

**Written Testimony of Harrison M. Pittman
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Before the Subcommittee on Fisheries, Wildlife and Insular Affairs**

February 27, 2014

Chairman Fleming, Ranking Member Sablan, and members of the subcommittee, thank you very much for the invitation to provide testimony regarding H.R. 3105, the *Aquaculture Risk Reduction Act*. The impact of the Lacey Act remains a significant issue for the nation's aquaculture industry, and it is an honor to help this subcommittee navigate its consideration of this important national issue. In short, H.R. 3105 speaks to the concern expressed by many producers and others in the aquaculture industry that they can inadvertently run afoul of the Lacey Act and, therefore, be subjected to significant fines, imprisonment, or forfeiture of property established under the Act.

As per the February 18, 2014 invitation to testify at this hearing, my remarks will embody the following areas: (1) an explanation of H.R. 3105; (2) the nature of aquaculture farming; (3) the injurious species that could be found in the shipment of farm raised catfish, bait fish, or ornamental fish; (4) the potential consequences of discovering a Lacey Act species in such a shipment; and (5) what happens to the entire shipment when it arrives at a processing facility. Before turning to these specific issues, I will very briefly introduce myself, the National Agricultural Law Center, and the role of the Center in dealing with Lacey Act and other agricultural and food law issues that arise throughout the United States.

My name is Harrison Pittman, and I serve as Director of the National Agricultural Law Center (Center). Created in 1987, the mission of the Center is to serve as the nation's leading source of agricultural and food law research and information. The Center is an objective, nonpartisan resource for the nation's vast agricultural community, including producers of all types, landowners, state and federal policymakers, Congressional staffs, journalists, Cooperative Extension Service personnel, attorneys, and others. The Center and its staff do not engage in legal or policy advocacy of any kind, but rather serve to enhance understanding of the complex fabric of local, state, federal, and international laws, regulations, and policies that impact our diverse system of food, fiber, and energy production. The testimony delivered here today is in furtherance of the Center's national research and information mission, and the role of the Lacey Act in the nation's aquaculture industry is but one of the many areas addressed at the Center on an ongoing basis.

A key part of the Center's mission is providing a comprehensive online clearinghouse of research and information in more than 50 areas of agricultural and food law research information. The Center's clearinghouse of resources is available free of charge through its website, www.nationalaglawcenter.org. The Center also engages in significant outreach and education through in-person workshops/meetings, publications, one-on-one assistance, webinars, presentations, and through social media.

In addition to this testimony, the Center's staff is prepared, upon request, to serve as a resource to members of this subcommittee and their staff in the days and weeks ahead. Senior Center

Staff Attorney Elizabeth Rumley has conducted extensive research and information activities on the issues involving H.R. 3105, including publication of the article *Aquaculture and the Lacey Act*, which is provided as an attachment to this testimony and available electronically on the Center's website. We can be contacted directly by phone or e-mail at any time at the contact information set out in the conclusion of this document.

The basic concern held by producers and others in the aquaculture industry is that they may inadvertently or unwittingly trigger a violation of the Lacey Act and the Act's significant penalties as a result of engaging in the ordinary course of their business. H.R. 3105 is a proposal that seeks to alleviate this concern. The specific approach of H.R. 3105 is to expressly exclude from the Lacey Act definition of "fish or wildlife" "any animal accidentally included in a shipment of an aquatic species produced in commercial aquaculture for human consumption or for use for recreational or ornamental purposes."

Generally stated, a violation of the Lacey Act occurs when a "person" violates any other state, federal, foreign, or tribal law – including regulations – that regulates the "taking, possession, importation, exportation, transportation, or sale of fish or wildlife or plants." The Act defines the term "fish or wildlife" as "any wild animal, whether alive or dead, including without limitation any wild mammal, bird, reptile, amphibian, fish, mollusk, crustacean, arthropod, coelenterate, or other invertebrate, whether or not bred, hatched, or born in captivity, and includes any part, product, egg, or offspring thereof."

The Act defines the term "person" as "any individual, partnership, association, corporation, trust, or any officer, employee, agent, department, or instrumentality of the Federal Government or of any State or political subdivision thereof, or any other entity subject to the jurisdiction of the United States."

More specifically stated, Lacey Act violations pertaining to "fish and wildlife" arise in two ways, as set out in § 3372 of the Act. First, it is unlawful for a person to "import, export, transport, sell, receive, acquire, or purchase any fish or wildlife . . . taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law." Thus, a violation of a federal law such as the Endangered Species Act or the Migratory Bird Treaty Act could also be a violation of the Lacey Act if the fish or wildlife at issue was 'imported, exported, transported, sold, received, acquired, or purchased.' Second, it is unlawful for any person to "import, export, transport, sell, receive, acquire, or purchase *in interstate or foreign commerce* . . . any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law."

