IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES ASSOCIATION OF REPTILE KEEPERS, INC., *et al.*, Plaintiffs, v. S.M.R. JEWELL *et al.*, Defendants.	Civil No. 1:13-cv-2007-RDM

FEDERAL DEFENDANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Pursuant to the Court's April 8, 2015, Minute Order, Federal Defendants provide the following supplemental brief in support of their opposition to Plaintiffs' motion for preliminary injunction. The Court asked the parties to address four questions, and "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." ECF No. 37 ("Order") at 2. The Court's questions all pertain to the likelihood of success on the merits prong of the standard for motions for preliminary injunction. For the foregoing reasons, in addition to the reasons provided in Federal Defendants' Opposition to Plaintiffs' Motion for Temporary Restraining Order (ECF No. 32) ("Defs.' TRO Opp'n"), Plaintiffs are not likely to succeed on the merits of the claims they have raised in the motion for preliminary injunction. Interpreting the Lacey Act to allow interstate transportation of injurious species between states within the continental United States is consistent not only to Congress' intent but also the public interest. Plaintiffs are also unlikely to succeed on the merits of their Regulatory Flexibility Act claim, as they have failed to demonstrate either the requisite procedural violation or any prejudice. Consequently, the Court should deny Plaintiffs' motion for preliminary injunction.

ARGUMENT

I. The Statute of Limitations Bars the Court's Consideration of Counts One and Two.

The Court has asked if there is "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[.]" Order at 2. Federal Defendants understand the Court to be asking whether the statute of limitations on Plaintiffs' challenge to the U.S. Fish and Wildlife Service's ("FWS") interpretation of 18 U.S.C. § 42(a) to

prohibit interstate transportation began to run before the FWS issued the regulations challenged in this case.

Before addressing the Court's specific question, Federal Defendants note that Plaintiffs' challenge to the FWS's interpretation of 18 U.S.C. § 42(a) has shifted over the course of this litigation. In Count One of the Complaint and First Amended Complaint, Plaintiffs challenged both the FWS's interpretation of the word "shipment" to mean "transportation" as well as the FWS's interpretation of the phrase "between the continental United States, the District of Columbia, Hawaii, the Commonwealth of Puerto Rico, or any possession of the United States" to include interstate transportation. Plaintiffs clarified at the TRO hearing that they are no longer challenging the FWS's interpretation of the word "shipment" to mean "transportation." Plaintiffs provided no explanation for the shift, but it likely was due to the fact that their challenge was clearly barred by the statute of limitations given that the FWS interpreted the word "shipment" to mean "transportation" when it first promulgated its Lacey Act regulations in 1965. ECF No. 22 at 8; ECF No. 25 at 3-4.

With respect to Plaintiffs' remaining challenge to the FWS's interpretation of the phrase "between the continental United States," the FWS provided its interpretation of this language through a regulation issued in 1989. Accordingly, Counts One and Two are still barred by the applicable statute of limitations, 28 U.S.C. § 2401(a).

Section 2401(a) provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." The "right of action first accrues" on the date that a regulation is promulgated. *See Hardin v. Jackson*, 625 F.3d 739, 743 (D.C. Cir. 2010) (under § 2401(a) "the 'right of action first

accrues on the date of the final agency action.'") (quoting *Harris v. FAA*, 353 F.3d 1006, 1009-10 (D.C. Cir. 2004)).

Here, the FWS first provided its interpretation of the geographic scope of the prohibition on transportation in 18 U.S.C. § 42(a) on May 23, 1989 when it promulgated a regulation to list the mitten crab as an injurious species. 54 Fed. Reg. 22,286, 22,287 ("interstate transportation [of crabs] . . . for any purpose not otherwise permitted, would be prohibited."). An agency's interpretation of a statute in the preamble to a rule may be subject to challenge. *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1308-9 (D.C. Cir. 1991) (holding preamble passage attempting to interpret the meaning of a statutory provision challengeable). Accordingly, the statute of limitations on challenges to the FWS's interpretation of the "between the continental United States" language expired on May 23, 1995, seventeen years and nearly twenty years, respectively, before Plaintiffs filed suit to challenge the FWS's 2012 and 2015 rules in this case.[1]

Because it is jurisdictional, the statue of limitations set forth in Section 2401(a) "cannot be overcome by the application of judicially recognized exceptions such as waiver, estoppel, equitable tolling, fraudulent concealment, the discovery rule, and the continuing violations doctrine." *W. Va. Highlands Conservancy v. Johnson*, 540 F. Supp. 2d 125, 138 (D.D.C. 2008) (quoting *Felter v. Norton*, 412 F. Supp. 2d 118, 122 (D.D.C. 2006) (ellipsis omitted)). Thus, the statute of limitations under Section 2401(a) accrues even at times when putative plaintiffs may lack standing to challenge the agency action or are not injured by the action. *Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362, 1365 (9th Cir. 1990). *See also Harris*, 353 F.3d at 1012 (noting the statute of limitations runs from the time "the wrong has been committed, even if at

[1] As noted in Federal Defendants' motion to dismiss, the FWS has consistently provided the same interpretation in listing other species after the mitten crab, including the brown tree snake, the first reptile to be listed as injurious. ECF No. 25 at 5.

the time no more than nominal damages may be proved") (citation omitted); *Alaska v. U.S. Dep't of Agric.*, 932 F. Supp. 2d 30, 34 (D.D.C. 2013) (allowing litigants to delay filing suit to assess justiciability "would virtually nullify the statute of limitations in the context of facial challenges to agency rules [ ], thereby upsetting the balance struck by Congress between administrative finality and the interests of litigants.") (citations omitted) rev'd on other grounds, 772 F.3d 899 (D.C. Cir. 2014).

