United States Association of Reptile Keepers

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BY EFILE

Ms. Tina Campbell, Division Chief
Division of Policy, Performance, and Management Programs
U.S. Fish and Wildlife Service
MS: BPHC
5275 Leesburg Pike
Falls Church, VA 22041–3803

Re: Interim Rule: Listing Salamanders Due to Risk of Salamander Chytrid Fungus, Docket No. FWS–HQ–FAC–2015–0005

Dear Ms. Campbell:

This letter is submitted by the United States Association of Reptile Keepers ("USARK"), in response to the U.S. Fish and Wildlife Service's ("FWS") interim rule to list 201 species of salamanders as injurious wildlife due to the risk of salamander chytrid fungus (hereafter, "interim rule").[1] USARK is a science, education and conservation-based non-profit membership organization representing responsible breeders, hobbyists, conservationists, business owners, herpetologists, and scientists who work with or in the herpetocultural industry.

In brief, USARK and its members are extremely concerned about the potential introduction of the chytrid fungus *Batrachochytrium salamandrivorans* ("Bsal") into the United States. Bsal has already had disastrous impacts on certain salamander populations in Europe, and we deeply fear it becoming established domestically. For that reason, USARK agrees that a temporary ban on imports of species susceptible to Bsal is justified until a time that proper sampling and certification protocols are developed. However, the Lacey Act[2] is not the proper law to achieve this end, nor is FWS the agency that should be implementing this rule. Rather, the Department of Agriculture's ("USDA") Animal and Plant Health Inspection Service ("APHIS") should institute an import moratorium under the authority granted by the Animal Health Protection Act ("AHPA").

Even were the Lacey Act appropriate for preventing the introduction of animal disease into the United States, which USARK argues it is not, it is far too blunt an instrument for achieving our shared conservation goal. As you know, the United States is not only home to the broadest array of wild salamander species, but salamanders are also domestically bred as pets and studied broadly across many fields of science. They comprise a significant portion of the herp pet trade. Many children grow up appreciating nature and wildlife only because of personal interactions they had with pets. Amphibian pets have lead many children onto paths studying biology and conservation, leading to critical roles in our society. In addition, captive bred animals allow for

[1] 81 Fed. Reg. 1534 (Jan. 13, 2016).

[2] 18 U.S.C. § 42(a).

personal interactions during educational outreach programs, which help tens of thousands of school children annually learn about nature firsthand, which simply can never be replicated through book and videos. Amphibians are very important to children and adults allergic to other types of house pets. Quite simply, these animals kept in captivity and this industry are important to our nation's citizens.

Since many species are facing threats of extinction due to human encroachment, pollution and loss of habitat while hobbyists maintain captive breeding populations kept viable through interstate trade, overreach from an unjust rule may indeed harm conservation efforts. As habitat continues to be eliminated for many species, the captive populations of these animals will be all that remain, with the only other option being extinction. In fact, it is a salamander species that is a shining example of conservation through captive propagation. The axolotl (*Ambystoma mexicanum*), which reproduces readily in captivity and is bred by many hobbyists in the U.S., is listed as a critically endangered species by the International Union for Conservation of Nature. As demand for water from an ever-increasing human population leads to draining of the lakes comprising their natural range and added pressure for consumption as traditional food continue to decimate wild axolotls, the species may soon only survive in captivity. While not listed under this rule as injurious, similar conditions already exist for other species.

Under FWS' misinterpretation of the Lacey Act, all interstate commerce and even personal transport across all state lines and other political boundaries of species deemed injurious are forbidden.[3] Even if the law had such an effect, such a prohibition is entirely unnecessary to protect domestic wild salamanders because, as FWS itself notes, Bsal is not present in the United States. Thus, a blanket restriction on salamander transportation, such as included in the interim rule, would all but eliminate the presence of many popular and commercially important species. Such a prohibition would eliminate the opportunity for responsible hobbyists and businesses to move captive bred offspring across state lines while doing nothing to aid conservation. In short, the apparently non-existent risk of Bsal becoming established nationally through the movement of domestically bred salamanders and captive individual pets does not supply sufficient justification for the interim rule's extreme measures.

Therefore, and for all the reasons described below, USARK urges FWS to reject the interim rule and immediately begin working with APHIS to institute an import ban based on the threat posed to native salamanders by Bsal. Alternatively, FWS should revise the interim regulations to allow for the interstate commerce in salamanders and also allow personal transportation of such animals. Furthermore, the Service should remove all domestic genera from the regulations, as the Lacey Act may only be applied to non-native species.

