

TESTIMONY OF EILEEN SOBECK, DEPUTY ASSISTANT SECRETARY FOR FISH AND WILDLIFE AND PARKS, DEPARTMENT OF THE INTERIOR, BEFORE THE U.S. HOUSE OF REPRESENTATIVES, COMMITTEE ON NATURAL RESOURCES, SUBCOMMITTEE ON FISHERIES, WILDLIFE, OCEANS AND INSULAR AFFAIRS, REGARDING H.R. 3210 AND H.R. 4171

May 8, 2012

Good afternoon Chairman Fleming and Members of the Subcommittee. I am Eileen Sobeck, Deputy Assistant Secretary for Fish and Wildlife and Parks, in the Department of the Interior. I appreciate the opportunity to testify before you today on H.R. 3210 and H.R. 4171, bills that would significantly amend the Lacey Act.

The Department of the Interior has serious concerns with each of these bills. As detailed in my testimony, H.R. 3210 would weaken the plant protection provisions of the Lacey Act. H.R. 4171 would remove essential authorities in the Lacey Act, one of the most important and effective conservation laws in the world and in doing so, undercut legal trade in wildlife and plants. In addition, H.R. 4171 would disarm wildlife law enforcement officers in the United States, putting these brave men and women, who already put themselves in harm's way on behalf of the American people, at serious risk.

The U.S. Fish and Wildlife Service (Service) is one of the lead federal agencies for enforcing the Lacey Act, a long-standing law that prohibits trafficking in illegally taken fish, wildlife, and plants. The Service also enforces many other U.S. laws that protect wildlife, including the Endangered Species Act, the Marine Mammal Protection Act, and the Migratory Bird Treaty Act. The Lacey Act complements and strengthens our ability to enforce these other statutes.

The Service's 225 special agents work on over 13,000 investigations each year involving complex, high-impact wildlife crimes. The focus of these wildlife crimes include highly endangered species such as elephants, rhinos, tigers, and sea turtles; rain forests in the tropics; wildlife habitat in the United States; and domestic species like deer and bears that are poached in violation of state laws. Our agents' efforts to stop wildlife smuggling pit them against organized networks and criminals conducting high-profit, black market trade valued in the billions. Our agents are responsible for covering the nearly four million square miles of land that make up this country. They are an extraordinary group focused on combating illegal taking and trafficking of wildlife and wildlife products in the United States. In fact, this group – in terms of numbers of officers – has remained essentially the same since the early 1980s. In contrast, illegal trade has grown in sophistication, the global economy for wildlife products has expanded, and new law enforcement mandates have been enacted.

We have 139 wildlife inspectors stationed at 38 of the more than 400 Customs port of entry. Last year they processed approximately 180,000 declared shipments of wildlife and wildlife products worth more than \$2.8 billion. Wildlife inspectors are our front line defenders utilizing the Lacey Act to help stop the import of injurious species that could devastate our native

ecosystems and industries if one of the species were illegally imported or smuggled into the country.

The Service also employs 403 Federal Wildlife Officers who serve as the uniformed police force and conservation officers for the 557 National Wildlife Refuges in the United States. These officers are responsible for maintaining law and order, and protect the safety of millions of visitors on approximately 150 million acres of land and water throughout the United States and its territories. These officers investigate and respond to many thousands of crimes committed on refuges each year, including violent crimes and crimes involving weapons and illegal drugs.

The Service's agents and officers depend on the Lacey Act to do their work. The Lacey Act is the single most effective wildlife law available in the United States. Its prohibitions protect animal and plant resources from rapacious exploitation here and around the world. Its penalties make prison sentences and significant fines a real possibility for hard-core profiteers; reduce financial incentives for wildlife and plant trafficking; and provide real deterrents for wildlife crime. It also supports those businesses that commerce in legitimate wildlife and plant trade here and abroad. Its authorities show that our Nation's commitment to wildlife conservation goes beyond words to encompass action, because it equips law enforcement officers with the tools they need to conduct investigations and bring criminals to justice.

The Administration strongly opposes H.R. 4171 because it would undermine the Lacey Act and facilitate the illegal trafficking of wildlife and plants. H.R. 4171 would tip the already unbalanced scales firmly against law enforcement officers and agents striving to enforce wildlife conservation laws on behalf of the American public.

