Statement of Shaun M. Gehan
Before the House Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs, of the House Natural Resources Committee, Regarding its Oversight Hearing on the Department of the Interior's proposal to use a Categorical Exclusion under the National Environmental Policy Act ("NEPA") for adding species to the Lacey Act's list of injurious wildlife

September 20, 2013

Chairman Fleming, Ranking Member Sablan, Members of the Subcommittee, thank you very much for this opportunity to testify on the U.S. Fish and Wildlife Service's ("FWS" or "Service") proposed "categorical exclusion" under the National Environmental Policy Act ("NEPA") for the Service's decisions to designate nonnative species as "injurious" under the Lacey Act, 18 U.S.C. § 42.

My testimony is presented on behalf of the United States Association of Reptile Keepers ("USARK"), a trade association representing all segments of this industry, including its reptile breeding, retail, transportation, equipment manufacture, trade show promotion, medical supply, herpetological veterinary, hobbyists, and wholesale sectors, as well as pet owners, conservationists, researchers, and academics.

I am an attorney with the Washington, D.C. office of Kelley Drye & Warren LLP and have served as legal counsel and advisor to USARK for over five years. My expertise is in natural resources, environmental, and administrative law, with particular focus on issues relevant to this Subcommittee, including, among others, the Lacey Act, Magnuson-Stevens Fishery Conservation and Management Act, the Endangered Species Act ("ESA"), NEPA.

I. Summary of Comments

USARK believes the Service's proposal for a categorical exclusion for its Lacey Act listings is unjustifiable and wholly unnecessary. There may be instances when employment of a categorical exclusion is warranted, particularly for species not in trade or not currently present in the United States. In such circumstances, however, the Department of Interior already has an appropriate categorical exclusion of which the Service has availed itself in past listing decisions. For most listings, however, NEPA provides for both public participation and rigorous scientific assessment, elements that are currently otherwise lacking in the law.

The Lacey Act invests the Secretary of Interior with discretion, delegated to FWS, to declare species of wildlife "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. § 46(a)(1). The law is unique among this Nation's conservation laws in that it provides neither standards, such as a "best science" requirement, nor procedural requirements to which the Service must adhere in making such decisions. The only prerequisite is that the listing be done "by regulation," which assures only the provision of notice-and-comment rulemaking and a minimally sufficient explanation of the basis of the decision.

It is important to understand why Administrative Procedure Act ("APA") processes alone are not adequate to protect the public interest. A determination that a species is "injurious" under the Lacey Act involves judgment by agency experts involving determinations both technical and scientific. Congress has vested the authority to make such determinations in the Secretary, while providing no criteria to guide her decisionmaking. Under such circumstances, the agency is given the utmost deference by courts. In fact, so long as some rationale is presented, it is unlikely a listing decision could ever be successfully challenged.

This makes FWS' continued adherence to NEPA essential. Years of judicial interpretation have established a clear framework for agencies to follow in making regulatory decisions. For example, it must evaluate the opinions of the public and outside experts, respond to all legitimate concerns brought forth relating to the environmental impacts of their actions, and consider significant proposed alternatives. If an agency fails to take the required "hard look" or adhere to processes the law requires, it can be held accountable. By contrast, utilization of a categorical exclusion shortcuts these procedures and places the burden of assuring FWS' NEPA compliance in the hands of the public.

In fact, as described in more detail below, the Service has a checkered past with respect to NEPA compliance in conjunction with Lacey Act listings. When it listed four species of constricting snakes as injurious in 2012, the Environmental Assessment ("EA") prepared was legally inadequate and FWS' accompanying "finding of no significant impact" ("FONSI"), wholly unjustified. This listing, done in partial completion of a 2010 proposal to list nine species of constricting snakes (five others, including the economically important boa constrictor, remain outstanding).

This was the first Lacey Act listing of species that are widely held in pet ownership and the foundation of a domestic industry. The proposal was highly controversial – one of the key NEPA criteria for producing a full environmental impact statement ("EIS") – for social and economic as well as scientific reasons. However, when USARK pointed out legal deficiencies with the EA, FWS' NEPA compliance generally, and other legal shortcomings in a detailed letter to FWS Director Dan Ashe in April of this year (a copy of which is attached to this testimony), the agency responded with the proposed categorical exclusion that is the subject of this hearing.

This response is inadequate, and the proposed exclusion, more generally, is unjustified and should be rejected.