I. THE LACEY ACT DOES NOT GRANT FWS AUTHORITY TO REGULATE WILDLIFE DISEASES, NATIVE SPECIES, MOST DOMESTIC SHIPMENTS, OR PERSONAL TRANSPORTATION

Several federal agencies share authority, derived from a multitude of statutes, for the prevention and management of animal-borne disease. As a matter of law and policy, APHIS, not

[3] As explained below, the Federal District Court for the District of Columbia found just last year that this reading of the law is wrong.

FWS, is the appropriate agency to regulate wildlife disease. Moreover, the Lacey Act provides no explicit authority to regulate pathogens generally or wildlife that is native to the United States. Indeed, FWS has never listed a native species as injurious under the Lacey Act. The new regulations therefore adopt a major policy change that the agency has not adequately acknowledged, justified in the interim rule, or has the legal authority to enact. Furthermore, the interstate commerce and transportation restrictions in the interim rule are not consistent with FWS' authority under the Lacey Act.

A. Other Agencies Lead Federal Efforts in Wildlife Disease Management

The prevention, detection, control, and treatment of animal-borne diseases are complex endeavors, and such diseases can affect a broad range of domestic interests. As a result, Congress has granted authority to different federal agencies to manage different aspects of these tasks. For example, the Centers for Disease Control and Prevention ("CDC") regulates the importation of animals under the Public Health Service Act if it determines those animals pose a risk to human health.[4] Customs and Border Protection ("CBP"), for its part, holds primary inspection authority under the Homeland Security Act for international shipments of animals.[5] Those roles are clearly defined by statute.

Similarly, the management of diseases posing a risk to wildlife is explicitly granted by statute to APHIS. The Animal Health Protection Act authorizes APHIS to restrict import of live animals determined to pose a disease risk to animals, people, commerce, or the environment.[6] Further, the Animal Damage Control Act ("ADCA") authorizes the Secretary of Agriculture to conduct a program of wildlife services with respect to injurious animal species and take any action necessary in conducting that program.[7] In response, APHIS created its Wildlife Services ("WS") and National Wildlife Disease Programs ("NWDP"). The primary task of the WS is to "provide Federal leadership and expertise to resolve wildlife conflicts to allow people and wildlife to coexist."[8] NWDP's complementary mission is to "promote[] safe agricultural trade by protecting the health of humans, animals, plants and ecosystems to reduce the levels of incurred losses to agricultural and natural resources."[9] These goals squarely align with disease management activities.

In contrast, to the best of our knowledge, FWS has no existing policy or program for the direct control of wildlife diseases. FWS restricts importation of injurious species and unlawfully

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[4] 42 U.S.C. §§ 201 *et seq.*

[5] 6 U.S.C. § 231.

[6] 7 U.S.C. § 8301(1).

[7] *Id.* § 426.

[8] U.S. Dept. of Agriculture, *Wildlife Damage Management* (May 14, 2013), *available at* https://www.aphis.usda.gov/wildlife_damage/.

[9] U.S. Dept. of Agriculture, *National Wildlife Disease Program* (July 24, 2015), *available at* http://www.aphis.usda.gov/aphis/ourfocus/wildlifedamage/programs/sa_nwdp/ct_national_wildlife_disease_program.

obtained wildlife through the Lacey Act.[10] While the use of the term "injurious" in this regard bears some resemblance to APHIS' mandate under the ADCA, FWS has consistently taken the lead on efforts to control invasive species under the Lacey Act and related laws, while for monitoring and responding to wildlife diseases it has only taken a participatory role in conjunction with APHIS and other agencies.

The congressional record supports this division of authority. Congress has considered a series of bills with the purpose of establishing an improved regulatory process to prevent the introduction and establishment of wild animal pathogens that are likely to cause harm to the environment or animal health. Those bills would have given FWS "the primary authority to prevent, and the primary responsibility for preventing, the importation of, and interstate commerce in, wildlife pathogens and harmful parasites"[11]—an authority it does not currently hold. None of those bills were enacted into law. Therefore, congressional intent does not support FWS authority over this regulatory process.

Moreover, there is convincing evidence that neither FWS *nor* APHIS hold jurisdiction to regulate interstate transportation of some salamanders. This jurisdictional inquiry is complicated by the fact that salamanders are not only wildlife, but pets. Although the pet trade is primarily regulated by USDA agencies, including APHIS, requirements for the movement of pets across state lines are generally reserved to individual states.[12] Furthermore, courts have often found individual animals to be exempt from livestock regulations that would otherwise apply, when those animals are characterized as household pets.[13] Salamanders in the pet trade should similarly not be considered "wildlife" for purposes of federal regulation of interstate transport.