In order for a person to violate the Lacey Act under either of these two standards, a person must violate the underlying applicable state, federal, foreign, or tribal law and, secondarily, the person must also violate the Lacey Act itself. A violation of the Lacey Act is not trivial because the potential penalties are significant. Lacey Act violations can trigger civil, misdemeanor, felony, forfeiture penalties, depending on the circumstances of the particular alleged unlawful conduct. The penalty applied to any particular situation hinges on the degree of knowledge and level of "due care" undertaken by alleged violator. Forfeiture, however, is determined on a strict liability basis.

The combination of violating any state “fish or wildlife” law and entering a product into interstate commerce is the primary basis of concern that has been expressed by many in the aquaculture industry. As a threshold matter, aquaculture producers commonly engage in interstate commerce as a routine necessity of participating in the industry. In addition, there exist a large number of state “fish and wildlife” laws. As noted in the publication *Aquaculture and the Lacey Act*, which is attached to this testimony, “[e]ach state has its own protected, prohibited, restricted, or approved exotic or game species lists, established by a state department of natural resources, fish and game, environmental protection or agriculture, and the creatures on the list can vary widely from one state to the next.” The sheer number of state “fish and wildlife” laws that can change virtually any time from one state to another can make it very difficult for anyone – producers, attorneys, members of Congress – to identify all the applicable state laws and regulations. This legal context speaks directly to the issue of what injurious species can be found in a shipment of farm raised catfish, bait fish, or ornamental fish. In other words, the range of injurious species is at least as broad and subject to change as the totality of the “fish and wildlife” laws that exist in each state.

Producers and others with whom Center staff have interacted have expressed concerns that it is often very difficult or impossible for them to know with confidence what the applicable laws are in a particular state, whether they are required to obtain a permit or other documentation in order to transport product from or into a state, and how that permit or other documentation can be obtained.

Consider a farm raised catfish, bait fish, or ornamental fish producer who lives in State A and transports product to State B. The State B Department of Natural Resources has a regulation in place that prohibits the transport of a particular species. A violation of that regulation carries a \$250 civil penalty. The producer transports a large load of fish that inadvertently contains one or more of the species that went undetected as the fish were loaded into the truck. The producer’s load is subsequently inspected by an official in State B and is found to be in violation of the regulation. The producer has allegedly violated State B’s regulation, which is the underlying “fish or wildlife” law, but may face a range of significant Lacey Act penalties depending on the producer’s level of knowledge and degree of due care exercised.

The determination of whether a civil penalty has occurred hinges on the question of whether the person engaged in the conduct at issue “in the exercise of due care should know that the fish or wildlife . . . were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty, or regulation” A civil violation carries a penalty of up to \$10,000 per violation, but can be reduced subject to certain statutory qualifications if the violation involved fish or wildlife with a market value of less than \$350.

The “due care” standard is a subjective term that, generally stated, requires a comparative assessment of what a reasonable person in the same circumstance would have done in the same or similar situation. The level of due care applied in any given situation will typically depend on factors such as experience and knowledge. For example, an experienced fish producer that violates a state’s “fish or wildlife” law may (or may not) be held to higher degree of due care than a younger producer just starting in the industry or a seasonal employee. Legislative history to the Lacey Act describes due care, in part, as follows: “that degree of care which a reasonably

prudent person would exercise under the same or similar circumstances. As a result, it is applied differently to different categories of persons with varying degrees of knowledge and responsibility level.”

The subjective nature of what constitutes due care causes concern among producers and others in the aquaculture industry. This is not a situation unique to the aquaculture industry; these concerns have been a central component of debate following the 2008 amendments to the Lacey Act designed to decrease illegal logging activities worldwide. Notably, the settlement agreement reached as part of the law enforcement action involving Gibson Guitar Corporation incorporated a set of due care guidelines Gibson Guitar Corporation to which Gibson Guitar must adhere.

The Lacey Act’s criminal misdemeanor provisions apply whenever a person “knowingly” engages in applicable prohibited conduct “and in the exercise of due care should know that the fish or wildlife . . . were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty or regulation. . . .”

In the previous hypothetical of the producer in State A who transports fish into State B, the issue of whether the state law was violated will be based on the due care standard. As noted, there is no “bright line” test for determining due care. Presumably, the more the producer can demonstrate that the load was carefully examined to avoid transport of a prohibited species, the more likely that individual can successfully convince a judge or jury that they exercised due care prior to transporting their product. With respect to the “knowingly” standard, however, the determination will turn on whether the alleged violator knew that they actually engaged in the conduct – i.e., transported or purchased the product in interstate commerce – rather than whether the violator knew that they were engaged in wrongful conduct.

The original criminal misdemeanor language of the Lacey Act stated that a violator “shall be fined not more than \$10,000, or imprisoned for not more than one year, or both.” Further, “[e]ach violation shall be a separate offense and the offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said fish or wildlife or plants.” However, in accordance with the Criminal Fines Improvement Act the Lacey Act misdemeanor penalty has been increased to \$100,000 for an individual and \$200,000 for an organization.