II. Background: Why USARK Opposes FWS' Proposed Lacey Listing of Constricting Snakes

USARK has, on several grounds, strongly opposed FWS' effort to list nine species of constricting snakes as "injurious" under the Lacey Act since it was first proposed in 2010.[1] While only a handful of the proposed and listed species are in active trade (most especially the boa constrictor, reticulated python, and the Burmese python), those that are support a thriving and dynamic domestic industry. Comprised of thousands of small, "mom and pop" breeders and

[1] *See* 75 Fed. Reg. 11808 (March 12, 2010) (proposed rule); 77 Fed. Reg. 3330 (Jan. 23, 2012) (final rule listing four of the nine species as injurious).

hobbyists, this segment of the $1.4 billion reptile pet industry supports specialized equipment manufacturers, veterinarians, feed producers, and an active trade show industry, of which scores are held each year across the country. At every level, this industry is comprised of small businesses.

The proposed and partially finalized listing process has caused economic harm industry-wide, as almost 90 percent of all sales involve interstate commerce. As a result, the market diminished considerably due to fears that FWS will prohibit owners from moving across state lines with their pets. Breeders have had to cut back and even destroy valuable brood stock due to low demand and the high costs of maintenance these animals require. Economic harm at both the macro and micro level has occurred as a result of FWS' actions.

For example, Jeremy Stone, a reptile breeder for over 25 years, built a full-time business ten years ago. A graduate of Brigham Young University, Stone supports his wife and four children through his reptile business. Stone's business is captive bred, high-end boa constrictors with rare colors and patterns. Advanced hobbyists may spend $10,000 or more on these snakes. Just the proposal to list boa constrictors has decreased his business by over 60 percent. Before the proposed listing, Stone had eight employees. He has reluctantly force to lay off five of these individuals. The listing also would have trickle-down effects on other businesses, such as his feeder rodent supplier, which he pays $60,000 annually. This Subcommittee heard a similar story last year from Colette Sutherland of TSK, Inc., who testified on H.R. 511.

However, because FWS failed to do an adequate economic analysis, required by the Regulatory Flexibility Act ("RFA"), USARK commissioned an economic study by a respected Washington economics firm. Even under the most conservative economic assumptions, lost revenue impacts from a finalized listing of all nine snakes range from $42.8 million to $58.7 million annually. However, given the fact that such interstate sales comprise a large portion of total revenue, more realistic annual revenue losses range from $75.6 million to $103.6 million. Many of these impacts have already been experienced, causing harm to USARK's members

Substantively, FWS' proposed listing is predicated on a highly controversial and imprecise study declaring that Burmese pythons "could find suitable climatic conditions in roughly a third of the United States."[2] The report, prepared by researchers with the U.S. Geological Survey ("USGS"), utilized a climate-matching methodology, the value of which has been debated in peer-reviewed literature. Detailed critiques over the data and assumptions employed in the USGS study have also been published. Among the principle scientific objections was the climate-matching methodology which relied on mean monthly temperatures rather than temperature extremes and the assumption that Burmese python hibernate, although they have never been observed engaging in this behavior. It has been noted also that a significant percentage of weather stations ostensibly within the species' native range and used to generate mean temperatures were at altitudes or in regions where these snakes have never been observed nor at which they could survive.

[2] 77 Fed. Reg. at 3332; *see also id*. at 3331 ("The purpose of listing the Burmese python and its conspecifics … as injurious wildlife is to prevent the accidental or intentional introduction of and the possible subsequent establishment of populations of these snakes in the wild in the United States.").

Empirical studies demonstrate that the initial projections of suitable habitat have been grossly overestimated. Nonetheless, FWS continued to rely on these findings when it listed five of the nine species under the Lacey Act in 2012. Further, the Burmese python, inappropriately defined as including the Indian python (*Python molurus molurus*)—a distinct species which is listed as "endangered" under the ESA, can be found in a broader range of climates than any of the other eight species. Each is found in tropical regions and are unlikely to survive anywhere in the continental United States outside of the subtropical regions of extreme southern Florida.

In fact, the boa constrictor, which accounts for the largest percentage of revenues for the industry by far, has had a small remnant population in a small area of south Florida known as the Deering Estate, since the 1950s. Believed to have been left behind after a film shoot or television production, this population has remained small and well contained. This empirical evidence belies FWS' claims that such snakes will spread and engulf the continental United States, from Washington State to Washington, D.C. and beyond.

In short, the proposal is unjustified. As shown below, the process by which the five species of snakes was listed violated applicable law, including not only the RFA and APA, but NEPA as well.

