**TESTIMONY OF**
**MARSHALL MEYERS**
**PET INDUSTRY JOINT ADVISORY COUNCIL**
**BEFORE THE**
**SUBCOMMITTEE ON INSULAR AFFAIRS, OCEANS AND WILDLIFE**
**HOUSE NATURAL RESOUCES COMMITTEE**

**April 23, 2009**

Madam Chair and members of the Committee, I am Marshall Meyers, Chief Executive Officer and General Counsel of the Pet Industry Joint Advisory Council (PIJAC). Thank you for inviting me to present testimony on the Nonnative Wildlife Invasion Prevention Act (HR 669).

PIJAC is a national trade association representing all segments of the pet industry: companion animal importers/exporters/breeders, wholesale distributors, product manufacturers, retail outlets, and affiliated hobby clubs, aquarium societies, other industry trade associations, and individual hobbyists. Our members serve the 63% of U.S. households that care for and maintain pets of all types, sizes and descriptions: the majority of these pets fall within the purview of the regulatory system contemplated in HR 669.

PIJAC's explicit mission is to:

> "Promote responsible pet ownership and animal welfare, foster environmental stewardship, and ensure the availability of pets."

According to the 2009-2010 APPA National Pet Owners Survey (April 2009):

- 14,000,000 US Households (42,600,000 people) maintain freshwater and saltwater fish;
- 6,000,000 households (18,000,000 people) maintain pet birds;
- 4,700,000 households (16,000,000 people) maintain reptiles; and,
- 5,300,000 households (19,100,000 people) maintain small mammals (non dog/cat).

The above data are conservative because they do not take into account multi-pet household ownership (i.e., a dog owning household with fish, bird or reptiles).

HR 669 conservatively affects more than one-third of our population. Apart from dogs, cats and goldfish which are exempt under Section 14(5)(D), virtually every species in those homes falls under the tarp created by HR 669.

Pet owners across this Nation possess a wide variety of non-native species in significant numbers. This is not a new phenomenon. For generations, people have maintained a wide variety of non-native mammals, birds, reptiles, amphibians, and fish as companion

animals. It is not the intent of the pet industry to intentionally release these animals into the natural environment. Nor would the vast majority of pet owners have any such intent. In fact, the majority of pet owners consider their pets family members.

The bond between pets and their owners is well documented – as are the benefits of this bond…greater mental and physical health among adults and greater socialization and learning skills among children. Furthermore, it is clear that children who grow up with pets develop empathy for animals and the environment in general. I have no doubt that the vast majority of individuals who are members of environmental organizations are also pet owners and developed their love for animals by the pets they grew up with.

As you are aware, the pet industry is not the only commercial or recreational group which has a relationship with nonnative animals. Other stakeholders dependent upon nonnative species include: sports fishing, federal/state hatcheries, agriculture, biological and biomedical research, entertainment, hunting, food aquaculture, zoos and aquariums, and classroom educators. While most of these organisms are never intended for release into natural environments, some of these species (e.g. oysters, trout, bass, deer, game birds) are intentionally placed into natural environments by government and private entities throughout the US.

Prior to delving into more detail, I want to state our position to make it abundantly clear that:

- We support the development of a strategic, risk-based process to prevent the introduction of invasive species (harmful nonnative species) into the United States.

- We do not support the approach taken in HR 669. Among other things, HR 669 fails to be strategic in that
  (a) it does not adequately take socio-economic issues and risk management options into account;
  (b) it requires funds and staffing not currently available nor likely to be available in the current economic climate to the US Fish and Wildlife Service (USFWS);
  (c) the timeline is not achievable given the thousands of species that would need to be assessed by an under-resourced Service;
  (d) because so many species would be in limbo awaiting assessment, or lacking sufficient data to enable an assessment, it would have a substantial economic impact on the pet industry and other industries and the pet owning public;
  (e) and it could result in significant unintended consequences of mass releases and/or euthanasia of pets, as well as dramatically increase harvest of some species of native wildlife – native tortoises for example.

