IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES ASSOCIATION OF REPTILE KEEPERS, INC., *et al.*, Plaintiff, - vs. - THE HONORABLE SALLY JEWELL, *et al.*, Defendants.	Civ. No.: 13-2007-RDM

PLAINTIFFS' SUPPLEMENTAL BRIEF IN RESPONSE
TO THIS COURT'S ORDER OF APRIL 8, 2015

On April 8, 2015, this Court ordered the Parties "to submit supplemental briefing addressing" specified questions, "as well as any other points not raised in the briefing on the Motion for Temporary Restraining Order that either party believes are relevant to the Court's decision whether to grant preliminary injunctive relief." (Order at 1-2 (Dkt. No. 37).) Plaintiffs respectfully provide the requested response and additional argument below:

I. The Traditional Tools of Statutory Construction Confirm that the Plain, Unambiguous Words Congress Used in 1960 Should Govern this Court's Interpretation

"To determine whether Congress has spoken directly to this issue under the first step of the *Chevron* analysis, this Court must use the traditional tools of statutory construction, which include an examination of the statute's text, structure, purpose, and legislative history." *Takeda Pharmaceuticals, U.S.A., Inc. v. Burwell*, Civ. Nos. 14–cv–1668, 1850 (KBJ), 2015 WL 252806, at *23 (D.D.C. January 13, 2015) (citing *Stat–Trade Inc. v. FDA*, 869 F. Supp. 2d 95, 102 (D.D.C. 2012); *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1319 (D.C. Cir. 1998)); and *Eagle Broad. Grp., Ltd. v. FCC*, 563 F.3d 543, 552 (D.C. Cir. 2009)). The text, structure, and history

of the 1960 Lacey Act amendments at issue here all confirm Plaintiffs' reading of the statute. Further, at no time subsequent to 1960 has Congress *ever* revisited the jurisdictional scope of 18 U.S.C. § 42(a)(1)'s ("Section 42") prohibitions. Thus, as explained below in answer to this Court's questions, none of the subsequent legislative history to which Defendants, the Honorable Secretary of the Interior Sally Jewell and the U.S. Fish and Wildlife Service (collectively, "Defendants" or "FWS"), point is of any assistance to this Court's inquiry.

A. Summary of the Interpretation Dispute

Plaintiffs argue Section 42's prohibitions that attach to a designation of a particular species of wildlife as "injurious" do not include a ban on its conveyance for commercial and personal purposes among the 49 continental states. By its terms, the Lacey Act only bars the "shipment" of such species as "between" any two of the listed jurisdictions; *i.e.*, "The continental United States, the District of Columbia, Hawaii, the Commonwealth of Puerto Rico, or any possession of the United States." 18 U.S.C. § 42(a)(1). In some (but not all) listings of particular wildlife as injurious, including the two at issue in this case, however, Defendants have included an additional restriction on any form of transportation not only between these places, but among the continental states as well.[1] These additional conditions exceed those authorized by the Lacey Act's plain terms, as Plaintiffs demonstrate in the subsection below.

B. Application of the Traditional Tools of Statutory Construction

When faced with a challenge to an agency's interpretation of its own statute, a court first must determine whether Congress has spoken clearly to the issue at hand and give effect to any

[1] In addition to the two rules listing non-native constricting snakes, FWS included this ban in its listing of the mitten crab, 54 Fed. Reg. 22286, 22287 (May 23, 1989), brown tree snake, 55 Fed. Reg. 17439, 17440 (April 25, 1990), and the zebra mussel, 56 Fed. Reg. 56942, 56942 (Nov. 7, 1990), among others. Such a condition was not attached, for example, to the listing of the raccoon dog. 47 Fed. Reg. 56360 (Dec. 16, 1982).

intent it finds Congress expressed unambiguously. *Chevron U.S.A., Inc. v. Nat'l Resources Def. Coun.*, 467 U.S. 837, 843 n.9 (1984) ("[T]hat intention is the law and must be given effect."). In relying on the Lacey Act's text, Plaintiffs assert that Congress has clearly expressed a position in unambiguously permitting shipments of injurious wildlife among states within the continental United States. *See* 18 U.S.C. §42(a)(1). All tools this Court may employ in deciding whether this language is ambiguous, and thus to determine whether it needs to engage in *Chevron* Step Two analysis, point in the same direction—no ambiguity for FWS to interpret.

For one, the use of the conjunctive "or" in the list of places between which shipment is prohibited in Section 42 creates no ambiguity. Courts take note that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Halverson v. Slater*, 129 F.3d 180, 186 (D.C. Cir. 1997) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). In the Lacey Act amendments of 1960, Congress used the same "or" construction in what was then 18 U.S.C. § 43: "to or from any State, territory, the District of Columbia, the Commonwealth of Puerto Rico, any possession of the United States, *or* any foreign country." (*See* S. Rep. 1823 at (June 14, 1960) *in* Dkt. No. 31-1 at 000013 (April 3, 2015) (emphasis added).) The salient difference between these two provisions is the use of "*between the continental* United States" in Section 42 and "*to or from any* State" in then Section 43, not the common use of the conjunctive "or" in both.[2]

Moreover, the 1960 legislative history makes this language's purpose plainly apparent. As Plaintiffs noted in their briefs on the temporary restraining order, the language at issue was proposed by FWS itself to deal with a very specific issue. (*See* Pl. Mem. of Points and Auth. in

[2] Thus, there is no ground to argue, as do Defendants, that use of "or" in this context creates a disjunctive list. (*See* Def. Opp'n to Pl. Mot. for a TRO ("Def. Opp'n"), Dkt No. 32 at 13-14.)