III. USARK Informs FWS of NEPA and Other Violations

The Federal Register notice proposing a categorical exclusion for Lacey Act listings followed by only three months submission of a letter by USARK to FWS Director Ashe that highlighted, among other things, stark inadequacies in the EA accompanying the final rule listing four species of constricting snakes as injurious. USARK's letter identified deficiencies with the rigor and thoroughness of scientific analysis the Service undertook in support of the listing, some of which are described above. In fact, important scientific studies submitted by the public were never considered. More importantly, the EA failed to address significant environmental concerns raised by the public during the rulemaking process.

In addition to USARK, organizations including environmental groups, state wildlife officials, the zoo and aquarium community, academic and private conservation researchers, and personnel with other federal conservation agencies raised concerns with the environmental impacts stemming from the proposed listing, including –

- Concerns that the proposal would engender the asserted harm; that is, create a perverse incentive for irresponsible or aggrieved owners of snakes to release them into the wild if they cannot be transported across state lines or lose value due to a market collapse;

- Academic and private researchers whose work is partially funded through breeding and sales operations noted that important conservation research and programs to develop captive breeding techniques to replenish threatened and endangered snake populations in the wild would be terminated;

- State fish and wildlife agencies discussed adverse impacts on limited state conservation and enforcement resources;

- The zoo and aquarium community raised concerns about adverse impacts on interstate and international transfers necessary for species survival programs and, along with USARK, negative effects on environmental education programs.

Matters such as these lie at the heart of NEPA. As USARK noted in its letter, however, none of these matters were addressed at all in the EA. Further, the EA entirely failed to mention that the listing itself was controversial and that there was considerable disagreement within the scientific community – including among federal scientists – over the proposed listings' scientific basis.

Some recommended FWS consider an import ban for these species as an alternative that would minimize much of the adverse economic impacts. Instead, the Service merely considered different combinations of the nine snakes to list as "alternatives." Despite NEPA's requirements, no serious consideration to meaningful alternatives occurred.

The letter, a copy of which is appended for the record, amply supported USARK's claim that these deficiencies in the Service's NEPA documentation was contrary to the law, NEPA's implementing regulations, and decades of well-established case law. In fact, far from making the unsupported finding that the listing would not have a significant effect on the human environment, the record demonstrated that a full environmental impact statement was required. Given that, it is difficult for USARK to see FWS' proposal for a categorical exclusion as anything other than a wholly inadequate response to the legal shortcomings it identified.

IV. Problems with the Categorical Exclusion and the Importance of NEPA in Lacey Act Processes

A. Brief Background on NEPA

NEPA applies to "major Federal actions significantly affecting the quality of the human environment." Contrary to FWS' assertion in the proposed Categorical exclusion, there is no exemption for actions that ostensibly benefit the environment.[3] NEPA applies to the actions under the Endangered Species Act,[4] and certainly to injurious listings under the Lacey Act.

NEPA is an "action forcing" statute with two major objectives: (1) it "ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts"; and (2) "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision."[5] "An agency's primary duty under NEPA is to take a 'hard look' at environmental consequences."[6] "[A]n agency takes a

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[3] *See* 40 C.F.R. § 1508.27(b) ("A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial").

[4] *See, e.g., Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 134-36 (D.D.C. 2004).

[5] *Robertson v. Methow Valley Citizens Council*, 490 US 332, 349 (1989).

[6] *Pub. Utils. Comm'n v. FERC*, 900 F.2d 269, 282 (D.C. Cir. 1990) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)) (internal quotes omitted).

sufficient `hard look' when it obtains opinions from its own experts, obtains opinions from experts outside the agency, gives careful scientific scrutiny and responds to all legitimate concerns that are raised."[7] Further, an agency must consider "all alternatives that appear reasonable and appropriate for study at the time of drafting the EIS, as well as significant alternatives suggested by other agencies or the public during the comment period."[8]

NEPA regulations provide that if the agency is uncertain whether the impacts rise to the level of a major federal action requiring an EIS, the agency must prepare an environmental assessment. An EA is "a concise document that briefly discusses the relevant issues and either reaches a conclusion that preparation of [an] EIS is necessary or concludes with a finding of no significant impact, in which case preparation of an EIS is unnecessary."[9] For its part, an EIS is required when, among other things, an action's "effects on the quality of the human environment are likely to be highly controversial;… possible effects on the human environment are highly uncertain or involve unique or unknown risks; [and when an] action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.'" 40 C.F.R. § 1508.27(b).