B. The Lacey Act Does Not Authorize the Action Taken in the Interim Rule

The Lacey Act prohibits the importation of species of wild mammals, birds, fish, amphibians, and reptiles which the Secretary of the Interior prescribes 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."[14] It does not include disease as a listing factor, nor does FWS include disease as one of its criteria to evaluate whether a species qualifies as injurious

[10] 18 U.S.C. § 42; 16 U.S.C. Chapt.53.

[11] *See* H.R. 996, 113th Cong. (2013); S. 1153, 113th Cong. (2013).

[12] U.S. Dept. of Agriculture, *Questions and Answers about Pet Travel* (Nov. 30, 2015), *available at* https://www.aphis.usda.gov/aphis/ourfocus/importexport/animal-import-and-export/travel-with-a-pet/ct_pet_travel_qas ("USDA does not set requirements for the movement of pets across state or territorial lines. The requirements are actually set by each individual state or territory").

[13] *See, e.g.*, *State v. Nelson*, 499 N.W.2d 512 (Minn. Court of Appeals 1993) (finding that a pet rooster is not livestock prohibited by a zoning ordinance); *Foster Village Community Ass'n v. Hess*, 667 P.2d 850 (Haw. App. Ct. 1983) (finding that a pet pig was not subject to a community association's restriction on livestock despite falling broadly under that definition); *Barnes v. City of Anderson*, 642 N.E.2d 1004 (Ind. Ct. App. 1994) (finding that the owner of Sassy the pot-bellied pig owner was allowed to keep her because "[t]he policy behind the ordinance of preventing farming in residential districts will not be furthered by the removal of Sassy").

[14] 18 U.S.C. § 42(a)(1).

under the Act.[15] Disease is not mentioned under the Lacey Act because, as explained above, it is not the appropriate authority to control the movement of animal disease.

Several more aspects of the Lacey Act indicate that it is not an appropriate vehicle for regulating disease. First, as FWS bluntly concedes in its interim rule, it does not provide the authority (nor does FWS have the capacity) to establish and enforce a quarantine system[16]—a system that is clearly integral to the prevention of disease introduction. Second, it does not allow for any permitting system to be created to transport an animal that is proven to be disease-free, except in extremely narrow circumstances.[17] In other words, if a species is listed under the Lacey Act, no animal of that species may ever be imported to the United States *even if* adequate testing and certification processes are developed in the future. Existing statutes, agreements, policies, protocols, and common sense all substantiate the notion that the Lacey Act was never intended to address disease.

C. APHIS Has Experience Managing Wildlife Diseases but FWS Does Not

APHIS has a rich history of managing wildlife diseases under the AHPA and ADCA. While much of its regulation has focused on preventing or managing the spread of disease among livestock,[18] it has also used its authority to regulate zoonotic disease in the pet trade[19] and a disease among lake fishes that affects stocked and wild individuals.[20] Moreover, in an action closely related to the one at hand, it issued regulations to address the spread of heartwater disease to livestock from ticks on imported tortoises. It appropriately did so by prohibiting importation of three tortoise species and requiring a certificate of veterinary inspection in order to transport individuals of those species across state lines.[21]

FWS, for its part, has only made one attempt to regulate animal disease by restricting interstate transport, in the case of salmonids. That rulemaking was also highly unusual. First, it constitutes the only Lacey Act listing that was not made at a species level. Furthermore, it regulated several of the same species and activities that APHIS did through its viral hemorrhagic septicemia regulations. Finally, it did not impose an outright restriction on trade and transport, unlike FWS' other Lacey Act regulations (ordinarily, and by the authority of the underlying statute, a person may only receive a permit to transport Lacey Act-listed injurious species for zoological, educational, medical, or scientific purposes).[22] Rather, it imposed sampling and certification requirements that are similar to those APHIS has developed for all other regulated disease vector

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[15] 81 Fed. Reg. at 1538.

[16] *Id.* at 1552-53.

[17] *See* 50 C.F.R. § 16.22 (providing FWS authority to authorize shipment of a Lacey Act-listed species only for zoological, educational, medical, or scientific purposes).