Supp. of their Appl. for a TRO ("Pl. TRO Mem.") (Dkt. No. 28-1) at 8-10; Pl. Br. in Reply (Dkt. No. 36) at 5.) Specifically, FWS proposed "broadening the language a bit to prohibit the shipment between the Continental United States and Hawaii, Puerto Rico, and the Virgin Islands of the Mongoose," then established in the latter three jurisdictions. (Dkt. No. 31-1 at 00048.)

Importantly, as the law stood prior to the 1960 amendments, there were no restrictions on any movement of animals listed as injurious between any areas under United States jurisdiction. Following the 1935 amendments, the Lacey Act only prohibited "deliver[y] or knowingly receiv[ing] for shipment, transportation, or carriage in interstate or foreign commerce, any wild animal or bird . . . *imported from* any foreign country . . . contrary to any Act of Congress." 18 U.S.C. § 43 (1960) (emphasis added). In this sense, the 1960 amendment requested by FWS was a partial return to the original law, which prohibited delivery to or by a common carrier of any wildlife "the *importation of which* is prohibited." C. 553, sec. 3, 31 Stat. 188 (May 25, 1900) (emphasis added). Therefore, in full context, the language at issue was modified to reinstate a limited ban on certain shipments; specifically, to prevent the introduction of the mongoose to the continental United States from off-shore states, territories, and possessions. Congress has never again modified or even considered changing this language.

Also, Congress' carefully considered wording in the 1960 amendments mirrors similar use in other statutes. In each instance, Congress uses "between" in conjunction with "the continental United States" to treat the continental states as a singular entity vis-à-vis unconnected places such as Hawaii or Puerto Rico.[3] Congress uses "within" to refer to the several states.

[3] As noted below, Congress defines what it means by the "continental United States" in particular provisions, sometimes including and sometimes excluding Alaska and the District of Columbia. In the Lacey Act, the District of Columbia is separately listed, and thus not included as a continental state, but Alaska is included, as evidenced by the separate listing of Hawaii. Congress was careful about defining its intent in statutes using the term "continental United

The provisions in the U.S. Code which use "*between* the continental United States" and other areas include:

- 46 U.S.C. § 55106 (coastwide trade) ("transportations *between* the continental United States and noncontiguous States, territories, or possessions" where "noncontiguous States" means Alaska and Hawaii);

- 5 U.S.C. §§ 5724(b), 5727(b) (transportation allowance for motor homes and vehicles) (allowance for transportation expenses "*inside* the continental United States, *inside* Alaska, or *between* the continental United States and Alaska," § 5724(b), and "*to, from, and between* the continental United States and a post of duty outside the continental United States, or between posts of duty outside the continental United States," where the statute defines "continental United States" as "the se*veral States and the District of Columbia*, but does not include Alaska or Hawaii, *id.* § 5721(3)) (emphasis added); and

- 37 U.S.C. § 479(a) (travel and transportation allowances for uniformed service members) ("A member . . . who would otherwise be entitled to transportation of baggage and household effects . . . , may be provided transportation of a house trailer or mobile home dwelling *within* the continental United States, *within* Alaska, or *between* the continental United States and Alaska . . . .").

- *See American Trading Co. v. H. E. Heacock Co.*, 285 U.S. 247, 257 (1932) (contrasting two trade-mark provisions, one for "commerce between continental United States and the Philippine Islands" with a different one which protected "the use of trade-marks in interstate commerce") (citing 33 Stat. 731, U.S.C. Tit. 15, § 108).

Of most direct relevance to construing "continental United States" in Section 42's shipment provision[4] is 18 U.S.C. § 5, which defines "United States" as used throughout Title 18 to mean "all places and waters, continental or insular, subject to the jurisdiction of the United States, except the Canal Zone." In light of this overarching definition, it was necessary for

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States" when dealing with the inclusion of Alaska and Hawaii, each of which only attained statehood in 1959. *See* 48 U.S.C. Chapt. 2 (Alaska); *Id.* Chapt. 3 (Hawaii). It took attention to the nuances of each such statute to be correct about whether Congress might still consider Alaska or Hawaii as apart from the lower 48. The same is true for the District of Columbia, which retains its unique status to this day. *See, e.g.,* 18 U.S.C. § 10 (defining D.C. as a separate entity from states and territories for purposes of defining "interstate commerce"). Awareness of Alaska's and Hawaii's very different legal status (*i.e.*, as territories) before 1959 and the District's ongoing unique status was very much alive in 1960.

[4] As distinct, for example, from the use of the unmodified term "United States" in the same section's "importation" provision. *See* 42 U.S.C. § 42(a)(1) (using the phrase "importation into the United States" and not specifically mentioning Hawaii).

Congress to use the modifier "continental" in the "shipment between" provision in order to make it pellucid that the 49 states on the continent were to be treated as a singular entity. Congress' careful and deliberate phrasing evinces a clear intent which this Court is constrained to honor.

II. What is the significance of the amendments to the Lacey Act that provided for listing of the zebra mussel and bighead carp?