- We believe that a constructive risk-based process could be developed and implemented in a timely manner. We need a process that strategically takes into

We, the pet industry, and I believe I can speak for other interest groups involved with nonnative species, are willing to work with you to craft such legislation.

Last month, we convened a multi-stakeholder workshop to analyze HR 669 and discuss potential improvements. The Report highlights a number of questions, concerns, and issues regarding the provisions of HR 669. We doo not have time today for a thorough discussion of that Workshop Report. My testimony will address only a few issues that surfaced. We are, however, prepared to make the report available to the Committee.

**Background**

For many years, PIJAC has been providing leadership on invasive species issues, serving as an advisor to and collaborator with numerous government agencies: various Aquatic Nuisance Species Task Force (ANSTF) committees and regional panels, the Invasive Species Advisory Committee (ISAC) and a number of State invasive species advisory committees or working groups. Additionally, PIJAC leads several initiatives and proactive campaigns designed to minimize the introduction and impact of invasive species. These campaigns reflect a strong collaborative effort among industry, the government, and other stakeholders.

As I noted in my testimony in 2007 and 2008, PIJAC and our industry are well aware of the problems posed by invasive species. Our involvement with this issue dates back to the early 1970s when the USFWS proposed to find all nonnative species "injurious" until proven innocent under the Lacey Act. That approach, much like that proposed in HR 669, would establish an untenable burden on the government and/or the trade to "scientifically prove" a negative – i.e. the absence of potential harm. I understand that HR 669 uses the term "Likelihood," but I also recognize that the term is undefined and subject to broad speculation and interpretation. Moreover, the requisite human and financial resources have yet to be made available to the relevant federal agencies so that they can fully and effectively implement and enforce existing policies and programs. Thus, the question for 2009 is: How will the Service accomplish the tasks mandated in HR 669, tasks far more complex and far more comprehensive than exist under today's listing process? Absent a crystal ball, it is impossible to demonstrate that no harm has ever nor will ever occur at anytime, anywhere in the United States.

Many thousands of non-native species have been in the pet trade as well as other industries for decades, yet the overwhelming majority of them have never established feral populations and even fewer have been demonstrated to have caused harm to the environment, economy, or human health. In rare instances where former pets have become invasive, the impacts have generally been to very localized areas in urban and suburban contexts which are already heavily impacted by habitat loss and degradation.

It is, thus, both unnecessary and unrealistic to conduct a risk assessment for every non-native species in the pet trade (e.g., more than 4,000 aquarium freshwater and saltwater fish), let alone those brought in by other industries as well.

PIJAC believes that effective measures should be in place to reduce the risk of the adverse impacts of invasive species. While we recognize that the existing Lacey Act process is inefficient in many ways, it is clear to us that this is largely due to a number of regulatory and administrative hurdles in the evaluation process that need to be revisited and revised where possible so the existing listing process is no longer paralyzed. We believe that the appropriate directives for risk management are currently contained in the Lacey Act, the National Invasive Species Management Plans (per Executive Order 13112), and several ANSTF initiatives, among others, but have not had the opportunity for effective implementation as intended due to an inefficient regulatory process and lack of resources.

HR 669 is set up for failure – it would be a managerial nightmare for the Service. Given limited staffing and biological data, how will the Service conduct adequate risk assessments on more than 10,000 species currently in trade? How will the Service meet the statutory deadlines set forth in Sections 3 and 4? Upon failure to do so, will the Service be forced to shut down a number of industries dependent upon nonnative species -- such as the pet industry, food aquaculture, and sports fishing?

HR 669 is an overly simplistic approach to a very complex problem which involves much more than running a series of risk assessments in order to publish a list of approved species. HR 669 needs to be redrafted to direct a risk analysis process rather than a risk assessment. According to the definitions adopted under the Convention on Biological Diversity (and supported by the US), "risk analysis refers to: (1) the assessment of the consequences of the introduction and of the likelihood of establishment of an alien species using science-based information (i.e., risk assessment), and (2) the identification of measures that can be implemented to reduce or manage these risks (i.e., risk management), taking into account socio-economic and cultural considerations."

