

Testimony of Mr. Mike Freeze, President of the National Aquaculture Association, to the House Committee on Natural Resources on Thursday, February 27, 2014, concerning H. R. 3105, Aquaculture Risk Reduction Act, H. R. 3280, Lacey Act Clarifying Amendments Act, H. R. 3324, Lacey Act Paperwork Reduction Act and H. R. 4032, North Texas Invasive Species Barrier Act

I would like to thank Chairman Fleming, my own Congressman Rick Crawford and the remaining members of the House Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs for allowing me to address you in support of H. R. 3105, the Aquaculture Risk Reduction Act that seeks to reduce the threat of federal criminal prosecution under the Lacey Act of farmers for minor accidental infractions occurring during regular business activities.

My name is Mike Freeze and I am currently president of the National Aquaculture Association, the largest producer-based aquaculture association in the United States. But in reality, since 1983, I have simply been an Arkansas fish farmer. I am co-owner of Keo Fish Farm along with my business partner, Mrs. Martha Melkovitz. Our farm has over 1,000 acres of ponds in which we produce hybrid striped bass and USFWS' certified sterile triploid grass carp for live sales nationally and internationally.

For aquaculture facilities that ship live product nationally, our number one federal regulatory issue is the Lacey Act. Written in 1900 and amended numerous times, including in the 2008 Farm Bill, the Lacey Act prohibits the international and interstate trafficking of illegally obtained wildlife and fish or parts as designated by federal, state, tribal or foreign governments. When the Lacey Act was written, it was specifically designed to regulate only "wild animals" and aquaculture was practically non-existent. The 1981 amendments to the Lacey Act included a provision that broadened its application to all "wild" animals, including those having been "bred, hatched, or born in captivity" (16 USC 3371(a)). The USFWS has used this broadened definition to regulate domestic ally produced aquaculture species but not other domesticated species such as turkeys. USDA, however, has defined wild members of the plant kingdom and excluded common cultivars and food crops (except planted trees). Hence, today our domesticated fish are regulated as if they were taken from the wild.

Of particular concern to our industry, is that the Lacey Act elevates the violation of even misdemeanor state regulations to federal felonies simply because \$350 of domesticated product has entered interstate commerce. Penalties for a Lacey Act felony violation begin at \$100,000 (\$200,000 for organizations) and mandatory incarceration. This scenario is analogous to a \$50 speeding ticket being elevated to a \$100,000 speeding ticket simply because you are driving on an interstate highway instead of a state highway. In a report by the National Agricultural Law Center entitled "Aquaculture and the Lacey Act" author, Elizabeth Rumley states: "The Lacey Act should be amended to exempt domestically produced aquatic species" and I could not agree more. This report and a shorter fact sheet by Ms. Rumley can be found at http://www.nationalaglawcenter.org/assets/articles/springsteen_lacey.pdf and <https://srac.tamu.edu/index.cfm/event/getFactSheet/whichfactsheet/247/>

I have also brought a short paper on "Aquaculture and the Lacey Act" by the National Association of State Aquaculture Coordinators that I would like to distribute to the subcommittee.

But today I want to specifically speak to H.R. 3105, the Aquaculture Risk Reduction Act that addresses one of industry's most egregious concerns with the Lacey Act: the prosecution of farmers for the accidental inclusion of an unintended species in the interstate shipment of aquatic species produced in commercial aquaculture for human consumption or for recreational or ornamental purposes. Prior to 1969, any accidental violation of the Lacey Act could not be prosecuted as the Lacey Act contained language stating that any person that "willfully" violated the law was subject to penalty. Unfortunately, the 1969 amendments changed the "willfully" requirement to a "knowingly" requirement. Though I am not an attorney, I have been advised that it is much easier to prove "knowingly" in a court of law than "willfully".

Congressman Fleming's letter inviting me to testify, asked four specific questions that I will attempt to answer next.

Aquaculture is defined as the farming of aquatic organisms such as fish, crustaceans, molluscs and aquatic plants under controlled conditions with some form of intervention in the rearing process to enhance production, such as regular stocking, feeding, protection from predators, etc. Or put in simplistic terms: aquaculture is underwater farming. Total U.S. aquaculture production is currently estimated by NOAA to exceed \$1 billion, while the U.S. seafood trade deficit exceeds \$10.4 billion annually. In Alabama, Arkansas, Louisiana and Mississippi alone over 250,000 acres are devoted to commercial aquaculture production.