With respect to H.R. 3210, the Administration appreciates the concerns raised in the bill and believes that many of these concepts are and can be addressed in the way that we implement the current law. However, we are willing to work with the sponsors to discuss how best to sharpen the approach to the concerns raised by H.R. 3210.

Historical Background

The Lacey Act was the Nation's first federal wildlife protection law. Its passage in 1900 was prompted by growing concern about interstate profiteering in illegally taken game species and the impact of that trafficking on states and their wildlife resources.

The Lacey Act was drafted and shepherded through Congress by Representative John Lacey, an Iowa Republican and early conservationist. The law made it illegal to transport from one state or territory to another wild animals or birds killed in violation of state or territorial law. According to the House Committee Report from the 56th Congress, its "most important purpose" was "to supplement the state laws for the protection of game and birds." It also banned the importation of injurious wildlife that threatened crop production and horticulture in this country. In its original version, the Lacey Act focused on helping states protect their resident wildlife. Defendants charged under its interstate commerce provisions would first have violated a state

wildlife law and then taken that unlawfully acquired wildlife across state lines and beyond the reach of its authorities.

Congress expanded the Lacey Act through amendments several times during the law's first century. One of the most significant of these amendments occurred in 1935, when Congress extended the Lacey Act's prohibitions on interstate commerce to include wildlife and birds taken in violation of federal or foreign law. An important example is the 1918 Migratory Bird Treaty Act.

Amendments enacted in 1981 expanded the scope of the statute to: include certain unlawfully harvested fish; increase penalties for trafficking; strengthen tools for enforcement; apply prohibitions on interstate and international trafficking to any type of wild animal; and extend protection to certain wild plants. The 1981 amendments also added tribal laws and U.S. treaties to the list of underlying laws upheld; incorporated strict liability forfeiture provisions consistent with other resource laws; and established criminal felony liability for those buying or selling protected specimens of fish or wildlife that they knew had been taken and transported in violation of an underlying law.

2008 Plant Amendments

The most recent amendments to the Lacey Act were passed by Congress and signed into law on June 18, 2008, as part of the Food, Conservation, and Energy Act of 2008 (Pub. L. 110-246). They expanded the definition of plants covered by the Act, and similarly expanded and clarified the predicate violations that could trigger the Lacey Act.

Under the 2008 amendments, it is unlawful to import, export, sell, receive, acquire or purchase in interstate or foreign commerce any plant that was taken in violation of a federal, state, tribal or foreign conservation law. The statute specifies that the underlying laws that trigger a plant trafficking violation include laws and regulations that:

- protect the plant;
- regulate the (i) theft of plants, (ii) taking of plants from a park, forest reserve, or other officially protected area, (iii) taking of plants from an officially designated area, or (iv) the taking of plants without, or contrary to, required authorization;
- require royalties, taxes or stumpage fees for the taking, possession, transportation or sale of any plant; and
- govern the export or transshipment of plants.

The amendments were supported by the Bush Administration as part of its *Presidential Initiative against Illegal Logging*. The initiative responded to widespread concerns about the economic impacts of illegal logging. Both Republicans and Democrats supported the amendments as a way to protect jobs from unfair and illegal logging practices.

The Lacey Act plant amendments were supported by more than 50 trade associations, non-profits, and unions, representing the entire range of stakeholders, as well as the Bush Administration, Executive Branch agencies, and both parties in Congress. This broad support was driven by the fact that: first, illegal logging practices have a negative impact on U.S.

businesses that operate by the rules; and second, illegal logging has a negative impact on biodiversity, indigenous peoples, and the global climate.

In particular, the law received strong support from the U.S. forest products industry. The 2008 amendments help ensure that all businesses, including foreign companies that send their goods into this country, are operating on a level playing field.

The amendments equipped the United States with tools for addressing illegal logging and timber trafficking. They provided a new definition of the term “plant” making it clear that (with some limited exceptions) the prohibitions apply to plant products as well as living plants themselves. Specifically, “plant” was defined as “any wild member of a plant kingdom, including roots, seeds, parts, or products thereof, and including trees from either natural or planted forest stands.” The inclusion of “products” parallels wildlife provisions in the Lacey Act, which cover not only live fish and wildlife, but also products made from them.

