized collection of applicable foreign laws under the Lacey Act, making it difficult for Americans to comply realistically with the Act, and further providing the Act with a virtually limitless scope.¹⁵ The number of foreign laws, regulations and judicial rulings that may not be readily available in English further complicate compliance with the Act.¹⁶ Compounding the problem is that different U.S. agencies and courts individually determine how to interpret a foreign government's interpretation of its own laws pertaining to Lacey Act enforcement. As one witness testified in 2013 before the Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs (Subcommittee) of the House Natural Resources Committee:

[In the case of *United State v. McNab*], the district court relied on the opinions of officials in the Honduran agriculture department that the McNab defendants violated Honduran law. The appellate court, however, refused to give any weight to the opinions of a Honduran court, the Honduran embassy, and the Honduran Attorney General that the regulations in question were invalid under Honduran law and could not serve as predicate violations

¹³ [Anderson, R.S. \(1995\), *The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking* \(16 Pub. Land L. Rev. 27\)](#), at 54.

¹⁴ [Why should Americans have to comply with the laws of foreign nations?: Hearing before the Natural Resources Committee Subcommittee on Fisheries, Wildlife, Oceans, and Insular Affairs, House of Representatives, 113th Cong., 1, \(2013\) \(Testimony of Paul J. Larkin Jr.\)](#), at 1; [The 2008 Lacey Act Amendments: Hearing before the Natural Resources Committee Subcommittee on Fisheries, Wildlife, Oceans, and Insular Affairs, House of Representatives, 113th Cong., 1, \(2013\) \(Testimony of Travis Snapp\)](#), at 3.

¹⁵ *U.S. v. Molt*, 599 F.2d at 1218-1219.

Courts have placed some restrictions on the applicability of foreign laws pertaining to a Lacey Act violation. In *U.S. v. Molt*, the Third Circuit Court of Appeals dismissed Lacey Act violations based on the laws of Fiji, determining that the foreign law in question need be designed for the protection of wildlife. The foreign law in question was categorized as a revenue measure. In the same case, a violation related to a Papua New Guinea law was upheld as dealing directly with wildlife conservation. However, *Molt* was partially overturned by *U.S. v. Lewis* where a violation of Oklahoma hunting law – strictly a revenue measure – was upheld as a legitimate Lacey Act violation. Citing the Senate Report on the 1981 amendments, this ruling broadly expanded the universe of laws that trigger the Lacey Act. (*U.S. v. Lewis*, 240 F.3d 870).

¹⁶ [Why should Americans have to comply with the laws of foreign nations?: Hearing before the Natural Resources Committee Subcommittee on Fisheries, Wildlife, Oceans, and Insular Affairs, House of Representatives, 113th Cong., 1, \(2013\) \(Testimony of Paul J. Larkin Jr.\)](#), at 5.

under the Lacey Act. The result was that Schoenwetter was sentenced to eight years in a federal prison—a term longer than what some violent criminals spend behind bars—for foreign regulatory offenses that, according to key Honduran officials, did not even violate foreign law.¹⁷

In 2013, the Subcommittee conducted a series of oversight hearings on the Lacey Act and testimony overwhelmingly endorsed requiring federal agencies to compile a list of foreign laws that fall under the Lacey Act.^{18 19}

Protectionist laws dealing with wildlife and natural resource development create unique challenges for Lacey Act enforcement. This was a central issue in the 2011 USFWS raid of Gibson Guitar Corporation (Gibson). Gibson was charged with Lacey Act violations related to imported wood from India. The Indian ebony and rosewood were harvested sustainably, but Indian law prohibits the export of unfinished wood as a way to insulate Indian woodworkers from foreign competition.²⁰ Gibson ultimately settled the case, paying a \$300,000 penalty in addition to a \$50,000 community service payment to the National Fish and Wildlife Foundation.²¹ Although Congress intended the 2008 amendments to reduce illegal logging, the Gibson case demonstrates that technical laws can invoke Lacey Act violations, irrespective of the impact on global conservation.

¹⁷ Id. at 7.

¹⁸ [The 2008 Lacey Act Amendments: Hearing before the Natural Resources Committee Subcommittee on Fisheries, Wildlife, Oceans, and Insular Affairs, House of Representatives, 113th Cong., 1, \(2013\).](#)

¹⁹ [Why should Americans have to comply with the laws of foreign nations?: Hearing before the Natural Resources Committee Subcommittee on Fisheries, Wildlife, Oceans, and Insular Affairs, House of Representatives, 113th Cong., 1, \(2013\).](#)

²⁰ [Why should Americans have to comply with the laws of foreign nations?: Hearing before the Natural Resources Committee Subcommittee on Fisheries, Wildlife, Oceans, and Insular Affairs, House of Representatives, 113th Cong., 1, \(2013\) \(Testimony of Paul J. Larkin Jr.\), at 8.](#)