In *JEM Broadcasting Company v. Federal Communications Commission*, 22 F.3d 320 (D.C. Cir. 1994), the D.C. Circuit directly addressed and rejected the claim that the statute of limitations for challenging an agency rule should not accrue when a particular party is not injured by the rule. There, the plaintiff broadcasting company, JEM, asserted that its failure to challenge certain Federal Communications Commission ("FCC") rules within the statute of limitations period should be excused because "it would have lacked standing to file a timely petition for review because it was not 'aggrieved' by the [challenged] rules at the time of their issuance." *Id.* at 325. The Court of Appeals rejected JEM's argument, finding that the statute of limitations ran from the date the FCC rule was promulgated because the rule "was subject to immediate challenge by any number of then-existing would-be license applicants. The mere fact that JEM, in particular, had no opportunity to challenge the procedural provenance of the … rule[s] within the statutory period is of no moment." *Id.* at 326. The JEM Court recognized that:

> [A]s a result of our holdings today, some parties—such as those not yet in existence when a rule is promulgated—never will have the opportunity to challenge the procedural lineage of rules that are applied to their detriment. In our view the law countenances this result because of the value of repose.

Id.

The D.C. Circuit also rejected the claim that a statute of limitations does not run when a plaintiff is not injured by an agency action in *Norwest Bank v. FDIC*, 312 F.3d 447 (D.C. Cir.

2002). There, the Court held that Norwest Bank's claim against the Federal Deposit Insurance Corporation for allegedly miscalculating insurance deposit obligations accrued when the error occurred even though the error caused no injury to the bank until years later. The Court noted, "it has long been settled that statutes of limitation begin running when the wrong has been committed, even if at that time 'no more than nominal damages may be proved, and no more recovered.'" *Id.* at 452 (quoting *Wilcox v. Plumer's Ex'rs*, 29 U.S. 172, 182 (1830)). The Court found that although application of the statute of limitations meant that Norwest "will suffer 'damage' indefinitely into the future," it must adhere to the "time-honored standard that 'limitations and conditions upon which the Government consents to be sued must be strictly observed.'" *Id.* at 454 (quoting *Soriano v. United States*, 352 U.S. 270, 276 (1957)).

Because the statute of limitations has expired, the Court lacks jurisdiction over Counts One and Two, and Plaintiffs are not likely to succeed on the merits of these claims.

II. Even if the Court has Jurisdiction over Counts One and Two, Plaintiffs are Not Likely to Succeed on the Merits because Congress Clearly Intended to Prohibit Interstate Transportation of Injurious Species and, Alternatively, the FWS's Interpretation of the Statute is Entitled to Chevron Deference.

Even if the Court were to conclude that the statute of limitations does not bar Plaintiffs' challenge to the FWS's interpretation of 18 U.S.C. § 42(a), Plaintiffs are not likely to succeed on the merits of Counts One and Two. The Court has asked two questions pertaining to the merits of these claims. First, the Court has asked about the significance of the amendments to the Lacey Act that provided for listing of the zebra mussel and the bighead carp. ECF No. 37 at 2. Second, the Court has asked whether agencies are entitled to *Chevron* deference when they interpret criminal statutes. *Id.*

The Court's questions raise issues of statutory interpretation. In their briefs on the motion for temporary restraining order, the parties agreed that the Court's statutory interpretation

analysis should be guided by the two-step framework set forth in *Chevron*.[2] Under *Chevron* step one, the Court must first determine whether Congress's intent with respect to the geographic scope of the transportation prohibition in 18 U.S.C. § 42(a) is clear. In making that determination, courts use traditional tools of statutory interpretation, including consideration of the significance of amendments to the statute. Using these tools here, Congress's intent with the prohibition on "shipment between the continental United States" and other areas under U.S. jurisdiction to prohibit interstate transportation of injurious species between states within the continental United States is clear. If the Court nevertheless determines that Congress was silent on this question or its intent is ambiguous, the FWS's reasonable interpretation is entitled to *Chevron* deference under step two. The rule of lenity does not prohibit the Court from considering the FWS's interpretation of a criminal statute in the context of a challenge to an agency's regulation.

A. Congress Clearly Intended to Prohibit Interstate Transportation of Injurious Species.

Defendants have already demonstrated that Congress's intent to prohibit transportation of injurious species between states within the continental United States is clear and thus the FWS's rule is consistent with the Lacey Act. Defs.' TRO Opp'n at 13-14. The authority to prohibit interstate transportation of injurious species between states within the continental United States has been there all along, even though Congress may have been addressing the specific situation of preventing the introduction of the mongoose from Hawaii and Puerto Rico to the continental

[2] Even if the Court were to determine that *Chevron* does not apply because the Lacey Act is a criminal statute, this should not change the analysis of whether the statute is ambiguous because there does not appear to be any difference between statutory interpretation under *Chevron* step one and under a non-*Chevron* analysis. *See Natural Res. Def. Council v. EPA*, 859 F.2d 156, 168 (D.C. Cir. 1988) (calling step one analysis "a pure question of statutory construction . . . using 'traditional tools of statutory construction.'") (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987)).

United States in 1960. Congress has confirmed this through its subsequent actions, including amending 18 U.S.C. § 42(a) to add the zebra mussel and the bighead carp to prevent the further spread of these species between states within the continental United States, and did so without amending the geographic scope of the prohibitions in that section. Moreover, the legislative history from these actions demonstrates that Congress has long been aware of the FWS's interpretation that listing a species as injurious under the Lacey Act prohibits interstate transportation of the listed species between states within the continental United States, and it endorses that interpretation.