The amendments also added a declaration requirement for plant products. This mandate is similar to the requirement for the declaration of wildlife imports and exports established by the Endangered Species Act, which also applies to all wildlife and wildlife products, whether protected under a specific conservation law or not, but covers a larger range of commercial and non-commercial shipments.

The U.S. Department of Agriculture’s Animal and Plant Health Inspection Service (APHIS), operating within available funding, has implemented and enforced the amendments with respect to the importation process itself. As in the past, the Service remains responsible for conducting criminal investigations of Lacey Act violations, including those authorized by the plant amendments. APHIS was assigned significant new responsibilities with respect to monitoring trade in plants and plant products under the Lacey Act – responsibilities that include developing and implementing a declaration system and collecting and maintaining plant import data.

Importance of the Lacey Act

Today the Lacey Act makes it unlawful to traffic in fish, wildlife, or plants taken, possessed, transported, or sold in violation of federal, state, foreign, or Native American tribal conservation law, treaty, or regulation. It allows the United States to help states, Tribes, and countries worldwide protect their natural resources by discouraging a U.S. market and U.S. demand for illegally obtained plants and wildlife. The law is a critical cornerstone for resource protection and conservation law enforcement.

Under the Lacey Act, Service law enforcement agents expose illegal guiding operations (i.e., guided hunting trips) profiteering in state, tribal, and federally protected species and pursue cases involving the illegal large-scale commercial exploitation of wildlife and plant resources in violation of state, tribal, or federal law. The Lacey Act provides a unique mechanism for states and Tribes to address crimes within their borders by out-of-state or non-tribal guides and hunters as well as the interstate sale or international export of unlawfully acquired U.S. wildlife or plants. Such sales fuel the market for certain species, putting domestic wildlife and plant populations

increasingly at risk. Illegal commercialization of wildlife is a real and present threat to conservation.

On the international front, the Lacey Act provides an essential tool for combating large-scale smuggling and the subsequent interstate commerce in global species protected and regulated under federal laws, international treaties such as CITES, and the conservation laws of other countries. Its provisions give the Justice Department access to powerful enforcement tools which help to bring charges against international organized crime rings and criminals who knowingly and deliberately traffic in the world's most imperiled species and in its most important natural resources, such as fisheries and timber. Trafficking in illegally harvested wood, for example, is estimated to generate proceeds of approximately \$10 billion to \$15 billion annually worldwide, according to a 2012 report by the World Bank¹.

The existence and enforcement of the Lacey Act's foreign law provisions have made the United States a leader and role model for countries around the world – particularly those that, like the United States, have long been major markets for wildlife and plant resources illegally taken in developing countries that struggle to feed their people, let alone protect their wildlife, plants, and forests. Through these provisions, our Nation holds itself accountable for stopping illegal trade in natural resources involving interests in our country, and recognizes and supports the efforts of other countries to level the playing field for legitimate businesses who manage their natural resources responsibly.

H.R. 4171

H.R. 4171, the Freedom from Over-Criminalization and Unjust Seizures Act, would eliminate essential authorities in the Lacey Act, radically changing its nature and severely undercutting its effectiveness to conservation internationally and here in the United States. The statutory structure of Lacey Act evolved over the past century. It reflects the deliberative work of many Congresses, federal enforcement of the Lacey Act by the Service and the National Oceanic and Atmospheric Administration and the experiences of federal, State, Tribal, and foreign governments in implementing conservation laws and programs that need to expand political borders. H.R. 4171 weakens Lacey Act prohibitions, eliminates Lacey Act criminal penalties, and significantly hampers the law enforcement capability of officers authorized to enforce the Lacey Act.

For these reasons, the Administration strongly opposes H.R. 4171 in its entirety. Specific comments on the provisions of H.R. 4171 follow.

H.R. 4171 Weakens Lacey Act Prohibitions

- Section 2(a) of H.R. 4171 would eliminate all violations predicated on foreign law. The Service opposes this provision for the reasons described below.

¹ Marilyn Pereira Goncales, et al. Justice for Forests : Improving Criminal Justice Efforts to Combat Illegal Logging. Washington, D.C.: World Bank, 2012.