The short answer to this question is "none at all." Each bill addressed discrete exigencies as part of a broader effort to deal with significant national environmental problems. In the case of zebra mussels, the provision adding this species to the list of injurious species was one small portion of a much larger bill. As to bighead carp, the Asian Carp Prevention and Control Act ("ACPCA") was only one of several legislative initiatives aimed at addressing the bighead carp crisis. For example, the Close All Routes and Prevent Asian Carp Today Act of 2010 ("CARP ACT"), introduced in identical form in the House and Senate, would have closed all connections between the Mississippi River and Great Lakes. *See* H.R. 4472, S. 2946, 111th Cong. (2010). Another set of related bills, referred to as the "Permanent Prevention of Asian Carp Act of 2010," would have required a feasibility study "of the hydrological separation of the Great Lakes and Mississippi River Basins." *See* H.R. 5625, S. 3553, 111th Cong. (2010). Two other bills in the 111th Congress also addressed the Asian carp issue.[5] With only one drastic solution at hand to control further spread of bighead carp – closing all shipping connections from the Great Lakes to the Mississippi River – Congress took one small step that cost no money and had no

[5] H.R. 51, Eradicating Asian Carp in the Great Lakes Study Act of 2009, would have directed FWS to conduct a study of "methods to eradicate Asian carp from the Illinois Waterway System, including methods for harvesting Asian carp," including their cost and feasibility. H.R. 4604, Asian Carp Action Plan Act of 2010, provided that "the Secretary of the Army shall coordinate and lead the actions of the Federal Government with respect to preventing the spread of Asian carp in the Great Lakes and the tributaries of the Great Lakes."

opposition. ACPCA was subject to no hearings, was adopted by the House under suspension of the rules, and passed the Senate by unanimous consent.

In neither of these bills did Congress revisit the Section 42's prohibitions or re-tailor the Lacey Act's geographic scope at all, much less in the deliberate and conscientious manner it did in 1960 and every other time it considered these issues. Whatever these reports reflect about Senate Environment and Public Works ("EPW") Committee[6] staff's view of the Lacey Act, the reports do not reflect the meaning that Congress intended in 1960 when it directly considered the issue of this criminal's statute geographic scope. As the Supreme Court has long noted,

> If . . . language [in a subsequent committee report] is to be controlling upon us, it must be either (1) an authoritative interpretation of what the [original] statute meant, or (2) an authoritative expression of what the [enacting] Congress intended. It cannot, of course, be the former, since it is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means.

Pierce v. Underwood, 487 U.S. 552, 566 (1988); *see also Verizon v. F.C.C.*, 740 F.3d 623, 639 (D.C. Cir. 2014) (quoting *North Broward Hospital District v. Shalala*, 172 F.3d 90, 98 (D.C. Cir. 1999) (Such "subsequent legislative history is 'an unreliable guide to legislative intent'").

A. How does the purpose of the Lacey Act amendments affect the significance of language in their legislative history suggesting that Congress understood the Lacey Act to prohibit interstate transportation of listed species?

In each case, the amendments at issue were small parts of a solution to big environmental problems. *See supra.* The immediacy of the concerns Congress sought to address demonstrates that no Member or committee paid any attention to the issue that is before this Court. The fact that a Lacey Act listing was not at all likely to be effective in stopping interstate movement of

[6] Which, notably, is not the committee of jurisdiction over Title 18, containing Section 42.

zebra mussels and bighead carp[7] suggests that Congress was grasping for solutions rather than giving serious consideration to the Lacey Act's terms. Further, nothing in the zebra mussel or bighead carp committee reports provides evidence that Congress meant to re-interpret or change the scope of the Lacey Act by adopting the "interstate" language at issue. Both amendments were uncontroversial and approved with extremely limited discussion under expedited legislative procedures. In sum, each amendment's short legislative history does not indicate that Congress understood the Lacey Act to prohibit interstate transportation of the species in question.

For instance, the aquatic nuisance bill which included a provision listing the zebra mussel received minimal floor discussion, no opposition, and no criticism – and was subject to no recorded vote – in either house. H.R. 5390, the "Aquatic Nuisance Prevention and Control Act," passed the House on October 1, 1990. *See* 136 CONG. REC. H8492 (daily ed. Oct. 1, 1990). It was passed via suspension of the rules, a procedure used for non-controversial bills. *Id.* at 8496. Only three members spoke, discussing the impact of the zebra mussels in the Great Lakes and the need to control their introduction via ship ballast water. *Id.* at 8495-96. The Lacey Act listing was not discussed, nor was the phrase "between the continental United States." *Id.*

The Senate version, S. 2244, passed on October 26, 1990. *Id*. S17147 (daily ed. Oct. 26, 1990). As in the House, there was no opposition, no criticism, and no recorded vote. The only relevant statement, included as part of a summary of the bill, was that "it amends the Lacey Act to prevent the interstate transportation of the zebra mussel in commerce." *Id.* at S17156 (statement of Sen. Glenn). This passing statement was not subject to further discussion or elucidation. The Senate passed the bill by unanimous consent, *id.* at 17159, and returned it to the

[7] This is because these are not pets and neither were subject to domestic trade; these animals were (and are) crossing state lines by their own volition. Indeed, while an import ban may have had some value for Asian carp, the zebra mussels were never intentionally imported, but were transported in ballast water of ocean-going vessels. (*See* Dkt. No. 31-1 at 000065.)

House, where it again passed under suspension of the rules, with no opposition, no criticism, and no recorded vote. *Id.* at H13285-87 (daily ed. Oct. 27, 1990). Section 42 was not discussed.

As to bighead carp, the Senate brought up and passed S. 1421 in a lame-duck session just before designating the week of November 15 to 19, 2010, as "Global Entrepreneurship Week." 156 CONG. REC. S7992 (daily ed. Nov. 17, 2010). There was no debate at all, much less discussion of Senate Report 111-181 upon which Defendants rely. (*See* Def. Opp'n at 19.) In the House, the bill adding bighead carp to the Lacey Act came to the floor under suspension of the rules without a committee report. 156 CONG. REC. H7821 (daily ed. Dec. 1, 2010). Unlike the Senate, there was some discussion of the problem sought to be addressed. Six Representatives spoke to the bill, three of whom expressed the view that the listing would restrict "interstate transportation," two of whom noted only that the law would bar imports, and one who did not mention the issue at all. *Id.* at H8721-22 (statements of Reps. Conyers, Poe, Levin, Biggert, Kaptur, and Petri). These statements, made in a lame-duck Congress on a non-controversial bill, may at most reflect individual members' views of the Lacey Act's scope, but cannot be ascribed to Congress as a whole, much less that of the 86th Congress in 1960 when it drafted the language which neither of the bills changed. *See, e.g., Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-67 (1979) (silence of legislative history "is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely").