To determine whether the intent of Congress is clear, courts rely on "tools of statutory construction." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987) (quoting *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984)). One of these tools "is that 'Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.'" *Public Citizen v. FAA*, 988 F.2d 186, 194 (D.C. Cir. 1993) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8); *see also Barnett v. Weinberger*, 818 F.2d 953, 963 n.89 (D.C. Cir. 1987) ("Courts have frequently considered whether reenactment of a statute after promulgation of an agency interpretation that is highly publicized or otherwise communicated to Congress may be regarded as ratification by acquiescence.") (citing cases).

In this case, since 1990, Congress has taken a number of actions that show it not only was aware that the FWS interpreted the Lacey Act's prohibition on "any shipment between the continental United States, the District of Columbia, Hawaii, the Commonwealth of Puerto Rico, or any possession of the United States" to prohibit the interstate transportation of species listed as injurious between states within the continental United States, but that Congress endorsed this

interpretation and did not see the need to change the statute to effectuate that interpretation. In 1990, Congress enacted the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990, 16 U.S.C. § 4701. This law established a broad new Federal program to prevent the introduction of, and to control the spread of, the zebra mussel and other nonindigenous aquatic nuisance species. As relevant here, the law amended 18 U.S.C. § 42(a) to add the zebra mussel to the list of injurious species. Pub. L. No. 101-646, 104 Stat. 4761 (1990). The Senate Report on the Act explained that declaring the zebra mussel an injurious species "would lead to the prohibition of the interstate transport of zebra mussels for commercial purposes." S. Rep. No. 101-523 (ECF No. 31-1 at 000071); *see also* 136 Cong. Rec. S17147 (daily ed.) (Oct. 26, 1990) (discussion of S.2244) ("The bill also addresses other probable pathways of zebra mussel spread. In particular, it amends the Lacey Act to prevent the interstate transportation of the zebra mussel in commerce.") (attached hereto as Ex. 1). Since the species was already found in the continental United States, Congress's aim was to prevent the spread of zebra mussels from the Great Lakes to other states within the continental United States. Sen. Rep. No. 101-523, ECF No. 31-1 at 000065 ("Since 1986, the zebra mussel has spread over a 10,000-square mile area and established itself in all five Great Lakes. It is expected to continue to spread to two-thirds of the Nation's fresh water systems if left unchecked."); *id.* ("Prevention efforts are aimed at minimizing the risk of unintentional introduction and spread of nonindigenous aquatic species.").

In 2010, Congress enacted the Asian Carp Prevention and Control Act "to amend section 42 of title 18, United States Code, to prohibit the importation and shipment of certain species of carp." Pub. L. No. 111-307, 124 Stat. 3282 (2010); *see also* S. Rep. No. 111-181 at 2 (May 5, 2010) (listed species "are prohibited from being traded in interstate commerce or imported into the United States.") (attached hereto as Ex. 2). The Northeast-Midwest Congressional Coalition

Great Lakes Task Force ("Task Force"), comprised of Congressional representatives from the Great Lakes region, had requested, in 2002 and 2009, that the FWS list three species of non-native carp as injurious species under the Lacey Act. 2002 Task Force Letter (attached hereto as Ex. 3); 2009 Task Force Letter (attached hereto as Ex. 4). In these letters, the Task Force members explained that the effect of the listing would be to "prohibit the importation of new carp into the country and prohibit interstate transportation." Ex. 3 at 1; Ex. 4 at 1. The FWS issued a Notice of Inquiry in response to the first letter, seeking comments from the public to help the agency determine if a proposed rule to list these carp as injurious species was warranted. 68 Fed. Reg. 54,409 (Sept. 17, 2003). Congress itself took action in 2010. The legislative history of this amendment shows that Congress understood that "if a species is listed as injurious, importation and interstate transfer of these fish is prohibited unless authorized through a permit from the U.S. Fish and Wildlife Service." H.R. Rep. No. 109-585 at 5 (July 20, 2006) (attached hereto as Ex. 5); *see also* S. Rep. No. 111-181 at 2 (ECF No. 31-1 at 000080); 156 Cong. Rec. H7821 (Dec. 1, 2010) (attached hereto as Ex. 6) ("This designation prohibits the importation and interstate shipment of Asian carp unless a permit is issued by the Secretary of the Interior."). The amendment simply added these species names to 18 U.S.C. § 42(a); it did not change any other language in that section. The legislative history also explains that the carp had been accidentally released into the Mississippi River Basin, and that the aim of the legislation was to prevent the further spread of the carp within the continental United States, particularly into the Great Lakes. H.R. Rep. No. 109-585 at 2; S. Rep. No. 111-181 at 1-2 (ECF No. 31-1 at 000079-80).

These two amendments to the Lacey Act show that Congress understood the "any shipment between the continental United States, the District of Columbia, Hawaii, the Commonwealth of Puerto Rico, or any possession of the United States" language in the statute to

prohibit interstate transportation of listed species between states within the continental United States. Indeed, the driving purpose of amending the Lacey Act to add these species was to prevent their spread between states within the continental United States, since both the zebra mussel and the three species of Asian carp were already in the continental United States at the time of listing. Based on these two actions alone, it is clear that Congress was aware of the FWS's interpretation of the statute, agreed with it, and did not believe there was any need to amend the statute in order to prohibit interstate transportation of these species (other than adding the species' names to others already included in section 42(a)). Under these circumstances, Congress' intent is clear and the Court should find that Plaintiffs have no likelihood of success on the merits on Counts One and Two.

Two other actions further demonstrate that Congress clearly intended to prohibit interstate transportation of injurious species between states within the continental United States, as seen by the language used in 18 U.S.C. 42(a). First, as explained in Federal Defendants' opposition to Plaintiff's motion for temporary restraining order, a bill was introduced in the House in 2013 to make it easier to export the four large constrictor snakes the FWS listed as injurious species in 2012. Defs.' TRO Opp'n at 19. The legislative history shows that Congress understood that the listing had the effect of prohibiting interstate transportation of these species. In fact, the bill would not have been necessary otherwise.