Lacey Act felony provisions apply to a person who “knowingly imports or exports any fish or wildlife” in violation of the Act. In addition, the felony provisions are triggered when a person violates the Act “by knowingly engaging in conduct that involves the sale or purchase of, the offer of sale or purchase of, or the intent to sell or purchase, fish or wildlife . . . with a market value in excess of \$350, knowing that the fish or wildlife . . . were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty or regulation” The original language of the Lacey Act provided that a person deemed to have committed a felony “shall be fined not more than \$20,000, or imprisoned for not more than five years, or both.” In addition, [e]ach violation shall be a separate offense and the offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said fish or wildlife or plants.” It bears noting, however, that the Criminal Fines Improvement Act has increased the

felony penalty to up to five years imprisonment, a fine of \$250,000 for individuals and \$500,000 for organizations, or both.

The Lacey Act also contains civil forfeiture and criminal forfeiture provisions. The civil forfeiture provisions state that “fish or wildlife . . . imported, exported, transported, sold, received, acquired, or purchased” in violation of applicable Lacey Act provisions or implementing regulations “shall be subject to forfeiture of the United States notwithstanding any culpability requirements for civil penalty assessment or criminal prosecution” The criminal forfeiture provisions state that “[a]ll vessels, vehicles, aircraft, and other equipment used to aid in the importing, exporting, transporting, selling, receiving, acquiring, or purchasing of fish or wildlife . . . in a criminal violation of this chapter for which a felony conviction is obtained shall be subject to forfeiture”, subject to certain qualifications set out in the Act.

The Lacey Act also makes it unlawful for a person “to import, export, or transport in interstate commerce any container or package containing any fish or wildlife unless the container or package has previously been plainly marked, labeled, or tagged in accordance with” the Act’s implementing regulations. Similarly, it is unlawful for any person “to make or submit any false record, account, or label for, or any false identification of, any fish, wildlife, or plant which has been, or is intended to be . . . transported in interstate . . . commerce.” The misdemeanor penalty for a false labeling violation is up to one year imprisonment and/or a fine of up to \$100,000, if the products have a market value of less than \$350. If the market value of the product exceeds \$350, the violator could face up to 5 years imprisonment, \$250,000 fine, or both.

The nature of aquaculture farming and how farm raised catfish are processed may be an important consideration for this subcommittee. For example, typically, fingerlings of channel catfish, blue catfish, or hybrids are delivered from a nursery operation to various freshwater ponds. Outside of the control of a producer, however, prohibited species could also be delivered to these ponds as, for example, eggs attached to a wild bird’s leg. The fish are raised, which is labor intensive and can involve around-the-clock attention, until they are sufficient size and quality to be delivered to a processor. In most (if not all) locales, there will be one to two area processors. The fish are loaded by net from the ponds into a transport truck, and delivered to the processing plant. Unlike other forms of livestock, such as cattle, there is no intermediate facility to which the catfish will be delivered prior to being harvested and processed.

At the processing plant the fish are unloaded into large metal containers that connect to the processing tables just inside the facility. They are weighed and any “non-catfish” are removed and placed in an enclosure located next to the metal containers holding catfish. The catfish are then stunned, sorted by size one-by-one and fed into the proper conveyor belt. They are filleted, frozen, and placed in shipping containers for delivery.

This process is noteworthy because it speaks to the likelihood and potential extent to which catfish and any other fish loaded from producers’ ponds may enter the ecosystem. Further, it shows how a producer could, through no fault of their own, have a prohibited species in his or her ponds (i.e., delivered as eggs attached to a bird’s leg). It also demonstrates that it is possible to discover at the unloading phase at the processing facility any potential prohibited species that

may have contained in the shipment. Given the significant penalties associated with the Lacey Act, this factor has caused concern for producers and purchasers of farm raised catfish.

I will conclude my remarks with an excerpt from the publication attached to this testimony, *Aquaculture and Lacey Act* authored by Elizabeth Rumley:

“How does this affect aquaculture? Imagine that a single fish (or even a fish egg)- legal to possess in Wisconsin- is inadvertently loaded with a 2,000 lb truckload of other fish that had been sold to an aquaculture producer in Minnesota. This single fish is on the Minnesota prohibited [species] list. Once the truck crosses the state line, it is stopped by Minnesota DNR, searched, and the prohibited fish is found. Both the Wisconsin seller and the Minnesota buyer may be prosecuted under the Lacey Act, and what would have been a maximum penalty of 90 days [imprisonment] and/or \$1,000 from the state of Minnesota has now turned into a potential year in federal prison and up to a \$100,000 fine. Moreover, the seller may also be charged with false labeling (for failing to include the prohibited fish in the list of the shipment’s contents), adding up to another 5 years and/or \$250,000 to the sentence.”

Chairman Fleming, Ranking Member Sablan, and members of the subcommittee, I hope that this information is helpful and I look forward to answering questions members of the subcommittee may have. As noted earlier, the National Agricultural Law Center staff is very willing to be a resource on this issue as the subcommittee continues to consider H.R. 3105 or other Lacey Act issues. We can be reached via email at nataglaw@uark.edu or at (479) 575-7646.