Keeping track of federal, state, tribal, and foreign regulated animals and plants is extremely difficult for U.S. fish farmers. These laws are amended frequently and the states, tribes and foreign governments do so without national public notice. Species accidentally included in an interstate shipment of domestic ally produced aquatic species that would trigger a Lacey Act violation include federally listed aquatic injurious species but are not limited to just those injurious species. For example, Wisconsin has prohibited the importation of mosquito fish (*Gambusia* sp.) into their state even though this species cannot survive their harsh winters and was previously allowed into their state for many years. While minnow farmers try very hard to exclude native mosquito fish from their production ponds, federally protected migratory birds sometimes contaminate their ponds by transferring eggs or fry into the ponds. Just a few mosquito fish accidentally included in a shipment of several thousand pounds of fathead minnows shipped to Wisconsin would be a Lacey Act violation because the underlying Wisconsin state regulation prohibiting mosquito fish was violated during interstate commerce.

California and certain cities (e.g., Chicago) regulate farm-raised aquarium species at the county level. It is very difficult for farms that raise ornamental fish, invertebrates, and plants to keep current with the identities of prohibited species at the zip code level. A single freshwater snail prohibited by a state or city that is accidentally shipped in a box of aquatic plants is a violation of the Lacey Act. Within the last several years, three petitions to list common aquarium species as endangered species (dwarf sea horse, sixty six Pacific hard corals, seven damsel fish and the orange clownfish that we all know as "Nemo") has created a significant Lacey Act risk for farms. In particular, scientists disagree about hard coral taxonomy and both farmers and regulators must use expensive DNA testing to identify coral species even though corals cultured in captivity develop an appearance different than those species found on wild reefs.

Examples of USFWS' aquatic injurious species that might be accidentally included in commercial aquaculture shipments include thumbnail size zebra mussels in a truck transporting catfish fingerlings from Louisiana to Arkansas (both states are already infested with zebra mussels and are connected by numerous zebra mussel infested rivers) or a single sterile triploid black carp in a 20,000 pound shipment of food catfish being transported from an Arkansas' catfish farm to a processing plant in Mississippi (sterile triploid black carp are legal in both Arkansas and Mississippi for snail control on fish farms and are highly regulated by each state; there are no catfish processing plants in Arkansas).

If a single individual of an injurious species or state prohibited species is found in an interstate shipment of domestic aquatic organisms, the farmer and transporter can be charged under the Lacey Act's felony provisions, if the shipment is worth more than \$350, which all such shipments are. In the example of the sterile triploid black carp in a shipment of food size catfish transported from Arkansas to a processing plant in Mississippi, the entire shipment is destined for slaughter, with all non-catfish species being killed, separated and placed into a "trash" tank so their poundage can be deducted from the poundage of the catfish that the farmer is paid for.

Adding credence as to why the Aquaculture Risk Reduction Act must be passed if the aquaculture industry is to prosper in the United States, the USFWS has already published in the Federal Register their proposal for a categorical exclusion under the authority granted by the National Environmental Policy Act, when determining whether a nonnative species should be listed as injurious under authorities granted by the Lacey Act. This would allow the USFWS to more easily and quickly list any species as injurious without adequate oversight. Also, the USFWS is actively pursuing Congressional authority to list disease organisms as injurious species, an authority currently lacking in the injurious provisions of the Lacey Act. USDA is currently the federal agency that regulates all aquatic animal diseases except Title 50 salmonid diseases.

The USFWS has also published in the Federal Register the possibility of listing all amphibians infected with the Chytrid fungus as injurious species, an authority that they clearly do not have. But imagine if the USFWS did have the authority for such a listing, any interstate shipment of fish that contained a single infected tadpole or any interstate shipment of potted plants that an infected frog jumped onto would expose the shipper to a felony Lacey Act conviction. Currently, the Chytrid fungus is found throughout the United States and researchers have proven that Chytrid fungus is transported by the wind, rain and migrating waterfowl.

Finally, the National Aquaculture Association is not asking for a "free pass" on animals accidentally included in a shipment of an aquatic species produced in commercial aquaculture for human consumption or for use for recreational or ornamental purposes. State agencies have state regulations that farmers still must abide by, such as the Wisconsin DNR prohibition on mosquito fish, but the state regulations are normally misdemeanors not felonies. And we are not asking for a categorical exclusion from the injurious species regulations of the Lacey Act, only for protection from Lacey Act prosecution for the accidental inclusion of an animal in a shipment of an aquatic species produced in commercial aquaculture for human consumption or for use in recreational or ornamental purposes. Protection, I might add, that we had until 1969.