Second, in 2012, Congress enacted an amendment to the Clean Water Act "to reauthorize the Lake Pontchartrain Basin Restoration Program, to designate certain Federal buildings, and for other purposes." Pub. L. No. 112-237, 126 Stat. 1628 (2012). One of the "other purposes" of the amendment was to exempt certain water transfers from the Lacey Act. 126 Stat. at 1629. Congress enacted this law after the FWS advised the North Texas Municipal Water District that,

because of an adjustment to the boundary between Texas and Oklahoma, pumping water from Lake Texoma "would constitute an interstate transfer of water and a violation of the Lacey Act because invasive zebra mussels would be transported across state lines."[3] H.R. Rep. No. 112-657 at *3 (Sept. 10, 2012) (attached hereto as Ex. 7). This law would not have been necessary but for Congress' agreement that the Lacey Act prohibits transportation of injurious species between states within the continental United States.

There is no question that Congress has long been aware of the FWS's interpretation of the statute. Through testimony provided during the deliberations on various bills, the FWS has made Congress aware of its interpretation of 18 U.S.C. § 42(a). For example, when Congress was deliberating whether to amend the Lacey Act to add the bighead carp, the FWS provided testimony that specifically said that adding the species to the Lacey Act would prohibit transport "across state lines." http://www.fws.gov/laws//Testimony/displaytestimony.cfm?ID=40 (last visited Apr. 20, 2015) (Testimony of Dan Ashe, FWS Deputy Director, Dec. 3, 2009).[4] As

[3] Congress recently passed another law to address the Lake Texoma situation, expanding the exemption from the Lacey Act to all injurious species (not just zebra mussels). *See* Pub. L. No. 113-117, 128 Stat. 1182 (2014).

[4] *See also* http://www.fws.gov/laws/Testimony/displaytestimony.cfm?ID=158 (last visited Apr. 20, 2015) (Testimony of Steve Williams, FWS Director, Nov. 14, 2002) (rule listing snakeheads as injurious wildlife makes it illegal to "transport across State lines all members of the Channidae family"); http://www.fws.gov/laws//Testimony/displaytestimony.cfm?ID=142 (last visited Apr. 20, 2015) (Testimony of Marshall Jones, FWS Deputy Director, July 17, 2003) ("The injurious wildlife provisions of the Lacey Act under Title 18 restrict the importation and interstate transportation of wildlife deemed 'injurious' or potentially injurious to human beings, to the interests of agriculture, horticulture, and forestry, or to wildlife or wildlife resources of the United States."); http://www.fws.gov/laws//Testimony/displaytestimony.cfm?ID=72 (last visited Apr. 20, 2015) (Testimony of Dr. Mamie Parker, FWS Assistant Director for Fisheries and Habitat Conservation, Sept. 27, 2007) ("Under the Lacey Act, the Secretary of the Interior is authorized to prohibit the importation and interstate transportation of species designated as injurious."); http://www.fws.gov/laws/Testimony/displaytestimony.cfm?ID=57 (last visited Apr. 20, 2015) (Testimony of Gary Frazer, FWS Assistant Director for Fisheries and Habitat Conservation, Jun. 26, 2008) ("Under Title 18 of the Lacey Act, the Secretary of the Interior is

explained above, Congress clearly agreed with the FWS's interpretation and passed the Asian Carp Prevention and Control Act in order to prevent the spread of the bighead carp between states within the continental United States.

Congress' actions demonstrate that it was aware of the FWS's interpretation of the Lacey Act and has ratified that interpretation through its amendments and other actions. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974) (a "court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration. This is especially so where Congress has re-enacted the statute without pertinent change. In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.") (citations omitted); *United States v. Sheffield Bd. of Comm'rs*, 435 U.S. 110, 134, 135 (1978) (legislative history of reenactment must show express approval of longstanding administrative interpretation for such interpretation to be treated as ratified by Congress); *Kay v. FCC*, 443 F.2d 638, 646-47 (D.C. Cir. 1970) ("a consistent administrative interpretation of a statute, shown clearly to have been brought to the attention of Congress and not changed by it, is almost conclusive evidence that the interpretation has congressional approval.").

Plaintiffs may argue that this subsequent legislative history cannot trump the contemporaneous legislative history from 1960. As an initial matter, although the legislative history from 1960 shows that the "between the continental United States" language may have been added to the statute to address the specific situation of the mongoose, there is no indication that it was intended to apply only to such circumstances. The plain language is broad enough to

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authorized to prohibit the importation and interstate transportation of species designated as injurious. Species listed as injurious may not be imported or transported across State boundaries by any means without a permit issued by the Service.").

encompass both the mongoose situation, as well as the movement of injurious species between states within the continental United States. Moreover, the developments here relating to the zebra mussel and Asian carp should not be dismissed as post-enactment legislative history because they relate to amendments to the statute. *See State of Ohio v. Dep't of Interior*, 880 F.2d 432, 453 n.30 (D.C. Cir. 1989) (comments made during consideration of a measure that amended and reenacted a statute "indicat[ed] that Congress made a conscious decision not to amend the operative language of [the statute] because it was deemed clear all along. We think it would be misguided to dismiss that report as mere postenactment history.") (internal marks and citations omitted); *see also Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1969) ("Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction."); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982) (court "would be remiss" to ignore postenactment developments where agency's statutory construction had been brought to Congress's attention and Congress did not alter that interpretation although it amended the statute in other respects). Indeed, under Plaintiffs' more limited reading of the statute, the interstate transportation of all injurious species, including those Congress itself listed, is not prohibited between states in the continental United States. This is a result that Congress clearly did not intend when it amended the statute to add the zebra mussel and Asian carp.[5]

[5] The tools of statutory construction also include examination of statutory context and purpose. *Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997). Both of these tools support FWS's reading as well. The purpose of the Act is to prevent introduction of species that are determined to be "injurious to human beings, to the interests of agriculture, horticulture, forestry, or to wildlife or the wildlife resources of the United States." 18 U.S.C.§ 42(a)(1). Injurious species are no less injurious when transported across state lines within the continental United States than when they are transported between the District of Columbia or Hawaii and the continental United States. It would be contrary to the statutory context and purpose to think Congress would leave such a gap in coverage, especially given that Congress itself added several species to the list because of the threats posed by interstate transport among states within the continental United States.