Unless socio-economic considerations and a comprehensive set of risk management options are adequately accounted for in this process, the vast majority of nonnative species will land on the "in limbo list" (Section 5(b)(3)(C)) due to there being "insufficient scientific and commercial information to make a determination" as to whether the species should be on the Approved or Unapproved lists. Nor should it be overlooked that there are already management measures in place for some species that reduce the risk of invasiveness.

Congress must also carefully consider both the financial costs and benefits of imported species. The loss of certain high-income fish, for example, could result in the collapse of the entire ornamental fish industry and have significant repercussions for product manufacturers, distributors, and retailers throughout the country.

Ultimately, we urge the Subcommittee to take into careful consideration the findings and recommendations of the National Invasive Species Management Plans, as well as initiatives of the ANSTF and numerous state agencies (e.g., Florida and Wisconsin) that are dealing with this issue. Initiatives under these programs already reflect stakeholder-inclusive reviews on and recommendations to address the import of live organisms in the invasive species context. They also address regional aspects of this issue.

The following comments address key sections of HR 669.

**Risk Assessment Process (Section 3)**

PIJAC questions the advisability of the Congress mandating specific criteria that the Secretary must factor into the Department's assessment protocols and regulations. As evidenced by the work of the Invasive Species Advisory Committee and the ANSTF, the Department's scientists need flexibility to design analysis protocols depending on the taxa, the purpose of introduction, and other relevant factors.

To get on the ultimate "Approved List", the Service would have to complete risk assessments, not risk analysis, using the following criteria (and possibly additional criteria that will be determined as the final regulations evolve). The assessors would have to make a determination based on:

- Species identified to species level, and if possible specific information to subspecies level and genetic identity;
- Native range of the species ;
- Whether species has established, spread, or caused harm to the economy, the environment, or other animal species or human health in ecosystems in or ecosystems similar to those in the US;
- Likelihood that environmental conditions exist in the US that are suitable for establishment of the species;
- Likelihood of establishment in the US;
- Likelihood of spread in the US;
- Likelihood species would harm wildlife resources of the US;
- Likelihood the species would harm native species that are rare or listed under Endangered Species Act;
- Likelihood species would harm habitats or ecosystems of the US;
- Likelihood "pathogenic species or parasitic species may accompany the species proposed for importation;" and
- Other factors "important to assessing the risk associated with the species".

Applying these criteria as part of the one-size-fits all approach will result in virtually no species passing the test. Endless debates and challenges will ensue as to the completeness of the "available data" or the lack thereof.

Sections 3(b)(4) through (10) incorporate the subjective, non-scientific standard of "likelihood" for determining the probability that a species will become established,

spread, do harm. Does "likelihood" connote some level of probability – a specific statistical term – or is it merely a subjective conclusion that something might establish, spread, cause harm or be accompanied with parasites? The mere presence of parasites or other associated organisms is not necessarily problematic. Furthermore, extremists employing Vaihinger's *"Philosophy of As If"* will conclude that every nonnative species has some probability of establishing somewhere in the US, at some time *in futuro*, given the right ecological conditions and propagule pressure – rate and volume of introduction. If that probability in scientific risk-based terms presents a negligible risk, how is it assessed under the "likelihood" doctrine? What methods would be used to determine or score "likelihood"?

Section 3 sets forth specific factors that must be taken into account in the Service's evaluation of risk but offers no direction as to the manner in which such factors must be evaluated. A reasonable inference, however, is that a positive finding of one or more of those factors is sufficient to prohibit import. Far greater statutory clarity is required. Is the Service compelled to list a species as prohibited in any case in which some combination of these factors are determined in the affirmative? Does this mean that a problematic species for one part of the country or a limited ecosystem is banned nationwide (including the Territories)? Is the mere absence of biological data, because it does not exist, sufficient to compel the Service to ban a species that has been imported or farmed in this country for decades absent evidence of invasiveness?