²¹ [Sheikh, P.A. \(2014\). The Lacey Act: Compliance Issues Related to Importing Plants and Plant Products \(Report No. R42119\) \[February 25\], at 5.](#)

Lacey Act Exemptions Relating to Water Supplies

The Lake Texoma reservoir project, completed in 1944 to control the floodwaters of the Red River, provides a vital water supply and produces hydropower on the Texas/Oklahoma border.²² In 1989, the U.S. Army Corps of Engineers granted an easement and permit to the North Texas Municipal Water District (NTMWD) to construct and operate an intake/pumping station at Lake Texoma.²³ The pump station can transfer - via pipeline - up to 125 million gallons per day out of Lake Texoma to a tributary of Lake Lavon. The NTMWD currently supplies drinking water to over 1.6 million people in the Dallas-Fort Worth Metroplex.²⁴ Since 2009, zebra mussels (listed as an injurious species in 1990)²⁵ have been identified in Lake Texoma's water.



Map 1: Oklahoma-Texas Lake Texoma Boundary.
Source: North Texas Municipal Water District

In December 2010, FWS suspended NTMWD's ability to pump water from Lake Texoma without notice due to Lacey Act restrictions. This was due to a surveyor's error associated with the Red River Boundary Compact Commission that mistakenly located two-thirds of NTMWD's Lake Texoma pump station in Oklahoma instead of Texas (See Map 1). Because of this error, continuing operations at the pump station would result in a violation of the Lacey Act due to the presence of invasive zebra mussels that would be transported across state lines. These restrictions resulted in the loss of 28% of the NTMWD's water supply amid a severe drought.²⁶

In 2012, Congress restored NTMWD's ability to pump water from Lake Texoma by enacting the "*North Texas Zebra Mussel Barrier Act of 2012*" (Public Law 112-237), and in 2014, broadened the exemption through enactment of the "*North Texas Invasive Species Barrier Act of*

²² <http://www.swt.usace.army.mil/Locations/Tulsa-District-Lakes/Oklahoma/Lake-Texoma/History/>

²³ [Legislative Hearing on H.R. 3105, H.R. 3280, H.R. 3324, and H.R. 4032: Hearing before the Natural Resources Committee Subcommittee on Fisheries, Wildlife, Oceans, and Insular Affairs, House of Representatives, 113th Cong., 2, \(2014\) \(Testimony of Mike Rickman\)](#), at 1.

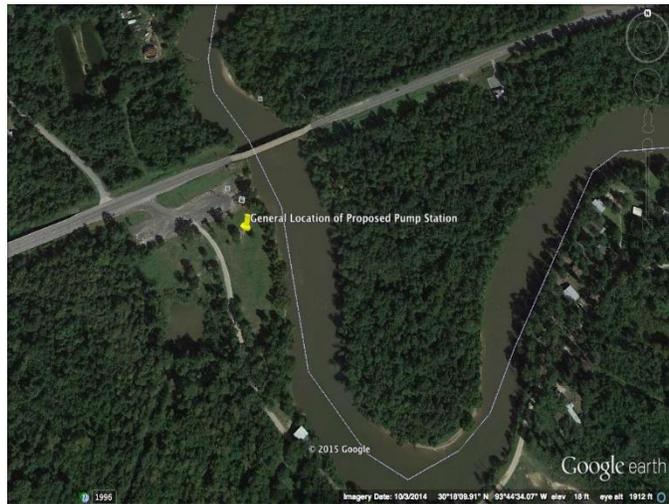
²⁴ *Id.*

²⁵ 104 Stat. 4772

²⁶ [Legislative Hearing on H.R. 3105, H.R. 3280, H.R. 3324, and H.R. 4032: Hearing before the Natural Resources Committee Subcommittee on Fisheries, Wildlife, Oceans, and Insular Affairs, House of Representatives, 113th Cong., 2, \(2014\) \(Testimony of Mike Rickman\)](#), at 1.

2014” (Public Law 113-117), which broadened the NTMWD’s exemption to include all injurious species listed under the Lacey Act.

The Sabine River Authority of Texas, for example, is currently constructing a new pump station located only a few yards away from the Louisiana side of the Sabine River (See Map 2), and authorities are concerned that an invasive species listing would result in catastrophic water supply disruptions.