The Service seeks to conserve fish, wildlife and plants for future generations. We have long recognized that conservation is a global issue. We cannot sacrifice coral reefs around the world and expect to have healthy oceans. We cannot sacrifice migratory birds in the rest of the Americas and expect to see them on their annual migrations through the United States. Americans enjoy seeing gorillas and elephants while on vacation or when they watch their favorite nature program. Many Americans wish to ensure that their grandchildren are afforded the same opportunities.

The Service supports international conservation projects around the globe, such as the Multi-National Species Conservation Funds that help countries conserve rhinos, tigers, elephants, and sea turtles. The Lacey Act foreign law provisions help to ensure that individuals within the jurisdiction of the United States do not undermine these global conservation initiatives. The statute's foreign law provisions recognize the reality that many countries with conservation laws lack the resources or capacity to enforce them within their borders, leaving their wildlife and plants especially vulnerable to outside exploitation. They also recognize that the United States provides a significant market for the trade in illegally taken wildlife, fish, and plants. Since the 1930s, the United States has had a law on the books that makes it illegal to knowingly import wildlife taken in violation of a foreign law. This is both a pragmatic and an ethically sound approach.

For the first time in more than eight decades, H.R. 4171 would do away with all trafficking prohibitions predicated on foreign law, destroying a global alliance for wildlife protection that has benefited species worldwide. H.R. 4171 sends a message to other countries, including long-standing strategic allies and more recent conservation partners, that the United States is no longer a team player when it comes to enforcing conservation laws throughout the world. Indeed, it proclaims an indifference to the toll that international trafficking has taken on species that range from African elephants and Madagascan ploughshare tortoises to South American parrots and Pacific corals and from neo-tropical mahogany to Southeast Asian orchids.

H.R. 4171 Eliminates Lacey Act Criminal Penalties, Permit Sanctions, and Vehicle Forfeiture

- Section 2(b) of H.R. 4171 eliminates all criminal penalties – both misdemeanors and felonies. It would eliminate the potential for jail time, no matter the scope of the violation.
- Section 2(b) of H.R. 4171 eliminates permit sanctions for violations of Lacey Act.
- Section 2(c) of H.R. 4171 eliminates the government's authority for forfeiture of vehicles and other instrumentalities used in the commission of an offense.

In addition to the harm that H.R. 4171 would do to U.S. contributions to global conservation, it would also make sweeping changes in the legal consequences for trafficking in state, tribal and federally protected species in the United States and in the Service's authority for enforcing its remaining prohibitions.

H.R. 4171 would eliminate criminal penalties for any Lacey Act violation and removes provisions that authorize the Service to suspend import/export licenses and deny permits to businesses that violate the Lacey Act's anti-trafficking provisions. It also prevents the forfeiture of vehicles and other instruments used in the trafficking. It thus would remove vital deterrents to crime and the prospect of serious punishment and only allow for imposition of more limited civil penalties. In organized schemes involving high-value resources, civil fines are not a sufficient deterrent and become merely an occasional and potential "cost of doing business" for those who stand to profit from conducting illegal activities. Wildlife cases can – and have – involved products valued in the tens of millions of dollars.

Under current law, Service special agents face a substantial burden of proof to secure criminal Lacey Act charges. Investigators must prove that the potential defendant acted with full knowledge of the legal status of the wildlife, plant, or product with respect to its removal from the wild and those transactions that occurred before interstate transport or importation. Criminal penalties only apply to those who intentionally or recklessly violate the law. Individuals and companies who unintentionally do so are currently subject only to civil liability and a maximum penalty of \$10,000.

Felony penalties do not apply (and would not be sought) against violators unless both investigators and prosecutors believe that it can be proved in court, beyond a reasonable doubt, that the violators knew exactly what they were doing. The Lacey Act provides misdemeanor penalties for persons who, in the exercise of due care, should have known that the wildlife or plant in which they were dealing was illegal.