[18] *See, e.g.*, 9 C.F.R. Part 73 (addressing scabies in cattle); 9 C.F.R. Part 79 (addressing scrapie in sheep); 9 C.F.R. Part 80 (addressing Johne's disease in domestic animals).

[19] *See* 9 C.F.R. Part 56 (controlling avian influenza).

[20] 9 C.F.R. Part 83 (controlling viral hemorrhagic septicemia in certain fish species).

[21] 66 Fed. Reg. 37125 (July 17, 2001).

[22] 50 C.F.R. § 16.22.

species. Again, because FWS has neither capacity nor jurisdiction to design or implement these requirements, they are far more appropriately within APHIS' jurisdiction.

D. The Lacey Act Cannot Be Applied to Domestic Species

Attempting to regulate interstate commerce and transportation of native species is an unprecedented use of the Lacey Act. The sole exception is the salmonid rule, as described above, which lists only diseased individuals and is not a species-level listing. That rule was an outlier in many other respects, and likely is not consistent with FWS's authority under the Lacey Act. Nothing in the law's plain language supports its application to native species; in fact, as shown below, Congress intended the Lacey Act to be applied solely to non-native species.

FWS authority to list domestic species as "injurious" can only be predicated on the 1900 Act's "purpose" allowing FWS "to regulate the introduction of American or foreign birds or animals in localities where they have not heretofore existed."[23] As the original Lacey Act legislative history shows, however, this language refers specifically to purposeful introduction of animals (the example given is the Chinese pheasant), generally to increase hunting opportunities for sportsmen.[24] In exercising such authority, FWS may bar private individuals from seeking to establish such species in new areas—such as by prohibiting intentional releases. This language was not intended to cover interstate commerce in native or non-native animals for pets or livestock. Certainly, Congress in 1900 would have used much clearer language if it intended to allow a federal agency to exercise its power to regulate interstate commerce and upset the federal/state balance of power.

Rather, since its inception, the Lacey Act's injurious species provisions have dealt with "foreign" animals and their importation. Indeed, Section 42 of Title 18, U.S. Code, begins with the word "importation."[25] Quite obviously, native wildlife is not imported, nor can the law be sensibly read to cover domestic wildlife. For instance, the Lacey Act provides that "[*a*]*ll* such prohibited mammals, birds, fish (including mollusks and crustacea), *amphibians*, and reptiles … *shall be promptly exported or destroyed at the expense of the importer or consignee*." 18 U.S.C. § 42(a)(1). This provision, which by its terms applies to *all* listed species, simply cannot be applied to domestic wildlife. There is absolutely no indication in either the Lacey Act's language or history suggesting that Congress ever meant for this law to cover native animals.

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[23] 16 U.S.C. § 701. Notably, this language is codified in Title 16 of the U.S. Code, as part of the law dealing with "protection of migratory game and insectivorous birds," not Title 18, which contains the authority under which the interim rule was promulgated.

[24] The House Report, No. 56-474, accompanying the bill discusses the efforts by "private individuals and clubs to introduce new varieties, or to restore again the old varieties of feathered life" that have been thwarted by "[t]heir active and persistent foes." The Report concludes: "Your committee believes that the birds that may be the subject of experiment by the Department of Agriculture will receive more encouragement from the people than when private individuals undertake their introduction or restoration." *Id.*

[25] The Lacey Act uses the words "importation" or "importer" eleven times, while never once mentioning the words "domestic" or "native."

E. FWS Lacks the Authority to Prohibit Interstate Commerce Among the 49 Continental States or Personal Transportation of Listed Species

Finally, as acknowledged in the interim rule, a federal court has enjoined FWS from enforcing a ban on interstate transportation of reticulated pythons, green anacondas, and two other non-native snake species.[26] On a motion for a preliminary injunction in *USARK v. Jewell*,[27] the court found USARK likely to succeed on its claim that the Lacey Act does not authorize FWS to prohibit interstate shipments of listed species among the forty-nine continental states. Further, although it is not at issue in that suit, the Lacey Act also does not allow FWS to prohibit personal transportation of injurious animals at all.

Nonetheless, FWS has issued this interim rule at issue here "regardless of the preliminary injunction decision" in USARK's case.[28] As the Defendant in that lawsuit, FWS is well aware of USARK's and the court's position on this issue. These comments will therefore not address the underlying legal analysis and legislative history supporting this interpretation here at length. USARK does note, however, that the final disposition of that case with regard to FWS' ability to regulate interstate commerce under the Lacey Act will be equally applicable to any species ultimately listed by FWS in its final rule.