Nor, while construing this criminal statute, should this Court give weight to the views of the Senate EPW Committee's staff reports for these two bills. As deliberate human transportation of bighead carp or zebra mussels was never at issue, and because these bills were hastily passed under cursory procedures, there passage provides no indication that lawmakers intended to revise the scope of 18 U.S.C. Section 42.

B. Do these amendments reflect an implied amendment of the Lacey Act?

The amendments do not reflect an implied amendment of the Lacey Act, as repeals and amendments by implication are strongly disfavored. Amendments by implication will not be found unless congressional intent is "clear and manifest." *See National Assoc. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662-63 (2007); *Hollingsworth v. Duff*, 444 F. Supp. 2d 61, 65 (D.D.C. 2006) (internal citations omitted). Congress is vested with the authority to "legislate [ ] with knowledge of former related statutes," *United States v. Hsia*, 176 F.3d 517, 525 (D.C. Cir. 1999), and is authorized to "specifically address language on the statute books that it wishes to change." *United States v. Fasuto*, 484 U.S. 439, 453 (1988). Implied amendments "must surmount a high bar, for if 'Congress had meant to repeal any part of any previous statute, it could easily have done so.'" *Hollingsworth*, 444 F. Supp. 2d at 65 (quoting *Hagen v. Utah*, 510 U.S. 399, 416 (1994)). Thus, courts have determined that when Congress leaves intact an older statute, and shows no indication to repeal or eliminate a provision in that statute – let alone a "clear and manifest" intention – the statute in question was not repealed or amended by implication. *See Mittleman v. Postal Regulatory Comm'n*, 757 F.3d 300, 306 (D.D.C. 2014). Nothing in the statutory language above meets this high bar.

C. Do they reflect Congressional ratification of FWS's interpretation of the language at issue in this case?

Similarly, the amendments do not reflect congressional ratification of FWS' implementation of the relevant language. These were two isolated additions to a list, not at all like a full-length re-enactment. This is the polar opposite of the prototypical case in which "the canon of statutory construction [finds] that reenactment [of a law] without change after a course of administrative interpretation is tantamount to legislative ratification of the interpretation." *Thompson v. Clifford*, 408 F.2d 154, 164 (D.C. Cir. 1968) (citing *Commissioner v. Estate of*

Noel, 380 U.S. 678, 682 (1965)); *see also Public Citizen v. Barshefsky*, 939 F. Supp. 31 (D.D.C. 1996) (courts can infer congressional ratification only where the administrative interpretation of the statute at issue was "shown clearly to have been brought to the attention of Congress"). For a re-enact, Congress must re-enact the full text of the relevant statutory provision, not make isolated additions. *See Pub. Citizen, Inc. v. Dep't of Health & Human Servs.*, 332 F.3d 654, 668 (D.C. Cir. 2003) (holding Congress "simply enacted a series of isolated amendments"); *see also Alexander v. Sandoval*, 532 U.S. 275, 292 (2001) ("[W]hen Congress has not comprehensively revised a statutory scheme but has made only isolated amendments, . . . [i]t is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the Court's statutory interpretation." (internal quotation marks omitted)). All these later bills did was to add zebra mussels and bighead carp to Section 42. There was no "comprehensive revision."

When no such re-enactment occurs, even if a congressional committee were to approve, at persuasive length, the agency views, a court will still not find that ratification has occurred. In *Tennessee Valley Authority v. Hill*, 457 U.S. 153 (1978), even though the Appropriations Committee explicitly adopted the FWS' interpretation of the Endangered Species Act ("ESA"), there was no ratification because there was no indication that Congress as a whole was aware of the agency's position. *Id.* at 192. Congress' express awareness of an interpretation is a key element of ratification. There is simply no ratification when applying the law's standards to the facts surrounding the adoption of these later isolated additional listings. The zebra mussel and bighead carp additions were enacted almost offhandedly, without any opposition, any criticism, or any quoting of the criminal provision at issue, and in the absence of even one single recorded

vote in either instance. Congress wanted to pass these two provisions without even informing itself about, let alone ratifying, any issues.

The authority Defendants now claim is no small matter. State wildlife agencies' collective opposition to the 2012 and 2015 rules, *see* 80 Fed. Reg. 12702, 12705 (Mar. 10, 2015), exemplifies the significance under principles of federalism of such an extension of federal authority. During the late 1950's and 1960's, when the 1960 Lacey Act amendments were enacted, the allocation of federal versus state enforcement authority was a defining public policy issue of the era. Indeed, "the Southern states rights' potential opposition to the expansion of federal law enforcement became an entrenched and recurring feature of the federal criminal law debate until well into the 1960s."[8] Therefore, into the 1960s, Congress acted with unmistakable intent when it meant to invoke the interstate commerce power to preempt state power.

When the Kennedy Administration took power in 1961 and sought to increase federal authority over issues such as organized crime and civil rights, "the relationship between federal authority and the states changed fundamentally." Kurland, *supra* n.9, at 19. One example is the Travel Act, 18 U.S.C. § 1952, which expressly federalized certain state crimes, such as gambling, prostitution, extortion, and bribery, involving use of "any facility in interstate or foreign commerce." *Id.* § (a). Civil rights was another issue over which southern states had impeded "expanded police power." Kurland, *supra* n.9, at 19-20. The civil rights issue in the larger sphere was not resolved until Congress did enact, after great struggle, the Civil Rights Act of 1964, Pub. L. 88–352, 78 Stat. 241 (July 2, 1964), to address civil rights through unmistakable invocation of the interstate commerce power. Invocation of federal interstate commerce

[8] Kurland, A.H., *The Travel Act at Fifty: Reflections on the Robert F. Kennedy Justice Department and Modern Federal Criminal Law Enforcement at Middle Age*, 63 CATH. U. L. REV. 1, 10 (Fall 2013) (footnote omitted).

authority to preempt state police powers represents a fundamental issue of federalism, both in 1960 and today. This congressional choice, once made, cannot be fundamentally altered via nearly idle references buried in subsequent legislative history of ancillary statutory amendments.