Map 2: Sabine River Authority Pump Station Location on the Texas/Louisiana Border. Source: Google Earth

To help provide water supply certainty for these communities, Representative Louie Gohmert (R-TX-01) introduced H.R. 1807, the “*Public Water Supply Invasive Species Compliance Act of 2017.*”

The bill aims to provide a path forward to address Lacey Act issues on a multi-state basis as opposed to the case-by-case basis represented by Public Law 112-237 and Public Law 113-117. H.R. 1807 provides for the continued transport of water across Arkansas, Texas and Louisiana if a species listed under the Lacey Act is present in both of the public water supplies between which the water is transferred or if the water is conveyed through a closed barrier conveyance system to treatment facilities where invasive species will be removed.²⁷

Lacey Act Relating to Aquaculture

Secretary of Commerce Wilbur Ross has made reducing the approximately \$11 billion U.S. seafood trade deficit a major policy priority of his tenure, citing responsible aquaculture as a centerpiece of any strategy toward that end.²⁸ Aquaculture is a \$1.4 billion industry in the United States, but faces regulatory hurdles as the industry continues to grow.²⁹ The Lacey Act can be a significant impediment; while the Act is designed to protect wildlife, farmed fish shipments can be ensnared in the Act’s prohibitions as well.

²⁷ [H.R. 1807 \(Rep. Louie Gohmert\), “Public Water Supply Invasive Species Compliance Act of 2017,” 115th Congress, Section 2.](#)

²⁸ [FY19 Budget Hearing – Department of Commerce: Hearing before the Appropriations Committee Subcommittee on Commerce, Justice, and Science, House of Representatives, 115th Cong., 2, \(2018\) \(Secretary Wilbur Ross Q&A with Rep. Steven Palazzo at starting at 1:57:30\).](#)

²⁹ [2007 Census of Agriculture, U.S. Department of Agriculture, Vol. 1, Ch. 1, Table 2.](#)

The Southern Regional Aquaculture Center detailed potential Lacey Act violations relating to aquaculture in a 2012 publication.³⁰ The primary Lacey Act violations relate to a violation of federal species protection laws and violations of State laws in interstate commerce. This report cites the example of a certain fish species that is legal in Wisconsin but prohibited in Minnesota. If even a single prohibited fish or fish egg inadvertently ends up in a large shipment of fish legal in both States, both the Wisconsin seller and the Minnesota buyer could be prosecuted under the Lacey Act.³¹ In this scenario, “what would have been a maximum penalty of 90 days and/or \$1,000 from the State of Minnesota has now turned into a potential year in federal prison and up to \$100,000 in fines.”³² Due to the 1981 amendments and judicial interpretations thereof, knowledge of the prohibited species’ presence and its inadvertent inclusion is immaterial when considering violations of the Lacey Act. In *U.S. v. 2,507 Live Canary Winged Parakeets (Brotogeris Versicolorus)*, the court comprehensively rejected the “innocent owner” defense, stating that the 1981 amendments preclude this as a defense.³³

The decision in *United States Association of Reptile Keepers v. Zinke* added a new wrinkle to the Lacey Act enforcement. The injurious wildlife provision of the Act states “[t]he 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... is hereby prohibited.”³⁴ The U.S. Association of Reptile Keepers (USARK) argued that a plain text reading of this provision precludes shipments between only listed jurisdictions, but not within any one listed jurisdiction. USARK argued this means that it is an inappropriate interpretation of the Act to apply this provision to interstate transport of injurious species.³⁵ On March 10, 2015, the district court struck down the rule prohibiting the interstate transfer of the listed species, and on April 7, 2017, the D.C. Circuit upheld the ruling.³⁶

It is unclear to what degree the USARK ruling alleviates the challenges facing the U.S. aquaculture industry. Aquaculture in Arkansas has faced significant challenges, specifically relating to catfish shipments where small amounts of injurious species, often carp, inadvertently end up in those shipments. In response to these concerns, Rep. Rick Crawford (R-AR-01), introduced H.R 3041, which would exempt persons engaged in the interstate trade of aquaculture

³⁰ [Southern Regional Aquaculture Center, National Institute of Food and Agriculture, U.S. Department of Agriculture, Aquaculture and the Lacey Act \(May 2012\).](#)

³¹ *Id.* at 2.

³² *Id.*

³³ *U.S. v. 2,507 Live Canary Winged Parakeets (Brotogeris Versicolorus)*, 689 F. Supp. at 1111, 1117.

³⁴ 18 U.S.C. 42(a)(1).

³⁵ [U.S. Fish and Wildlife Service, U.S. Department of the Interior, Implementation of the D.C. Circuit Court Decision in United States Association of Reptile Keepers, Inc. v. Zinke, No. 15-5199 \(D.C. Cir. April 7, 2017\), at 1.](#)

³⁶ *Id.* at 2.

from the Lacey Act when inclusion of small amounts of injurious species in the shipment is done unknowingly or unintentionally.³⁷

³⁷ [H.R. 3041 \(Rep. Rick Crawford\), “Aquaculture Risk Reduction Act”, 115th Congress, Section 2.](#)