Further, while not at issue in the present case, USARK believes it is important to underscore that a species' listing under the Lacey Act does not entail a prohibition on private, non-commercial transportation. Rather, with respect injurious species, the law only prohibits "[i]mportation … or *shipment*."[29] "Shipment" has a specific legal meaning which is much narrower than "transportation." Congress has long distinguished between the two terms. Under the original version of the Lacey Act in 1900, for instance, the prohibition attached to injurious species was their delivery "to a common carrier" or "for any common carrier to *transport*" them.[30] In other words, it was the act of shipment – delivery to a carrier service – or for a commercial carrier itself to "transport" an injurious species that was forbidden.

It was not until 1935 that "shipment, transportation, or carriage" – commercially and by individuals – of animals "imported from any foreign country contrary to any law of the United States" (*i.e.*, those designated as injurious) and wildlife that was illegally obtained was forbidden.[31] When Congress adopted the law's current language in 1960, it moved only the "shipment" prohibition to Section 42.[32] At the same time, it expanded the prohibitions in what then was then 18 U.S.C. § 43 (now found, as amended, in Chapter 53 of Title 16), relating to movements of wildlife obtained in violation of state, federal, and foreign laws. That section applies to "whoever *delivers, carries, transports, ships*, by any means whatever …" There is no doubt that Congress

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[26] 81 Fed. Reg. at 1535.

[27] Civ. No. 13–2007 (D.D.C. May 12, 2015), 2015 WL 2207603 (D.D.C, May 12, 2015)..

[28] 81 Fed. Reg. at 1535.

[29] 18 U.S.C. § 42(a)(1).

[30] Act May 25, 1900, ch. 553, § 3, 31 STAT. 188 (emphasis added).

[31] Act of June 15, 1935, ch. 261, title II, § 201, 49 STAT. 380.

[32] Pub. L. 86-702, 74 STAT. 754 (Sept. 2, 1960) (emphasis added).

intended to apply only the original prohibition of shipment by common carrier to species listed under Section 42 of the Lacey Act, or else it would have used the same formulation in both sections.

"A term appearing in several places in a statutory text is generally read the same way each time it appears."[33] As such, the word "shipment" used in Section 42 cannot also mean "transportation," particularly given Congress' use of both words, along with others, in the same bill, in a contiguous section. Indeed, since 1935, Congress repeatedly used "transportation" or "transport," as distinct from "shipment" or "ship," when it wanted to include movement of animals by individuals for non-commercial purposes.[34]

In legal terms, "ship" and "transport" have distinct meanings. The former is defined as meaning "to send (goods, documents, etc.) from one place to another, esp. by delivery to a carrier for transportation."[35] "Transport" has a much broader meaning; *i.e.*, "to carry or convey from one place to another."[36] The two terms are not synonymous and were not intended to be so by Congress.

In sum, FWS has exceeded its authority by: (1) predicating a listing based on solely to control disease; (2) listing domestic species; (3) purporting to curtail all trade in domestic, captive-bred species; and (4) prohibiting personal non-commercial transportation of those it has the authority to list.

II. THERE ARE MORE NARROWLY TAILORED WAYS TO ACHIEVE THE STATED GOAL

Under Executive Order ("EO") 12866, reaffirmed by EO 13563, a federal law is required to "identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends."[37] In other words, any regulation must be narrowly tailored to achieve its purpose. The stated purpose of the interim rule listing salamanders as injurious is "to prevent the accidental or intentional introduction of salamanders into the United States are expected to serve as carriers of [Bsal], a fungus that poses a risk to native species of salamanders."[38] It is therefore incumbent upon FWS to promulgate regulations to achieve that purpose without imposing undue burden to the public.

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[33] *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994).

[34] In 1948, Congress dropped the clause it added in 1935 that made it unlawful for individuals "to ship, transport, or carry, by any means" from then-18 U.S.C. § 43. As a result, from then until 1960 it was only unlawful to "deliver[] or knowingly receive[] for shipment, transportation, or carriage in interstate or foreign commerce" unlawfully imported animals or those taken in violation of state, federal, territorial, or foreign law. In the 1960 amendments, Congress explicitly acted to restore the ban on personal transportation of illegally obtained wildlife by adding the language quoted above. At the same time, it applied only the "shipment" prohibition to Section 42.

[35] Bryan A. Garner, ed., Black's Law Dict. (7th ed. 1999).

[36] *Id.*

[37] Exec. Order No. 13563, *Improving Regulation and Regulatory Review*, 3 C.F.R. § 13563 (Jan. 18, 2011).