Additionally, it is not technically feasible to identify some species in trade – including some very high volume and income species – to the "species level" (Section 3(b)(1)). Nor is it clear how the prescribed process would deal with taxonomic name changes in cases in which molecular studies indicate that the classifications should either be "split" or "grouped." If the scientific classification changes, would the risk analysis have to be repeated for the affected species? Furthermore, how would agency staff address the fact that some countries (particularly developing, exporting countries) are using different taxonomic names (often "old" versus "new") than others?

Section 3(b)(3) incorporates terms such as "established," "harm" and "spread" without the benefit of definition. Is the USFWS free to adopt its own definitions? Does "established" mean a self-sustaining reproducing population? Is an analysis as to benefit versus harm part of the evaluation?

Based on the criteria in Sections (b)(4) through (b)(10), virtually all tropical fish, birds, reptiles and small mammals would be automatically banned from the entire United States if it could be demonstrated that under Section 3(b)(4) there is a likelihood that "environmental conditions suitable for the establishment or spread…exist anywhere in the United States" or "has established, spread or caused harm… in ecosystems similar to those in the United States." (Section (b)(3)) Under the HR 669 standard, a species that may have become "established" or "spread" is treated as if it is "invasive" whether or not it causes or is likely to cause "harm."

Marine organisms would be banned in Kansas because they might become established in Hawaiian waters; a parakeet would be banned in Minnesota because it could survive in south Florida; a Neon Tetra fish that might survive one warm season in southern Florida waters would be banned in northern Florida, Alaska, Colorado, Minnesota or Georgia where it would not survive a normal winter! Absent inclusion of some qualifying language, the HR 669 listing criteria becomes a mandate and mandates become prohibitions even though a likely adverse impact is never shown.

**Transparency (Section 3(d))**

Transparency is critical to the credibility of the process being mandated by this bill. PIJAC urges that language be inserted making it abundantly clear that there is stakeholder involvement at all stages of the process. Furthermore, language should direct that the persons making the management decisions are not the same people (assessors) conducting the risk assessment(s).

**Legal Possession (Section 3(f)**

This section claims that the process will "not interfere" with one's ability to possess an individual animal that does not make the "Approved List" if the person can demonstrate that the animal "was legally owned… before the risk assessment is begun." Irrespective of problems ascertaining when the risk assessments for an individual species will really commence, what criteria does one have to meet to demonstrate legal possession? The majority of pet owners do not possess the details related to the original importation, or subsequent owners or breeders prior to their acquiring their animals. Simply put, how does one prove legality to avoid prosecution under the Lacey Act? Even the Service does not keep import records indefinitely.

**List of Approved Species (Section 4)**

The listing process is complex. To place a species on the Preliminary Approved List under Section 4(b)(1), the Service must make a determination that those listed species, based on scientific and commercial information:

> "are not harmful to the United State's economy, environment, or other animals species' or human health ; or
>
> may be harmful…but already are so widespread in the United States that it is clear to the Secretary that any import prohibitions or restrictions would have no practical utility for the United States."

While proponents would argue that this test would not be as rigorous as the ultimate test for being on the Final Approved List, we are at a loss to understand how one proves "no potential harm" under the alleged simplified test for inclusion on the "Preliminary Approved List." Would not one be compelled to rely upon the detailed criteria that the Service is mandated to include in its regulations for listing and

publishing the "Final Approved List"? Otherwise, the argument of a lesser standard is nothing more than an attempt to assuage opponents' concerns about proving a negative.

Section 4(b) provides for a "Preliminary Approved List." Once the Service determines that a species passes the "test" the Service will place a species on one of 3 lists:

- Approved List
- Unapproved List
- The "In Limbo List" or "Non-List" (Section 4(2)(C)) for species for which "the Secretary has insufficient scientific and commercial information to make a determination " whether to approve or disapprove.