Congress' intent to prohibit the interstate transportation of injurious species between states within the continental United States is clear. Consequently, Plaintiffs are not likely to succeed on the merits of Counts One and Two.

B. Even if the Statute Were Ambiguous, the Court Must Defer to the FWS's Reasonable Interpretation.

If, in spite of the voluminous evidence that Congress agrees that the existing language of the Lacey Act prohibits interstate transportation of injurious wildlife between states within the continental United States, the Court determines that Congress was silent on this question or its intent is ambiguous, then the Court must accord *Chevron* deference to the FWS's reasonable interpretation of the statutory language. The fact that the Lacey Act is a criminal statute does not mean that the agency's interpretation of ambiguous statutory language is not entitled to *Chevron* deference where, as here, the agency has provided that interpretation in the context of a rulemaking.

The precise question at issue here was addressed by the Supreme Court in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). In *Sweet Home*, respondent forest product industries challenged the FWS's regulation defining the word "harm" in the Endangered Species Act's ("ESA") definition of "take." As here, the ESA includes provisions for imposition of criminal penalties for violations of the "take" prohibitions. *See* 16 U.S.C. § 1540(b)(1). Accordingly, the respondents argued "that the rule of lenity should foreclose any deference to the Secretary's interpretation of the ESA because the statute includes criminal penalties." 515 U.S. at 704 n.18. The Court rejected this argument, stating that it had "never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement." *Id.* And so it is here.

The D.C. Circuit has followed the Supreme Court's holding in *Sweet Home* when addressing whether to apply *Chevron* deference to agency interpretations of statutes with criminal enforcement provisions. In *United States v. Kanchanalak*, the D.C. Circuit rejected the defendants' argument that the "court should not give *Chevron* deference to the FEC's interpretation of an ambiguous statute in a criminal proceeding." 192 F.3d 1037, 1047 (D.C. Cir. 1999). The Court stated that "Defendants' support for this proposition is scant. That criminal liability is at issue does not alter the fact that reasonable interpretations of the act are entitled to deference." *Id.* (citing *Sweet Home*, 515 U.S. at 703-05); *see also In re Sealed Case*, 223 F.3d 775, 107 (D.C. Cir. 2000) ("Deference is due as much in a criminal context as in any other for interpretations made outside that context, such as those found in published regulations.") (citing *Kanchanalak*, 192 F.3d at 1047 n.17, and *Sweet Home*, 515 U.S. at 703-05). Other circuits follow *Sweet Home* as well. *See*, *e.g.*, *Mujahid v. Daniels*, 413 F.3d 991, (9th Cir. 2005) (reaffirming its holding that "the rule of lenity 'does not prevent an agency from resolving statutory ambiguity through a valid regulation.'") (quoting *Pacheco-Camacho v. Hood*, 272 F.3d 1266, 1271 (9th Cir. 2001)).

This conclusion is not altered by Justice Scalia's statement concurring in the denial of a petition for certiorari in *Whitman v. United States*, 135 S. Ct. 352 (2014), which this Court noted at the hearing. Indeed, Justice Scalia's statement acknowledges that *Sweet Home* is the prevailing law on this issue. While Justice Scalia clearly disagrees with *Sweet Home* and appears eager to address this issue again, his statement actually underscores that the law currently requires courts

to defer to agency interpretations of criminal laws where, as here, the interpretation is provided in the context of the promulgation of a regulation.[6]

Nor do the two cases cited by Plaintiffs in their TRO reply brief support an argument that the rule of lenity should supplant *Chevron* deference here. Pls.' TRO Reply (ECF No. 36) at 12 (citing *United States v. Santos*, 553 U.S. 507, 514 (2008) and *United States v. Lanier*, 520 U.S. 259 (1997)). Neither case was decided in the context of an agency rulemaking, nor does either case even mention *Chevron*.

The two cases the Court cited at the TRO hearing similarly are not on point. In *United States v. Apel*, 134 S. Ct. 1144 (2014), the Supreme Court reviewed the conviction of a war protester for unlawfully reentering a military installation. One of the protester's arguments was that some executive branch documents supported his interpretation of the statute to require exclusive possession, which was allegedly absent. 134 S. Ct. at 1151. The Court rejected this argument, stating that "we have never held that the Government's reading of a criminal statute is entitled to any deference." *Id.* (citing *Crandon v. United States*, 494 U.S. 152, 177 (1990) (concurring opinion of J. Scalia)).[7] *Apel*, however, is factually distinguishable because it

[6] Moreover, most of the cases cited by Justice Scalia in the statement do not expressly discuss the interplay of *Chevron* and the rule of lenity at all, much less in the context of a facial challenge to administrative rulemaking rather than a criminal proceeding. Those cases that do touch upon the issue do not reach it. And of course, Justice Scalia's statement is not precedent. Indeed, Justice Scalia was in the dissent in *Sweet Home*, 515 U.S. at 714-36, and *Sweet Home* remains the controlling law.