[38] 81 Fed. Reg. at 1536.

A. The Interim Rule is Overly Broad in Restricting Interstate Transport

First and foremost, USARK strongly agrees that Bsal poses a serious risk to wild salamanders, and that international trade should therefore be restricted to the extent necessary to mitigate the risk of its introduction in the United States, until such time that importation can be done safely. However, as Bsal does not occur domestically, FWS provides no evidence to justify an outright ban on interstate transport of these species. The restrictions on interstate commerce therefore would amount to a regulatory overreach even if FWS held the authority to regulate in this area.

An agency is required by law to consider alternatives to a proposed action.[39] In the interim rule, FWS describes several alternatives in addition to the selected alternative, including listing different groupings of species and requiring a health certificate certifying that an animal being moved is free of Bsal in addition to or in lieu of listing.[40] In particular, the latter option is highly suitable for achieving FWS's goals. The concerns FWS cites regarding this option, including the effectiveness of current testing methods and lack of available testing capacity,[41] are largely technical in nature and are addressed below.

USARK notes that APHIS and FWS, to the extent that it holds the authority to regulate these matters, have historically regulated wild animal and livestock disease through testing and permitting programs, not through outright commercial prohibitions. Even the transport of animals that have tested positive for infectious diseases is generally regulated through permits and conditions.[42] An outright ban on interstate commerce, then, is so extreme that one would expect the risk being mitigated to match the severity of the regulation. However, the interim rule provides that permits will be available for zoological, educational, medical, or scientific purposes.[43] If those permits do not require testing or treatment, what are the implications for the seriousness of the risk from Bsal spreading in interstate commerce? And if they do require such testing, why is that testing not adequate for animals in the pet trade?

B. There Are Less Restrictive Means to Prevent the Introduction of Bsal

As discussed above, FWS is required to regulate the threat of Bsal through the most narrowly tailored means available. Moreover, according to FWS guidelines, one factor that reduces the likelihood of a species being considered injurious is the ability to prevent or control the spread of pathogens such as Bsal.[44] Suitable technology exists to eliminate Bsal on captive salamanders, and this technology is in fact already routinely used in the pet trade.[45] There are also

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[39] *See, e.g.,* Exec. Order No. 12866; National Environmental Policy Act, 42 U.S.C. § 4332(C)(iii).

[40] 81 Fed. Reg. at 1552.

[41] *Id.*

[42] *See, e.g.,* 9 C.F.R. § 80.3 ("Movement of domestic animals that are positive to an official Johne's disease test").

[43] 81 Fed. Reg. at 1538.

[44] 81 Fed. Reg. at 1538.

[45] *See, e.g.,* M. Blooi, A. Martel, F. Haesebrouck, F. Vercammen, D. Bonte & F. Pasmans. "Treatment of urodelans based on temperature dependent infection dynamics of *Batrachochytrium salamandrivorans*", Scientific Reports 2014, 5:8037. DOI: 10.1038/srep08037; M. Blooi, F. Pasmans, L. Rouffaer, F. Haesebrouck, F. Vercammen & A.

reliable tests for Bsal.[46] Therefore, FWS must focus its regulations on the universal adoption of this technology rather than the overly broad outright prohibition.

The interim rule states that "although prophylactic treatments for imports of salamanders to manage Bsal are in development, they are not yet fully tested or feasible."[47] This statement is flatly incorrect, and is even contradicted by other statements within the interim rule. For example, the technique of heating animals at 25ºC for ten days resulted in clearance of the chytrid infection in 100% of salamanders in a laboratory study, as did another method of combined antifungal treatment and temperature control.[48] FWS' stated only the following concerns with these treatments: that it was not certain whether all species can tolerate the temperature range, and it was not certain whether the antifungal treatment could be used in a natural environment.[49] Neither of these concerns justifies the broad-scale restriction on interstate transport and the pet trade. Salamander breeders and hobbyists are well-situated to understand thermal tolerance in species, and could quickly and easily determine what species could withstand the required thermal bath. Furthermore, in the absence of importation, there is no reason to treat wild populations with an antifungal treatment.

Moreover, FWS cites inadequate agency resources to conduct inspections and expenses associated with testing as additional reasons supporting its finding that there are not less restrictive means to prevent Bsal than those selected for the interim rule.[50] To the extent that those expenses and hardships fall upon the owners of salamanders, USARK would like to work with the federal government in developing safe, practical procedures. To the extent that those burdens fall upon the agency, FWS must not discriminate between regulation of salamanders in the pet trade and other species for which it has dedicated resources to developing satisfactory testing protocols.