An agency's NEPA analysis insufficient where it lacks a "reasoned discussion of major scientific objections."[10] When "highly qualified experts" raise criticisms regarding important scientific findings, an "agency cannot merely say that the [information] and the criticisms arising from it make no difference; to comply with NEPA, it must give a reasoned analysis and response." *Id.* at 1482-83. The need to consider important scientific issues also applies when an agency develops an EA.[11]

A categorical exclusion is a form of NEPA compliance, albeit one that applies to "a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations."[12] However, even for such categories of actions, an agency must analyze an action for "extraordinary circumstances in which a normally excluded action may have a significant environmental effect." 40 C.F.R. § 1508.4.

B. USARK's concerns with the proposed categorical exclusion

The Lacey Act is a statute with a conservation purpose that is unusual both in the fact it is set forth in Title 18 of the U.S. Code, which deals with criminal laws, and in the utter absence of

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[7] *Hughes River Watershed Conservancy v. Johnson*, 165 F.3d 283, 288 (4th Cir. 1999) (citing *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378-85 (1989)); *see also* 40 C.F.R. § 1500.2 ("Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.").

[8] *Roosevelt Campobello Int'l Park Comm'n v. United States E.P.A.*, 684 F.2d 1041, 1047 (1st Cir. 1982) (internal quotations omitted).

[9] *Sierra Club v. Espy*, 38 F.3d 792, 796 (5th Cir. 1994).

[10] *Seattle Audubon Society v. Moseley*, 798 F. Supp. 1473, 1482 (W.D. Wash. 1992).

[11] *Found. for N. Am. Wild Sheep v. U.S. Dept. of Agr*., 681 F.2d 1172, 1178 (9th Cir. 1982).

[12] 40 C.F.R. § 1508.4; *see also id.* § 1507.3(b)(2)(ii) (requiring agencies to adopt NEPA procedures including categorical exclusions).

any standards or process to guide the listing process. Unlike the ESA or the Magnuson-Stevens Fishery Conservation and Management Act, the law contains no requirement that the agency utilize the best scientific information or assess economic impacts of the action. A determination that a species is injurious is almost entirely committed to the Secretary's discretion.

NEPA fills a gap that no other provision of law provides. For example, while the APA sets forth procedural requirements for notice-and-comment rulemaking, that law does not require any substantive analysis of a proposal. Its requirement for reasoned decisionmaking merely provides that an agency explain its authority and rationale for promulgating a rule. Agency determinations, especially those involving scientific determinations, are given high deference by courts. The Lacey Act's lack of standards or criteria ensures that every listing would pass judicial review, unless the Service itself declared that it had "arbitrarily and capriciously" decided to list a species.

The RFA, for its part, requires economic impacts analysis, but only as to small entities. While in the case of constricting snakes, such analysis captures the overwhelming majority of the sector's economic activity, here and elsewhere the law does not require FWS to capture or describe the full range of economic impacts. Similarly, executive orders, like E.O. 12866, require agencies to compare benefits and costs and utilize sound scientific information. However, executive orders are not judicially enforceable. Only the Office of Management and Budget's Office of Information and Regulatory Affairs ("OIRA") controls their implementation. And as OIRA is charged with implementing an administration's regulatory philosophy, it can be a weak guardian of these procedural safeguards.

Among all of these, NEPA is the only law that provides assurances that listing decisions will be based on sound science; that the public will have input on the quality of the analyses and underpinning of a rule; and, most importantly, to hold FWS accountable for political decisionmaking. USARK's letter to Director Ashe makes this case convincingly. Without the ability to challenge the agency's compliance with NEPA, the public would be entirely subject to the whims of the FWS. If the categorical exclusion had been applied in this instance, what was already weak and perfunctory analysis would be even more shrouded from public view.

Even though application of NEPA provides an important tool, it is also far from perfect. USARK agrees with FWS that the law may be too blunt an instrument to effectively address invasive species concerns. However, in addition to providing additional tools to address specific issues – for example, in the case of the constricting snakes, a ban on imports only would effectively meet the concerns while minimizing impacts – the law must include substantive standards and procedures.

USARK would ask the Subcommittee to consider adding the types of protections found in other conservation laws. For example, the MSA requires economic impact analysis, use of the best scientific information available, provides for ample public input, and includes a host of other required analyses including for an impact statement on affected parties. Similar provisions should be considered for the Lacey Act.

Recognizing that a revisiting of the law is unlikely in the near term, full application of NEPA is the next best alternative. For all these reasons, USARK strongly opposes the Service's proposed exclusion.

I thank you very much for this opportunity to testify on this very important matter. If there is any further information that would assist the Committee in its work, I will do my very best to provide it.