D. Do they reflect a subsequent Congress' understanding of that language? How does this doctrinal characterization affect the parties' statutory construction argument?

There is no doctrinal characterization to make, as neither the implied amendment nor subsequent ratification doctrines are implicated. For the reasons explained above, there is no evidence in the legislative history of the zebra mussel and bighead carp bills to suggest that Congress intended to, or actually did, revisit the relevant statutory language. As such, neither of these doctrines affect Plaintiffs' demonstration, as expressed in prior briefs and herein, that the enacting Congress' view of the law is correct and that the geographic scope of the Lacey Act's prohibitions should be applied (1) in accordance with the clearly expressed intent of the 1960 amendments, and (2) in accordance with the statute's plain meaning. The unimpressive scraps of legislative materials put forth by Defendants could scarcely rise to a subsequent congressional understanding of the language. *See SEC v. Sloan*, 436 U.S. 103, 120 (1978) (agency interpretation "made known ... at a time when the attention ... of the Congress were focused on issues not directly related to the one presently before the court ... is scarcely the sort of Congressional approval needed for ratification"); *North'n Colo. Water Conservancy Dist. v. FERC*, 730 F.2d 1509 (D.C. Cir. 1984) (no ratification unless Congress was "generally aware" of certain EPA regulations); *Rivers v. Rosenthal & Co.*, 634 F.2d 774 (5th Cir. 1980) (general congressional awareness of agency's view can be presumed from extensive deliberations, not a "few fleeting references").

III. Is there any authority for the proposition that, pursuant to 28 U.S.C. § 2401(a), the statute of limitations governing a challenge to an agency's regulation can begin to run before the agency promulgates the challenged regulation?

Plaintiffs are unaware of any such authority. Rather, claims brought under the Administrative Procedure Act "must be commenced within six years after the right of action first accrues." *Harris v. FAA*, 353 F.3d 1006, 1009 (D.C. Cir. 2004) (citing 28 U.S.C. § 2401(a)). The right of action first accrues "on the date of the final agency action." *Id.* at 1009. In a case challenging an agency regulation, the relevant "final agency action" is the agency's promulgation of the final rule. *See, e.g., Center for Law & Educ. v. U.S. Dep't of Educ.*, 209 F. Supp. 2d 102, 110 n.9 (D.D.C. 2002) ("final agency action" with regard to agency rulemaking is "typically the promulgation of the final rule" and there exists a "long tradition in federal administrative law which authorizes judicial review of agency rules at the time those rules are promulgated"). This threshold was met with the publications of the January 2012 and March 2015 rules listing, in total, eight species of constricting snakes as injurious under the Lacey Act and applying the condition to ban these snakes' interstate transport. Plaintiffs challenge each rule well within the six year limitations period.

A. The Relevant Final Agency Action is the Agency's Promulgation of the 2012 and 2015 Final Rules

There is no basis for this Court to decide the limitations "clock" began to run against Plaintiffs any earlier than when the snake listings occurred. As Plaintiffs note in their memorandum in support of their application for a TRO (Dkt. No. 28-1, at 13), Defendants have promulgated no general rule purporting to interpret the Lacey Act's language describing its geographic scope; to wit, "between the continental United States, the District of Columbia, Hawaii, the Commonwealth of Puerto Rico, or any possession of the United States." 18 U.S.C. § 42(a)(1). FWS' implementing regulations, first adopted in 1965, use the same language as in the

statute and quoted above. *See* 50 C.F.R. § 16.3. Defendants never proposed adopting the definition for "between the continental United States" and elsewhere that is applied in the rules at issue. Indeed, the only time Defendants proposed interpretative language, their reading agreed with that proposed by Plaintiffs in this case. (*See* Pl. TRO Mem. at 11-12.)

Thus, if this case were to be considered time-barred, the only possible basis for starting the limitations period would be the FWS' first assertion of the authority to bar transportation within the continental states when it applied that condition in the preamble to the rule listing mitten crabs in 1989. *See* 54 Fed. Reg. at 22286. However, the mitten crab rule did not purport to establish conditions beyond those for that species; nor has any of FWS' other Lacey Act listings extended its application beyond species subject to the listing.[9] The previous FWS interpretation of the Lacey Act's provision limiting the transport of certain injurious species "between the continental United States" and other territories had no direct effect on the business of the parties in question here. Plaintiffs had no reason to be aware of these rules or conditions contained therein; nor would they have had standing to challenge those rules even had they been aware of their existence. Further, by adding the transportation and shipment provision to the two rules at issue, FWS has rendered the issue fit for judicial review. *See Public Citizen v. Nuclear Regulatory Comm'n*, 901 F.2d 147, 152-53 (D.C. Cir. 1990) ("We believe the law to be that where an agency reiterates a rule or policy in such a way as to render the rule or policy subject to

[9] In this sense, FWS' actions in barring certain conveyance is a condition of each listing, are not dissimilar to those it may require under an ESA, 16 U.S.C. §§ 1531-1544, incidental take statement ("ITS"). *See id.* § 1539(a). Terms and conditions it may require in an ITS governing oil and gas exploration activities that may result in a take of a lesser prairie chicken do not, for example, become conditions of a later-adopted ITS for the dunes sagebrush lizard. There, as here, each is an independent rule subject to its own statute of limitations.

renewed challenge on any substantive grounds, a coordinate challenge that the rule or policy is contrary to law will not be held untimely because of a limited statutory review period.").