Although FWS acknowledges that the interim rule regulations are meant to provide time for monitoring while measures to allow safe trade are developed,[51] USARK urges FWS and other relevant agencies to work with its members to develop immediate measures to allow for preventive treatment and certification, without causing undue personal impacts. APHIS should be an active partner (if not the lead) in any certification program that is developed, as it has extensive experience in implementing certification programs and monitoring compliance with those programs in order to prevent disease of livestock, horses, and other household pets.

Martel. "Successful treatment of *Batrachochytrium salamandrivorans* infections in salamanders requires synergy between voriconazole, polymyxin E and temperature", Scientific Reports 2015, 5:11788. DOI: 10.1038/srep11788. *See also* comments of Caudata.org, with which USARK is in full agreement.

[46] M. Blooi, F. Pasmans, J. E. Longcore, A. Spitzen-van der Sluijs, F. Vercammen, A. Martel. "Duplex Real-Time PCR for Rapid Simultaneous Detection of *Batrachochytrium dendrobatidis* and *Batrachochytrium salamandrivorans* in Amphibian Samples", Journal of Clinical Microbiology 2013, 51:12, P. 4173-4177. DOI: 10.1128/JCM.02313-13

[47] *Id.*

[48] *Id.* at 1550-51.

[49] *Id.*

[50] *Id.* at 1552.

[51] *Id.* at 1536.

III. THE INTERIM RULE AMOUNTS TO A REGULATORY TAKING

Federal agencies must review their actions carefully to prevent unnecessary takings of constitutionally protected property rights.[52] FWS evaluated the interim rule and determined that it does not constitute a taking as it does not impose significant limitations on private property use.[53] Specifically, it states that a pet owner "can continue to possess the salamander and engage in intrastate transport and other activities within their state or territory."[54] This conclusion is facially false—a restriction on interstate travel with a family pet not only is impermissible under the law, but most certainly denies the pet owner enjoyment and companionship (amounting to use) of that pet.

A regulatory taking "arises when the government's regulation restricts the use to which an owner may put his property."[55] "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[56] A regulatory taking occurs when "all economically viable use, i.e., all economic value has been taken by the regulatory imposition."[57]

It is, admittedly, difficult to meet the high bar for showing that a regulation has deprived a given property of *all* economic value. However, courts have traditionally "eschewed the development of any set formula for identifying a 'taking' ... and have relied instead on ad hoc, factual inquiries into the circumstances of each particular case."[58] Clearly, any situation in which an owner may not keep his pet if that owner must relocate to a different state for reasons including change in employment or military service would result in such complete deprivation. Some courts have found that regulatory restrictions on pet ownership do not amount to takings because the owners may still keep the pets with a license;[59] in this case, however, an owner would not be able to keep the pet at all.

Many factors inform whether or not an agency action amounts to a taking. For example, if such an action does restrict the use of private property—which the interim rule plainly does—that restriction "shall not be disproportionate to the extent to which the use contributes to the

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[52] Exec. Order 12630, 3 C.F.R. 12630 (Mar. 15, 1988).

[53] 81 Fed. Reg. at 1553.

[54] *Id.*

[55] *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 318 (2001).

[56] *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992). *See also Lingle v. Chevron U.S.A. Inc*., 544 U.S. 528, 528 (2005) ("[G]overnment regulation of private property may be so onerous that its effect is tantamount to a direct appropriation or ouster").

[57] *Conti v. United States*, 291 F.3d 1334, 1339 (Fed. Cir. 2002).

[58] *Connolly v. Pension Benefit Guaranty Corp*., 475 U.S. 211, 224-25, 106 S. Ct. 1018, 89 L. Ed. 2d 166 (citing, among other cases, *Penn. Central Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978)).

[59] *See, e.g., City of Aurora*, 618 F.Supp.2d 1271, 1279 (D. Colo. 2009) (finding that a restriction on pet pit bulls "does not result in a taking of physical property if a dog owner may keep the dog by obtaining a license and complying with the minimum standards for keeping the dog").

overall problem that the restriction is imposed to redress."[60] Moreover, "the mere assertion of a public health and safety purpose is insufficient to avoid a taking. Actions [should] be designed to advance significantly the health and safety purpose, and be no greater than is necessary to achieve the health and safety purpose."[61] For the reasons described above, this rule is not narrowly tailored to achieve its purpose and it constitutes a regulatory taking.