If H.R. 4171's proposed changes had been in place over the past decade, none of the convicted defendants in Lacey Act cases would have served any prison time or would have had their vehicles subject to forfeiture. No restitution would have been paid to states, tribes, or other groups and no conservation efforts would have been funded with these monies. Repeat or egregious violators would retain and remain eligible for Service permits or licenses, including licenses to conduct commercial trade in wildlife. Even those trafficking in wildlife and plants that are on the brink of extinction would face only limited liability under federal wildlife law. At most, they could be charged with misdemeanor violations.

The reality is conservation law enforcement is already challenged with competing for the attention of federal prosecutors and courts. Without felony provisions, far fewer resource trafficking cases will be brought. H.R. 4171 sends a message that conservation law enforcement is not a priority. It should also be noted that the Lacey Act's felony provisions often provide incentives for violators to plea to offenses with lesser penalties, thereby reducing the burden on courts and prosecutors.

H.R. 4171 Eliminates Law Enforcement Capabilities

- Section 2(d) of H.R. 4171 eliminates the authorized officers' authority to conduct searches for evidence.

- Section 2(d) of H.R. 4171 eliminates a Magistrate’s authority to even issue a search warrant when probable cause of a violation of the Lacey Act exists. In doing so, it strips the Government of its fundamental ability to obtain vital evidence to prove a violation of the law.
- Section 2(d) of H.R. 4171 eliminates the authorized officers’ broad authority under the Lacey Act to detain and inspect any vehicle, vessel, or other conveyance and any package, crate or container and its contents being imported or exported.
- Section 2(d) of H.R. 4171 removes law enforcement agents’ ability to make an arrest under the Lacey Act even with the clearest, most demonstrable evidence in hand.
- Section 2(d) of H.R. 4171 bars judges from issuing an arrest warrant for violations of the Lacey Act.
- Section 2(d) of H.R. 4171 eliminates the explicit statutory authority of authorized officers to carry firearms under the Lacey Act.

The Lacey Act is not only a cornerstone for the Service’s wildlife law enforcement, it is a critically important law for our federal, state and tribal partners. States and tribes regularly ask the Service to open joint investigations into interstate wildlife trafficking predicated on violations of State and Tribal law. But such investigations would make little progress were H.R. 4171 to become law, for special agents who cannot get a federal search warrant, conduct a search, or carry a firearm to protect themselves essentially have no tools for documenting criminal activity.

Removal of the explicit statutory authority for Service law enforcement officers to carry firearms under the Lacey Act is of particular concern. Service law enforcement officers regularly encounter armed and dangerous criminals while enforcing federal wildlife conservation laws. Placing law enforcement officers in the position of being unable to defend themselves or others creates an unacceptable risk.

H.R. 4171 would not only prevent Service law enforcement officers from carrying firearms when enforcing the Lacey Act, it could also remove in its entirety the authority for Service special agents and law enforcement officers to carry a firearm during any enforcement activity. Many of the wildlife protection laws passed after the Lacey Act (including the Migratory Bird Treaty Act, Eagle Protection Act, National Wildlife Refuge System Administration Act, and Endangered Species Act) do not address this issue, likely because of the pre-existing authority under the Lacey Act.

H.R. 4171 would weaken the Nation’s access to the law enforcement expertise and manpower that Service special agents and refuge officers provide to U.S. Government efforts to protect Americans from terrorism and help communities across the Nation respond to natural disasters and other emergencies. It would also put these brave men and women in danger.

These armed officers answered the call of a Nation in crisis in the aftermath of 9/11, providing enhanced security at federal facilities and Boston’s Logan International Airport and serving as full-time federal air marshals for extended periods. These officers provided security at the

Olympic Games in Salt Lake City and Atlanta and for political events in Washington, D.C. They waded through flood waters in the wake of Hurricane Katrina to rescue stranded residents and helped secure the devastated city of New Orleans as it struggled to restore order. They were on the scene just last year serving the people of the Dakotas when rivers in those States flooded homes and farms, threatening lives and livelihoods.

On National Wildlife Refuges, our law enforcement officers are charged by law and regulations, "...to protect fish and wildlife and their habitat and prevent their disturbance, to protect Service lands, property, facilities, or interests therein and to insure the safety of the using public to the fullest degree possible." National Wildlife Refuges have approximately 44 million visitations each year, including 2.5 million hunting and 7.2 million fishing visitations.