Finally, the D.C. Circuit has affirmed the rule that "a party against whom a rule is applied may, at the time of application, pursue substantive objections to the rule, including claims that an agency lacked the statutory authority to adopt the rule, *even where* the petitioner had notice and opportunity to bring a direct challenge within statutory time limits." *Indep. Cmty. Bankers of Am. v. Bd. of Governors of Fed. Reserve Sys.*, 195 F.3d 28, 34 (D.C. Cir. 1999) (citations omitted, emphasis added). In this instance, there was no notice and no opportunity for these Plaintiffs to challenge the condition limiting all interstate movement of the prior listed species.

B. If this Court rules that the six-year limitations period has passed, Plaintiffs here can still challenge the regulation in question.

If the Court rules that the limitations period was triggered by FWS' listing of the mitten crab in 1989, Plaintiffs can still challenge the application of the same transportation condition to large constricting snakes, provided that the ground for the challenge is that the agency exceeded its constitutional or statutory authority. It is well-established that one may bring an applied challenge outside the six year limitations period. *See, e.g., Coal River Energy, LLC v. Jewell*, 751 F.3d 659, 664 (D.C. Cir. 2014) (jurisdiction lies for substantive challenge when rule is applied) (citing *Indep. Cmty. Bankers*, 195 F.3d at 34). Plaintiffs know of no authority that prevents a party from bringing suit within six years of the time an agency action became final as to that person. Here, FWS enacted the conveyance condition in its listing of the snakes and applied this rule against Plaintiffs, both ripening their claim and rendering it justiciable.

The law strongly favors such applied challenges. They are more consistent with purposes of deferring to the legislative process and resolving concrete disputes. *See Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1884, 1190-91 (2008) (discussing the court's

preference for applied challenges); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328-30 (2006) (same). Such a challenge to the substantive validity of a final agency action may be brought via a declaratory judgment action where a plaintiff has, as here, a credible fear of prosecution. *See Edwards v. District of Columbia*, 943 F. Supp. 2d 109, 114-16 (D.D.C. 2013).

To sustain such challenge, the Plaintiff "must show some direct, final agency action involving the particular plaintiff within six years of filing suit." *See Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997).[10] Likewise, this Circuit has long held that jurisdiction to hear a case exists "when a rule is 'brought before this court for review of further [agency] action applying it.'" *Murphy Exploration & Prod. Co. v. U.S. Dep't of Interior*, 270 F.3d 957, 958 (D.C. Cir. 2001) (quoting *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958)). This is "because 'administrative rules and regulations are capable of continuing application,' [so] were we to limit review to the adoption of the rule without further judicial relief at the time of its application, we 'would effectively deny many parties ultimately affected by a rule an opportunity to question its validity.'" *Id.* at 58-59 (quoting 270 F.2d at 958); *see also Natural Res. Def. Council v. E.P.A.*, 513 F.3d 257, 260 (D.C. Cir. 2008). Thus, even if the original limitations period was triggered by FWS' listing of the mitten crab in 1989, there is no question that Plaintiffs' challenges to the January 2012 and March 2015 rules have been timely lodged because Plaintiffs' complaint was filed within the *new* six-year limitations period following the agency's application of the final rule to these *particular* Plaintiffs.

[10] In *Dunn-McCampbell*, the court found that "an agency's application of a rule *to a party* creates a new, six-year cause of action to challenge to [sic] the agency's constitutional or statutory authority" and noted that, to sustain such a challenge, the plaintiff "must show some direct, final agency action *involving the particular plaintiff* within six years of filing suit." *Id.* at 1287 (emphasis added).

Plaintiffs had no standing or cause to challenge any of the prior listings. Here, however, there is no doubt that constricting snakes rules "affect" Plaintiffs or that these challenges were brought within six years. Thus, this Court has jurisdiction over Counts One and Two.

IV. Are agencies entitled to Chevron deference when they interpret criminal statutes?

In brief, the answer to this question is "no." Recent Supreme Court jurisprudence underscores that "criminal laws are for the courts, not for the Government, to construe." *Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014). The Supreme Court has emphasized that it has "never held that the Government's reading of a criminal statute is entitled to any deference." *See United States v. Apel*, 134 S. Ct. 1144 (2014). *Apel*, *Abramski*, and this case all involve the construction of Title 18, the U.S. Criminal Code. *See* 134 S. Ct. at 2274. Because the FWS has construed a provision of Title 18, the part of the Lacey Act at issue here is not a place where Congress has given the FWS broad latitude.

Indeed, in a short statement accompanying the denial of *certiorari* in *Whitman v. United States*, 135 S. Ct. 352 (2014), Justice Scalia, joined by Justice Thomas, addressed an issue different from that here. Justice Scalia began by reiterating the general rule: "A court owes no deference to the prosecution's interpretation of a criminal law.'" *Id.* at 352-53 (quoting *Abramski*, 134 S. Ct. at 2274). Noting that *Whitman* involved a criminal case arising under § 10(b) of the Securities Exchange Act of 1934, 48 Stat. 491, as amended, *codified at* 15 U.S.C. § 78j(b), Justice Scalia then raised the next question: "Does a court owe deference to an executive agency's interpretation of a law that contemplates both criminal and administrative enforcement?" *Id.* at 353. Indicating that providing such deference "would … upend ordinary principles of interpretation," Justice Scalia stated that "[d]eferring to the prosecuting branch's expansive views of [such] statutes 'would turn [their] normal construction ... upside-down,

replacing the doctrine of lenity with a doctrine of severity.'" *Id.* (quoting *Crandon v. United States*, 494 U.S. 152, 178 (1990) (SCALIA, J., concurring in judgment)) (third alteration in original). Noting that Whitman did not seek review on the question of deference, Justices Scalia and Thomas concurred in the denial of *certiorari*. *Id.* at 354.