The degree of uncertainty that will result by applying the "as if" criteria will result in virtually every species ending up on the list for which there is insufficient information to make a decision despite the fact that most of these species have been in trade, recreational use, farming, etc. for decades with only a small percentage of species ever being problematic, and then in localized situations.

Subsequently, if and when the lists are published,will there be any grace period for an importer or person possessing banned species already in the United States to revamp their operation(s) and ethically dispose of animals in their possession or do they become violators of this Act, as well as the Lacey Act, overnight? The perception, alone, that millions of Americans could become criminals overnight is likely to motivate frightened individuals to abandon or kill their animals. In short, it could facilitate the introduction and establishment of numerous non-native species; clearly, an unintended consequence of HR 669.

**Deadlines (Sections 3(e) and Sections 4(a)(1)) and (c).**

The prescribed timeframes to implement HR 669 are unrealistic. According to Section 3(e)(1), the proposed regulations and an initial list of approved species must be published within two years of enactment of HB 669. The final regulations, the initial list of approved species and a notice of the list of prohibited species must be published, pursuant to Section 3(e)(2), no later than 30 days before the date on which the Secretary begins assessing the species . The assessment process must start within 37 months of HR 669's enactment (Section 3(e)(3)). Yet Section 4(a)(1) mandates that the list of approved species be finalized and published no later than 36 months following enactment. How is this possible?

How will the USFWS be able to develop regulations, publish them in the Federal Register seeking public comment, review and finalize the regulations, seek and obtain OMB clearance and publish final rules and lists within such mandates? To date, the USFWS has required an average of four years to accomplish such a process for a single species proposed for an injurious wildlife listing. History is prologue and the failure to meet deadlines will simply be repeated.

**List of Unapproved Species (Section 5)**

Since violations of the proposed Act would also constitute a violation of the criminal provisions of the Lacey Act, which includes felony sanctions, full and complete lists of what is illegal should be published by the USFWS to ensure adequate notice of what constitutes a violation of law. Due process calls for no less. If the Congress insists on multi-lists it should ensure providing the American public clear and precise information to avoid confusion. The final lists should contain every species in the animal kingdom to ensure that the public is aware of what is illegal (and on the "In Limbo List") as well as legal inasmuch as they are subject to a strict liability criminal statute.

**Prohibitions and Penalties (Section 3(f) and Section 6(3), (5) and (6)).**

Interestingly, a person already engaged in the captive propagation or farming of a species in the United States that does make the "Approved List" finds him or herself in the rather awkward position of being subject to conflicting provisions of the law. According to Section 3(f), the "Act shall not interfere with the ability of any person to possess an individual animal of any species…if such individual animal was legally owned by the person before the risk assessment is begun…" Yet a close reading of the prohibitions in Section 6 raises significant issues which will undoubtedly compel millions of frightened people to kill or abandon their pets. Once a species appears on the "Unapproved List," or fails to make the "Approved List" and remain in limbo, the imaginary "grandfather clause" of Section 3 is virtually ineffective since it would be illegal to breed, sell, barter, or transport interstate any nonnative species appearing on the Section 4 prohibited list.

The prohibition section will significantly impact not only the pet industry, but also food aquaculture, sport fisheries, the bait industry, and the livestock industry. These sections need to be revisited.

**User Fees (Section 8)**

The establishment of a fee-based risk assessment system is fraught with problems. Apart from trying to ascertain how the amount of the fee(s) will be determined, this system will result in rank discrimination whereby small business will no longer be able to compete. It places the entire financial burden on larger companies willing to assume the financial risk of going through a nondescript assessment and listing process. This becomes a significant burden if the importer imports hundreds or thousands of species for which there is sketchy biological or scientific data, yet the species has been in trade in extremely large numbers for many, many years without adverse impacts.