IV. THE INTERIM RULE UNDERESTIMATES THE ECONOMIC EFFECTS OF LISTING

As you know, many salamander species are popular as pets, and many others are bred by niche hobbyists. FWS estimates that but for the interim rule, 217,000 salamanders would be imported each year. These imports will be prohibited if the twenty genera are listed under the Lacey Act as proposed in the interim rule.[62] FWS further estimates that 338 domestically bred salamanders would be affected by the interstate transportation prohibition per year, resulting in impacts to domestic breeders of up to $23,000. These domestic production numbers do not pass a straight-face test; in order for the estimate to be accurate, each salamander would need to be worth an average of $68. In reality, salamanders typically sell for between $10 and $50, depending on the species.[63]

As several USARK members and others in the herpetocultural industry, including trade numbers provided by Caudata.org via John P. Clare, Ph.D., have written in submitted comments to FWS, the actual number of domestically bred salamanders shipped across state lines is far higher than 338. The species listed in the interim rule comprise the overwhelming majority of those in the pet trade,[64] so the economic effect of the listing will amount to nearly the full total of the industry's value. The U.S. Small Business Administration's Office of Advocacy has provided detailed comments on this issue in response to the interim rule. In particular, we echo its concerns about the Draft Regulatory Flexibility Analysis' alarming underestimation of this action's impact to small businesses. USARK shares the Office of Advocacy's concerns.

V. THE ISSUED REGULATIONS DO NOT MATCH THE INTERIM RULE LANGUAGE

The regulations promulgated in the interim rule do not only restrict international and interstate transport, but any movement whatsoever of the listed genera. The regulatory language prohibits "[t]he importation, transportation, or *acquisition* of any live or dead specimen, including parts, but not eggs or gametes, of the genera."[65] There is simply no authority in the Lacey Act to prohibit acquisition. In fact, the interim rule itself implies (though unlike the recent constrictor

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[60] Exec. Order 12630 § 4(b).

[61] *Id.* § 3.

[62] 81 Fed. Reg. at 1553.

[63] *See, e.g.*, Reptile City, *Salamanders and Newts for Sale* (2016), *available at* http://www.reptilecity.com/Merchant2/merchant.mvc?Screen=CTGY&Category_Code=SALAMANDERS.

[64] *See* 81 Fed. Reg. at 1544.

[65] *Id*. (emphasis added).

snake listings, does not explicitly state[66]) that individuals will be able to engage in intrastate sales of listed salamanders.[67] FWS does not explain how one may sell (or, for that matter, give away) a listed salamander without someone else "acquiring" it. Because the Lacey Act does not forbid acquisition of a listed animal, the interim regulation is *ultra vires* to the extent it purports to prohibit the same.

Further, there is a problem with the law's overbroad definition of "transport." The Lacey Act defines "transport" as "to move, convey, carry, or ship by any means, or to deliver or receive for the purpose of movement, conveyance, carriage, or shipment."[68] Even if the law did authorize FWS to bar personal transport, which it does not, this definition would reach solely intrastate activities. Although FWS has agreed that states, not it, have the power to regulate ownership and sales within their borders, USARK is concerned that the Service is laying the groundwork to involve itself in federal regulation of wholly intrastate activities.

Thus, FWS must amend this language to clarify that the prohibitions do not apply to intrastate activities.

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In closing, we reiterate our request that FWS work with APHIS to enact an appropriate import ban on salamanders with the potential to carry Bsal. Short of that, USARK urges FWS to comply with the law and remove the restriction on interstate transportation. USARK is committed to working with the Service to develop reasonable protocols for disease prevention in the pet trade. USARK appreciates your close attention to these important matters. If you have any questions about these comments, or would like to discuss these matters in greater detail, please do not hesitate to contact USARK. Have a good day.

Sincerely,

/s/ Phil Goss
Phil Goss, President, USARK
Joan Galvin
Anne Hawkins
Counsel for the United States Association of Reptile Keepers

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[66] *See* 80 Fed. Reg. , 12823 (Mar. 10, 2015) ("Family businesses will still be able to operate, provided they either sell [listed snakes] within their State or have a port of export directly from their State ….").

[67] 81 Fed. Reg. at 1553 ("[A]ny person who currently owns one of the listed species can continue to possess the salamander and engage in intrastate transport and other activities within their State or territory, as allowed under State, tribal, or territorial law.").

[68] 16 U.S.C. § 3371(k).