[7] In the portion of his concurring opinion in *Crandon* cited by the Court in *Apel*, Justice Scalia states that the "vast body of *administrative* interpretation that exists – innumerable advisory opinions not only of the Attorney General, the OLC, and the Office of Government Ethics, but also of the Comptroller General and the general counsels for various agencies – is not an administrative interpretation that is entitled to deference under *Chevron*[.]" 494 U.S. at 177 (emphasis in original). Justice Scalia goes on to explain that interpreting a statute to determine when to prosecute "is not the sort of specific responsibility for administering the law that triggers

involved a criminal prosecution, not a facial challenge to a regulation issued by an administrative agency. *Sweet Home,* 515 U.S. at 704 n.18 (In contrast to the situation presented in the context of a facial challenge to a regulation, "[w]e have applied the rule of lenity in a case raising a narrow question concerning the application of a statute that contains criminal sanctions to a specific factual dispute . . . where no regulation was present."). Indeed, the Court in *Apel* does not even discuss *Chevron*.

In *Abramski v. United States,* 134 S. Ct. 2259 (2014), the defendant had been convicted for making a false statement on a firearms purchase form. Abramski argued that a straw purchaser's misrepresentation was material only if the true buyer could not legally possess a gun and that this view was adopted by the Bureau of Alcohol, Tobacco, and Firearms until 1995. The Supreme Court rejected this argument, stating that "criminal laws are for courts, not for the Government, to construe." 134 S. Ct. at 2274 (citing *Apel,* 134 S. Ct. at 1151). Like *Apel*, *Abramski* does not mention *Chevron* and does not address the circumstances presented here – whether an agency with delegated authority to promulgate regulations to implement a criminal statute is entitled to deference in interpreting that statute.

Alternatively, even if *Chevron* deference were inapplicable, the fact that a statute is criminal in nature is not enough to invoke the rule of lenity. Instead, a court must also find that there is a "grievous ambiguity or uncertainty in the statute." *Chapman v. United States,* 500 U.S. 453, 463-64 (1991). As demonstrated above, the relevant statutory language contains no ambiguity, much less a "grievous ambiguity." Rather, Congress clearly intended to broadly address and prevent the introduction and spread of non-native species that are determined to be

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Chevron." *Id.* Here, in contrast, it is undisputed that the FWS has been delegated responsibility for administering the Lacey Act.

injurious to humans, the interests of agriculture, horticulture, or forestry, and wildlife or the wildlife resources of the United States.

In sum, the FWS's interpretation that species listed as injurious under the Lacey Act may not be transported between states is entitled to *Chevron* deference pursuant to binding law. For all the reasons already provided, Defs.' TRO Opp'n at 14-19, and for those provided herein, the interpretation is reasonable and Plaintiffs are not likely to succeed on the merits of Counts One and Two.

III. Plaintiffs' Have Not Alleged the Prejudice Necessary to Demonstrate Their Likelihood of Success on Their Regulatory Flexibility Act ("RFA") Claim.

This Court asked the parties to address the question: "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?" Order at 2. The Court need not reach this issue in order to find that Plaintiffs are unlikely to succeed on the merits of their RFA claim because, as explained in Federal Defendants' opposition to Plaintiffs' TRO Motion, the FWS fully complied with the RFA's procedural requirements. Defs.' TRO Opp'n at 22-25. However, even if this Court were to find that Plaintiffs are likely to demonstrate an RFA violation, they are still unlikely to succeed on their RFA claim because the harmless error test applies to such violations and Plaintiffs have not demonstrated prejudice.

In *Environmental Defense Center, Inc. v. EPA*, plaintiffs claimed that EPA failed to conduct the analysis required by the RFA because it treated significant costs as not significant and failed to account for the entire universe of small entities affected by the rulemaking at issue. 344 F.3d 832, 878 (9th Cir. 2003). The Ninth Circuit found that EPA complied with the RFA, but that, "even if EPA had failed to properly comply with the procedural requirements of the

RFA, its actual assessment of the Rule's economic impacts renders any defective compliance harmless error." *Id*. at 879. Likewise, in *U.S. Telecom Ass'n v. FCC*, the D.C. Circuit implied that the harmless error standard applies to the RFA. 400 F.3d 29, 42 (D.C. Cir. 2005). There, because the RFA violation—a failure to produce a Final Regulatory Flexibility Analysis ("FRFA")—was indisputable and significant, the court noted that there could be no "argument that the Commission's failure was harmless." *Id*.

These cases suggest that the harmless error rule applies to the RFA and that Plaintiffs must therefore show that they were prejudiced by the alleged RFA violations in order to demonstrate that they are likely to succeed on the merits of that claim. *See Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 868 (D.C. Cir. 2001). ("Failure to comply with the RFA 'may be, but does not have to be, grounds for overturning a rule.'" (quoting *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 538 (D.C. Cir. 1983)). This understanding of the RFA is in line with the Administrative Procedure Act ("APA"), which instructs courts to take "due account" of "the rule of prejudicial error" in determining whether to set aside agency action. 5 U.S.C. § 706; *see also DSE, Inc. v. United States*, 169 F.3d 21, 31 (D.C. Cir. 1999) ("[I]t is equally well settled that the principle of harmless error applies to judicial review of agency action."). Because the APA provides the standard of review for the RFA, the APA's "prejudicial error" standard also applies to RFA claims. *See Nat'l Tel. Co-op Ass'n v. FCC*, 563 F.3d 536, 540 (D.C. Cir. 2009) (applying APA's arbitrary and capricious standard of review to RFA claim); *Associated Fisheries of Me. v. Daley*, 127 F.3d 104 (1st Cir. 1997) (same); *Nat'l Ass'n for Home Care v. Shalala*, 135 F. Supp. 2d 161, 166-68 (D.D.C. 2001) (examining issue of proper standard of review for RFA at length).