While the question of deference owed an agency construing a civil statute which also calls for criminal penalties may be open, it is not one that applies to this case. The Securities and Exchange Act is not a criminal statute in the criminal code, but rather it extends civil and criminal liability to statutory and regulatory violations of a civil law. By contrast, Section 42 is a core criminal statute providing only criminal penalties. *See id.* § (b) (violators "shall be fined under this title or imprisoned not more than six months, or both").

Even so, it is apparent that Justices Scalia and Thomas would not extend deference to agencies' interpretations of civil statutes and implementing regulations carrying civil and criminal penalties for their violation because such deference "collide[s] with the norm that legislatures, not executive officers, define crimes." 134 S. Ct. at 353. "Undoubtedly Congress may make it a crime to violate a regulation, … but it is quite a different matter for Congress to give agencies—let alone for us to presume that Congress gave agencies—power to resolve ambiguities in criminal legislation." *Id.* While the extension of the rule set forth in *Apel* and *Abramski* to crimes provided for in civil statutes will remain undecided by the Supreme Court for the time being, it is an academic matter to this case.

B. Even Were it To Apply, *Chevron* Does Not Aid Defendants

As in any case involving an agency interpretation of a statute, the threshold, or "step zero," question for purposes of *Chevron* analysis starts with issue of the regulatory authority granted the agency by Congress. In *U.S. v. Mead Corp.*, 533 U.S. 218 (2001), Justice Souter

determined that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Id.* at 226-27. By way of example, the Securities and Exchange Act, at issue in *Whitman*, provides express authority to promulgate implementing, interpretative rules. See 15 U.S.C. § 78(j).

By contrast, Section 42, grants the Secretary no specific authority to craft broad regulations, but only the authority to "prescribe by regulation" additional wild animals deemed "injurious."[11] 18 U.S.C. § 42(a)(1). Defendants have explicitly *not* been granted authority to determine the scope of the prohibitions that attach to such designations. The actual substantive offense determined by the statute as written in 1960.

Further, it is the "the well-reasoned views of the agencies implementing a statute [that] 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *Bragdon v. Abbott*, 524 U. S. 624, 642 (1998) (quoting *Skidmore v. Swift & Co.*, 323 U. S. 134, 139-40 (1944)); *see also Mead*, 533 U.S. at 227. In this case, Defendants have provided no analysis, reasoned or otherwise. Rather, FWS' flip-flop from its earlier and correct understanding of the law was never announced or explained. FWS simply provided the following condition to its final rule listing the mitten crab "[i]n addition" to the Lacey Act prohibition on "shipment between":

> [N]o live mitten crab, viable eggs, or progeny thereof acquired under permit may be sold, donated, traded, loaned, or transferred to any other person

[11] Moreover, none of the regulations FWS promulgated to enact Section 42 provide any interpretation of the "between the continental United States," but merely recite the phrase verbatim. Thus, Defendants are owed no deference at all in any event. *See, e.g., Liparota v. United States*, 471 U.S. 419, 430 n.13 (1985) ("We fail to see how this sentence, which merely parrots the terms of the statute, offers any enlightenment as to what those terms mean.").

> unless such person has a permit issued by the Director of the Service. The interstate transportation of any live mitten crabs or viable eggs thereof that currently may be held in the United States for purposes such as aquaculture propagation or for human consumption, or for any purpose not otherwise permitted, would be prohibited.

54 Fed. Reg. at 22287; *see also* 56 Fed. Reg. 56943 (including both the "shipment between" and "additional" transportation conditions for zebra mussels). The quoted condition contained in a preamble includes no analysis, no application of informed judgment, nor even recognition that the agency was changing its position.[12] As such, Defendants' interpretation should fail at Step Zero. Plaintiffs have explained the myriad other reasons why Defendants' "interpretation" is entitled to no deference. (*See, e.g.*, Pl. TRO Mem. (Dkt. No. 28-1) at 13-21.)

V. Must a plaintiff alleging failure to comply with the Regulatory Flexibility Act demonstrate that the plaintiff was prejudiced by the alleged failure in order to obtain relief? If so, did the alleged failure to comply with the Regulatory Flexibility Act result in any prejudice to Plaintiffs in this action?

An agency's failure to adhere to the RFA's requirements cannot be entirely harmless, but the prejudice that needs to be shown for a procedural RFA injury is minimal.[13] "'[P]rocedural rights are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992). "A plaintiff who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been

[12] *See FCC v. Foc Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009) ("To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.") (citing *United States v. Nixon*, 418 U.S. 683, 696 (1974)).

[13] *See, e.g., U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 42 (D.C. Cir. 2005) (citing *Sprint Corp. v. FCC*, 315 F.3d 369, 377 (D.C. Cir. 2003) (a final rule's "uncertain" effect can suffice).

altered. All that is necessary is to show that the procedural step was connected to the substantive result." *Sugar Cane Growers Co-Op. of Florida v. Veneman*, 289 F.3d 89, 94-95 (D.C. Cir. 2002).