In 2011, the law enforcement officers of the National Wildlife Refuge System handled 43,733 reported service calls. Of these calls, 35,200 involved violations of law, including 6 homicides, 5 rapes, 67 burglaries, the seizure of approximately 246,000 pounds of marijuana and 62 kilos of cocaine. Refuge System law enforcement officers apprehended 2,372 undocumented aliens who were either being smuggled as human trafficking or were participating as traffickers themselves. Refuge System law enforcement officers investigated or encountered approximately 26,459 wildlife related crimes on Service lands in 2011.

Refuge System law enforcement officers work all corners of the United States from the northern part of Alaska to the U.S./Mexico border, in Puerto Rico, Guam and Midway Atoll, and in every state in the continental United States. They routinely work alone, in very remote areas, and in situations where support or aid is often hours away.

Refuge System law enforcement officers have statutory authority to arrest under several laws but the Lacey Act is the only law that grants the statutory authority for officers to carry firearms in conducting their duties. It is essential to protect the safety of the public and the law enforcement officers and that this explicit statutory authority is maintained.

H.R. 3210

H.R. 3210, the Retailers and Entertainers Lacey Implementation and Enforcement Fairness Act, calls for a number of specific changes to the 2008 plant amendments to the Lacey Act. The Administration appreciates the concerns raised in H.R. 3210. We believe that many of these concepts are addressed in the way we implement the current law, including an enforcement focus on commercial trafficking, not on individual owners or retailers. In addition, APHIS, working with agencies responsible for enforcing the Lacey Act, has taken and is taking a number of steps to address some of the issues that have arisen in implementation of the Act without undercutting the important purposes of the Amendments. We believe that those processes have and will adequately address the concerns and implementation issues.

However, we are willing to work with the sponsors to discuss how best to sharpen the approach to the concerns raised by H.R. 3210.

The Administration does, however, have significant concerns with H.R. 3210, as written. For example, Section 3(c) would introduce the concept of the “innocent owner” into the Lacey Act for the first time, and would extend this exemption not just to individuals or retailers, but also to forfeitures against companies engaged in the importation of the illegal material. Such companies would have little incentive to exercise due care (the culpability standard for a misdemeanor Lacey Act violation) in buying imported wood or other plant products since the government could only seize and forfeit such contraband when investigators could prove that the Lacey Act violation was knowingly committed. Limiting prosecutions to only those who knowingly violate the law would provide an incentive for importers to be ignorant or claim ignorance of the contents of his or her shipments and undermine the Administration’s efforts to combat the trafficking of protected wildlife and the importation of injurious non-native species.

Current law provides the Service's Office of Law Enforcement and the Department of Justice the flexibility to take into consideration mitigating and aggravating circumstances when deciding whether to file formal charges, issue a violation notice, or simply seize a shipment. There is a significant amount of discretion applied on a case-by-case basis. The U.S. Government has a long and positive track record of pursuing fair prosecutions under the Lacey Act.

In addition, Section 4 of H.R. 3210 would also cap civil penalties (and apparently criminal misdemeanor penalties) for first offenses involving plants and plant products at only \$250, even offenses involving commercial scale quantities of illegally harvested raw wood and timber. This change would signal to companies trading in illegal wood or other plant resources that they could risk being caught on at least one more contraband shipment as “a cost of doing business” unless investigators can prove that the Lacey Act violation was deliberately committed. This provision of the bill would weaken deterrents for illegal trafficking. It would also significantly undercut U.S. businesses who follow the rules and exercise due care putting them at a competitive disadvantage.

Conclusion

In considering H.R. 4171, we urge the committee to weigh carefully the far-reaching negative impact and message passage of these laws will have on efforts to stop illegal trafficking in wildlife and plants; on U.S. conservation partnerships with states, tribes, and other countries; on our collective stewardship fish, of wildlife and plant resources; on businesses here and abroad engaged in the legitimate harvest of, and trade in natural resources; and on the conservation of species here and around the world. With regard to H.R. 3210, we are concerned that the legislation may have unintended, deleterious consequences on the important protections provided to plants under the Lacey Act, but we are willing to work with the sponsors to address the issues raised by the bill.

Mr. Chairman, thank you for the opportunity to testify on these bills. I would be pleased to answer any questions that you and members of the subcommittee may have.