Here, Plaintiffs have failed to demonstrate that they have suffered prejudice as a result of Federal Defendants' alleged noncompliance with the RFA. *See Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) ("[T]he burden of showing that an error is harmful normally falls upon the party attacking the agency's determination."). Plaintiffs allege that the FWS (1) failed to make public "any proposed courses of action they were considering in the 2014-15 period" as part of the 2015 FRFA, thereby depriving Plaintiffs of the ability to comment on those proposals (Pls.' TRO Reply at 14-16), and (2) failed to consider in the 2015 FRFA "alternatives to reduce the economic impacts of the listing" (*Id*. at 16; Pls.' TRO Mot. (ECF No. 28-1) at 26-27; Second Am. Compl. (ECF No. 27) ¶ 135). As to the first allegation, putting aside the fact that Plaintiffs are essentially arguing that the FWS should have produced a supplemental Initial Regulatory Flexibility Analysis ("IRFA") and that the RFA does not permit judicial review of an IRFA, Plaintiffs do not explain what they would have said, had they been given the opportunity to comment on the FWS's "proposed courses of action." In order to demonstrate prejudice when alleging that an agency failed to provide notice of a proposed action and opportunity to comment, a plaintiff "must indicate with reasonable specificity what portions of the documents it objects to and how it might have responded if given the opportunity." *Gerber v. Norton*, 294 F.3d 173, 182 (D.C. Cir. 2002) (citation omitted). As the D.C. Circuit explained in finding that EPA's failure to provide notice of a change from a proposed rule in advance of the final rule was harmless,

> We cannot think how [plaintiffs'] comments would have differed fundamentally if they had known what EPA would do. Though they would have had a different proposition against which to argue, their proposed solutions would, presumably, have been the same for the same reasons. They might have responded in greater volume or more vociferously, but they have not shown us that the content of their criticisms would have been different to the point that they would have stood a better chance of convincing the Agency.

United Steelworkers of Am., AFL-CIO-CLC v. Marshall, 647 F.2d 1189, 1225 (D.C. Cir. 1980) (quoting *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 644 (1st Cir. 1979)). Here too, Plaintiffs have provided no indication of the substance of the comments they would have made had they had the chance to review the 2015 FRFA prior to its publication, and there is no evidence that their comments would have been so markedly different from those made on the 2010 IRFA "that they would have stood a better chance of convincing" the FWS to change its course.

Moreover, to the extent Plaintiffs' comments would have concerned the changed "economic baseline *circa* 2014" in light of the 2012 listing, Pls.' TRO Reply at 16, the 2015 FRFA and the 2015 Final Economic Analysis took that data into account. *See* 2015 FRFA (ECF No. 31-3) at 4, 8, 10, 19-20 (citing 2015 FWS Final Economic Analysis; 2014 Small Business Administration ("SBA") data; 2014 FWS importation data; 2012 census data; and 2011 report by Georgetown Economic Services, Inc. on "The Modern U.S. Reptile Industry"); 2015 Final Economic Analysis at 73-75, available at http://www.fws.gov/injuriouswildlife (citing 2011-2012 and 2013-2014 American Pet Products Association National Pet Owners Survey; 2014 Kingsnake.com survey of breeders, hobbyists, importers, exporters, and sellers; 2013 report by Blue Sky Consulting Group on "The Effects of Listing Five Additional Species of Constrictors as Injurious Under the Lacey Act"; 2013 FWS National Survey of Fishing, Hunting, and Wildlife Associated Recreation; and 2012 study "Severe Mammal Declines Coincide with Proliferation of Invasive Burmese Pythons in Everglades National Park"). Plaintiffs have not identified any studies or data that the FWS overlooked or failed to take into account. Because the FWS considered more recent data of its own accord, Plaintiffs' cannot demonstrate prejudice from the

inability to provide and comment on that data.[8] *See Envtl. Def. Ctr*., 344 F.3d at 878 (finding harmless error when agency had already performed analysis that would have been remedy for alleged RFA violation); *Fla. Wildlife Fed'n v. Jackson*, 853 F. Supp. 2d 1138, 1176 (N.D. Fla. 2012) (same).

Plaintiffs also cannot demonstrate prejudice from their inability to comment on the FWS's proposed courses of action in the 2015 FRFA because they effectively had notice and an opportunity to comment. Plaintiffs were put on notice by the 2014 notice reopening comment on the proposed rule that the FWS (1) was considering listing the remaining five species; (2) would conduct additional economic analysis as part of their review; and (3) was seeking new comments on its IRFA and on "the economic effect [of the proposed listing] on wholesale and retail sales." 79 Fed. Reg. 35,719, 35,720 (June 24, 2014). That notice expressly invited the regulated community and any other interested parties to provide comments on the proposed listing of the five additional species. *Id*. at 35,719 ("You may submit your comments and supporting materials concerning the proposed rule, the draft economic analysis, the initial regulatory flexibility analysis, and the draft environmental assessment by one of the methods listed . . . ."). Thus, to the extent Plaintiffs wished to provide comments regarding the effect of the Burmese python listing on the market and the "economic baseline *circa* 2014," Pls.' TRO Reply at 16, they were made aware that they should do so by the notice reopening comment on the proposed rule and

[8] As the FWS explained in the FRFA, because no individuals or organizations provided more recent data regarding the economic impact of listing the five proposed additional species on small businesses during the 2014 comment period, the information submitted by the Pet Industry Joint Advisory Council as part of its 2010 comments on the 2012 Rule "is still the best available information to describe the number of large constrictor snake businesses impacted." 2015 FRFA at 4. The FWS is "not required [by the RFA] to conduct an industry survey," but instead "compiled the best currently available economic data on the large constrictor snake industry to estimate potential impacts that are expected as a consequence of this rule." *Id*.

should not now be heard to complain that they lacked the opportunity to comment.[9] Indeed, two members of USARK, Kevin McCurley and Kristopher Brown, did submit comments regarding the effect of the proposed listing on their businesses, indicating that Plaintiffs were aware of the opportunity to submit such comments and could have done so prior to the publication of the 2015 FRFA. Pls.' TRO Mot. at 26; Second Goss Decl. (ECF No. 42-1) (identifying USARK members).