In the present case, Defendants' failure to prepare meaningful regulatory flexibility analyses for the March 2015 rule deprived Plaintiffs of the opportunity to engage in the "informed and detailed discussion" the RFA is intended to foster. *Southern Offshore Fishing Ass'n v. Daley* ("*SOFA II*"), 55 F. Supp. 2d 1336, 1338 (M.D. Fla. 1999), *vac'd on settlement*, 2000 WL 33171005 (M.D. Fla., Dec. 7, 2000). A rational RFA analysis begins with a rational recognition of a regulation's impacts. *See North Carolina Fisheries Ass'n v. Daley*, 16 F. Supp. 2d 647, 653 (E.D. Va. 1997) (arbitrary and capricious not to afford "significant consideration" to economic impacts). The RFA's requirement for notice and an opportunity to comment on small business impacts and participate in development of alternatives to minimize the most serious of these, is integral to the conduct of a rational, compliant record-based RFA process. *SOFA v. Daley* ("*SOFA I"*), 995 F. Supp. 1411, 1436 (M.D. Fla 1998).

The record demonstrates FWS did engage in meaningful discussion with the larger reptile-related businesses focused on the boa constrictor; this snake is more of a commodity item. The record, moreover, reflects FWS engaged with these larger businesses because the agency understood the practical extent of the established domestic trade in boas and the economic impact of virtually eliminating trade via a listing. In fact, FWS took a step – relying on state regulation and private initiatives – that the agency had previously explicitly rejected.[14]

[14] *See* FWS, Final Regulatory Flexibility Analysis (Jan. 2012), at 12 (noting the dependence of Surinamboas.com on boas constrictors for "all revenues"), appended hereto as Exhibit A; *see also id.* at 5 (FWS "cannot rely on a State permitting program" and such approach "is not within the authorities of the injurious wildlife provisions of the Lacey Act). (Plaintiffs note that they

The record does not reveal a reasonably equivalent level of dialogue relating to higher-value reticulated pythons and green anacondas. As Plaintiffs' declarations explained, specialty breeders of these latter species tend to be among the smaller businesses in the trade. The market for more high-value, specially-bred snakes had narrowed following the 2012 listing, but is rebuilding. Specialty breeders' small size and specialization render them particularly vulnerable to a listing of reticulated pythons and green anaconda. They explained these facts to FWS in their comments during the 2014 re-opened comment period. As Kevin McCurley put it well, these entities had no idea that FWS did not understand their business or their near-total dependence on reticulated pythons (primarily) and also green anacondas. (*See* Decl. of Kevin McCurley (Dkt. No. 28-9, Ex. G), at ¶¶ 9, 26-27.)

The FWS's 2015 FRFA confirms the agency either did not understand about these entities or else took pains to minimize the 2015 rule's impact on them. In the 2015 FRFA, Defendants claimed these two species account for only ten percent of the average annual retail value the ascribed to domestic-bred constrictor snakes ($3.4 million out of $34.6 million), and that average annual impacts on "affected businesses" from the alternatives identified in as Alternative 2B were only (at the higher end) likely to be between $2,400 and $3,700. (Dkt. No. 31-4 at 13.) This figure grossly underestimates losses to specially breeders and, reminiscent of the National Marine Fisheries Service's tactic in *Southern Offshore*, was a simple averaging technique to minimize that impact.

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inadvertently attached the Final Economic Analysis (Jan. 12, 2012) as Exhibit 3 to the Parties' Joint Notice (Dkt. No. 31-3) (April 3, 2015).)

The point is not that these figures are ridiculously low, although they are.[15] Rather, the utter lack of FWS' meaningful analysis in advance of the final 2015 rule, and accompanying FRFA, never put Plaintiffs on notice that FWS considered the impacts of the action it chose (listing reticulated pythons and green anacondas, but not boas) to be so utterly minimal. Accordingly, small business specialty breeders had no way of knowing the FWS did not "get it" about this sector.

The prejudice is as follows: Had the FWS engaged in meaningful RFA outreach and analysis relating to the 2015 rule, Plaintiffs would have had notice that the agency perceived significant economic impact from a boa listing but essentially no material economic impact for a reticulated python and green anaconda listing. As no supplemental IRFA was produced, nor was such analysis presented in any other RFA documentation available to Plaintiffs, smaller entities that specialize in reticulated pythons and green anacondas had no way to address this discrepancy in their comments. Had Defendants supplied analysis of the actual alternatives under consideration, including an assessment of the impacts it foresaw from the listing of the reticulated python and green anaconda, the public would have had notice that FWS: (1) fundamentally misunderstood the universe of small entities that specialize in these species and the magnitude of the impacts of their listing; and (2) was reconsidering the alternative of allowing state regulation as an alternative (for boa constrictors, anyway).

While the RFA does not require FWS to reach a different result, it does mandate a process that, if followed, would have led to a reasonably-informed, record-based decision that

[15] Declarants alone have conservatively identified economic impacts well in excess of $3 million stemming from the potential loss of income attributable to the captive breeding and sale of reticulated pythons, as well as to ongoing maintenance costs pertaining to incubating eggs. *See* Dkt. No. 28-9, Exs. B, D, E, F, G, H, J, K and L.

the FRFA process was designed to ensure. 5 U.S.C. § 604(a). The impact of FWS' failure is thus not speculative, and satisfies the prejudice standards applicable to procedural rules.

VI. Additional Support for the Finding of Irreparable Harm

Plaintiffs append hereto, as Exhibit B, the Declaration of Dr. Scott J. Stahl, a veterinarian specializing in large constricting snakes, including those of Declarant David Riston. (Riston Decl. (Dkt. No. 28-5), ¶ 5.) As Dr. Stahl notes, there are many clients in the same situation as Mr. Riston, i.e., owners of reticulated pythons and green anacondas, located in states without adequate specialists to provide life-saving care. (Stahl Decl. ¶ 6.) These clients deliver or ship these animals to Dr. Stahl's clinic for needed care. (Id. ¶¶ 5-6.)

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their Application for a Preliminary Injunction and Relief Pending Review.

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Respectfully submitted,

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