Unlike other areas of the economy where fees are assessed to seek government approval of a patented or proprietary drug or chemical product, importers of nonnative species would be funding an assessment not only for themselves but for all of their competitors, and even other industries that trade in the same species for other purposes. How will the USFWS determine which importer is selected to bare the costs? Risk assessments and

risk analyses are expensive undertakings. Will the fees be $10,000, $25,000, $50,000 or $100,000 or more per assessment per organism? How will the figures be determined and consistently applied?

**Definitions (Section 14)**

As crafted, "nonnative wildlife species" includes "any species that is not a native species." The definition goes on to specifically cover the entire animal kingdom including insects, mollusks, crustaceans, arthropods, coelenterates, and all other invertebrates that do not make to the "exempt list" (Section 14(5)(D)) or covered by some other law (Sections 14(5)(C(i) or (c)(ii)).

"Native species" under Section 14(4) are species "that historically occurred or currently occurs in the United States, other than as a result of an intentional or unintentional introduction by humans." What constitutes "historical?" What is the cut-off date? 1492! What baseline data or referenced authority does one rely upon? Defining "nonnative" based on an unknown raises interesting biological and legal challenges. And how will states address the status of nonnative species they have classified as "naturalized" and have been affording protection?

An exception to listing appears to exist if a species is so "widespread in the United States that it is clear to the Secretary that any import prohibitions or restrictions would have no practical utility for the United States." (Section 4( b)(1)(B)). What is the definition of "widespread?" Is it limited to widespread presence in the environment or does it also include millions of specimens of a species maintained as a pet in millions of homes across the Nation?

Section 14(5)(D) authorizes the Secretary to add a species to the "exempt" list if the Secretary determines a species to be "common and clearly domesticated." The term "domesticated" is a term of art and has no legal definition in wildlife laws of the United States. Is domesticated defined according to Webster's as one adapted " to life in intimate association with and to the advantage of humans?" Or, one which has been selectivity bred in captivity and thereby modified from its ancestors for use by humans who control the animals breeding and food supply." Or, must animals have their behavior, life cycle, or physiology systemically altered as a result of being under human control for many generations. Or, is some other evolutionary criteria to be used for demonstrating man's control of the species for a specified period of time? Would a Ferret (*Mustela putorius furo*) which has been under human control since 1500 BC or Zebra Finches since the early 1900s qualify?

**Conclusion**

On behalf of the Pet Industry Joint Advisory Council (PIJAC), thank you for providing us an opportunity to share our thoughts and concerns regarding HR 669. Despite our reservations about HR 669, we remain committed to working with your Subcommittee to address this important environmental issue.

We believe that we have raised a number of valid issues regarding HR 669 and its potential for shutting down several industries dependent on nonnative species. Additionally, it could end up encouraging rather than preventing the release of nonnative animals.

We respectfully suggest that the bill as currently crafted sets the US Fish and Wildlife Service up for failure. Its whole approach is one that defies practical implementation, and demands exorbitant resources. In short, it would not visit upon the public the beneficial results to which it aspires. The measure demands the nearly impossible task of conducting thousands of scientifically valid risk assessments in a short time-frame, and presumes that all species subject to these assessments shall be prohibited pending a contrary finding, even though no evidence of adverse impact exists. Unlike a risk analysis, it does not explicitly account for socio-economic and cultural considerations. The bill assigns such an impossible task to an agency woefully bereft of resources for the job, and holds hostage several vital sectors of a challenged economy.

We believe that there is a better way to achieve a superior result. To that end, we recommend that a working group comprised of various stakeholders be convened to offer recommendations on the most effective method for moving the screening process forward, as called for in the National Invasive Species Management Plan. A number of key industries need to be at the table. This is not simply a pet industry issue. A number of pathways have proven to be far more significant vectors of nonnative species than pets.

We look forward to working with your Subcommittee in crafting more realistic legislation that will serve the public and affected industry alike in concert with the National Invasive Species Management Plan and the Executive Orders calling for such an approach.