As to the FWS's alleged failure to consider alternatives in the 2015 FRFA, Plaintiffs argue that the FWS should have considered treating reticulated pythons and green anacondas like the boa constrictor—that is, relying on state and private efforts to regulate those species instead of listing them under the Lacey Act. Pls.' TRO Reply at 16. They also allege that the FWS failed to consider extending the effective date of the Rule to allow Plaintiffs more than thirty days to adjust to the new listings. Pls.' TRO Mot. at 27-28. Putting aside the question of whether the FWS had a duty under the RFA to consider these additional alternatives when it was already considering five others, *see* Defs.' TRO Opp'n at 24-25, Plaintiffs cannot show that they were prejudiced by the FWS's failure to consider their proposed alternatives because the FWS did in fact consider both of them.

As to the first, the FWS considered relying on state and private efforts to regulate the green anaconda and reticulated python as part of its no action alternative. 2015 FRFA at 5. The FWS explained in the 2015 FRFA that an alternative that would rely on state regulation rather than listing under the Lacey Act "has been reconsidered since the issuance of the draft EA, but

[9] To the extent Plaintiffs wished to have an "informed dialogue" with Defendants regarding their proposed courses of action, that is not a requirement of the RFA. Pls.' TRO Reply at 16. The RFA requires that an agency make its IRFA "available for public comment" and that it address any comments received in the FRFA. 5 U.S.C. §§ 603(a), 604(a)(2). Federal Defendants met that requirement here when FWS solicited comments on its 2010 IRFA and 2012 FRFA and addressed those comments in the 2015 FRFA. *See* 79 Fed. Reg. at 35,719-20; 2015 FRFA at 2-6.

the alternative was dismissed from further consideration for all but one species, the boa constrictor, because this alternative is generally not practical for the other four species." *Id*. The agency went on to explain that state regulation was unreliable because "[f]ew states address all introduction pathways" and "states continue to apply different approaches to listing and prohibitions, generally making cooperative enforcement and management from state to state difficult." *Id*. The FWS then noted that "the boa constrictor presents a unique situation" because it is by far the most popular non-native large constrictor snake species kept by pet owners and hobbyists in the United States—"captive boa constrictor numbers are likely higher than for all of the other eight large constrictor snake species combined." *Id*. "Thus, of the nine large constrictor snakes evaluated by the FWS, risk management measures by States and private entities such as the pet industry, are particularly needed for the boa constrictor . . . ." *Id*. at 5-6. Because the FWS considered Plaintiffs' proposed alternative of relying on state and private regulation of the reticulated python and green anaconda as part of the no action alternative, Plaintiffs could not have been prejudiced by the FWS's alleged failure to consider it.

As to Plaintiffs' second proposed alternative—that the FWS consider extending the effective date of the 2015 Rule—Plaintiffs were not prejudiced because, again, the FWS did in fact consider an extension, albeit not in the IRFA or 2015 FRFA. On March 16, 2015, Plaintiffs submitted a letter to the FWS Director asking that the effective date be extended by one year to allow the affected community time to adjust.[10] Pls.' TRO Mot., Ex. I (ECF No. 28-11). The FWS considered the proposal and rejected it because Plaintiffs were requesting the extension "to

[10] Notably, neither Plaintiffs nor any other individual or entity provided comments in response to the 2014 notice reopening comment on the proposed rule asking the FWS to extend the effective date in the event one or more of the species were listed, despite the fact that, having experienced the effect of the 2012 listing, Plaintiffs and others in the regulated community would have been well-aware of the alleged grounds for requesting the extension at that time.

minimize or avoid economic impacts to breeders and sellers" rather than to "bring their actions into compliance with" the 2015 Rule. *Id*., Ex. O (ECF No. 28-17). The FWS noted that "[t]his is not the purpose of the effective date and would undermine the very purpose of the listings." *Id*. Courts have found an alleged violation of the RFA is harmless if the agency later cures it. *Envtl. Def. Ctr*., 344 F.3d at 878; *Fla. Wildlife Fed'n*, 853 F. Supp. 2d at 1176. Here, Plaintiffs had their opportunity to seek an extension of the effective date, and that request was considered and denied.

In sum, Plaintiffs are unlikely to succeed on their RFA claim, not only because FWS fully complied with the RFA's procedural requirements, but also because they cannot demonstrate that they were prejudiced by the alleged RFA violations. The FWS fully considered available economic data concerning the impact of the 2015 Rule on small businesses, and Plaintiffs were expressly invited to provide any additional information in comments. The FWS also considered both of Plaintiffs' proposed alternatives—not listing the reticulated python and green anaconda and extending the effective date. Because the harmless error rule applies to claims under the RFA, even if Plaintiffs were to successfully demonstrate that the FWS likely violated the RFA, they have not shown the prejudice necessary to succeed on the merits of Count Six.

CONCLUSION

For the foregoing reasons, as well as those set forth in Federal Defendants' Opposition to Plaintiffs' Motion for a Temporary Restraining Order, Federal Defendants respectfully request that this Court deny Plaintiffs' Motion for a Preliminary Injunction.

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Respectfully submitted,

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