



March 2, 2016

Daniel Ashe  
Director, U.S. Fish and Wildlife Service  
1849 C Street, NW  
Washington, DC 20240

**Re: Listing Salamanders Due to Risk of Salamander Chytrid Fungus**

Dear Mr. Ashe:

The Office of Advocacy submits these comments to the Fish and Wildlife Service's (the Service) proposed rule entitled *Injurious Wildlife Species: Listing Salamanders Due to Risk of Salamander Chytrid Fungus* (the Interim Rule).<sup>1</sup> Advocacy is concerned that the Interim Rule will impose a significant economic impact on a substantial number of small businesses, an economic burden on small business, and suggests that the alternative of prohibiting the importation of salamanders yet allowing the interstate transport within the continental U.S. would reduce that burden and support the Service's goal of preventing the spread of chytrid fungus.

**The Office of Advocacy**

Congress established Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA); as such the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), gives small entities a voice in the Federal rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, Federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy. The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.

**Background**

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<sup>1</sup> 81 Fed. Reg. 1534 (January 13, 2016).

This Interim Rule adds all species of salamanders, a total of 201 species, to the list of injurious amphibians under the Lacey Act.<sup>2</sup> Importation into the United States and interstate transportation between States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States of any live or dead specimen of these 201 species of salamanders is prohibited, except by permit for zoological, educational, medical, or scientific purposes (in accordance with permit conditions) or by Federal agencies without a permit solely for their own use.

This action is being taken in order to protect the interests of wildlife from the introduction and spread of the chytrid fungus *Batrachochytrium salamandrivorans* (Bsal) into ecosystems of the United States. The fungus affects salamanders, but is not currently found in the United States.<sup>3</sup> Small businesses support action to ensure that Bsal does not spread to the U.S.; however they are concerned with the prohibition on interstate transportation of salamanders within the United States.

### **Prohibiting Interstate Transport Will Have a Larger Impact than is Stated in the Initial Regulatory Flexibility Analysis**

Many small businesses have commented that the prohibition on interstate transport will have a greater impact than the Service anticipates. In the IRFA, the Service has stated that it does not believe that the impact of prohibiting interstate transport will be significant.<sup>4</sup> However, several small breeders and hobbyists involved in selling salamanders in the U.S. have indicated that there is a substantial domestic trade in salamanders. More than one commenter indicated that they transport hundreds of salamander specimens per year.<sup>5</sup> In addition, Advocacy has spoken to a small business representative who indicated that this number could be as high as 1,500 specimens shipped in a year for certain businesses.<sup>6</sup> These individuals' stories suggest that the domestic market may be more robust than the Service estimates and will be greatly affected by the prohibition on interstate transport.

Although the Service states that it does not know how the ban on interstate commerce will affect domestic breeding,<sup>7</sup> the IRFA estimates possible costs at \$24,000 per small business which would be a 48 percent reduction in revenue.<sup>8</sup> While the IRFA does not estimate the potential reduction in domestic bred Salamanders for each genus affected, for those genera an estimate for the reduction ranges from 64 percent to 82 percent.<sup>9</sup> This indicates that domestic breeding is a more substantial portion of the industry than the Service is estimating. Given these circumstances, Advocacy encourages the Service to conduct more outreach in order to obtain a greater understanding of the effect of the prohibition of interstate transport on the

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<sup>2</sup> 18 U.S.C. §42

<sup>3</sup> 81 Fed. Reg. at 1534.

<sup>4</sup> Draft Economic Analysis & Draft Regulatory Flexibility Analysis for the Listing of Salamanders due to Chytrid Fungus (Draft IRFA), p.36.

<sup>5</sup> Comment from Heather Jewett (February 8, 2016) (on file at Regulations.gov); Comment from Charles Templeton (February 2, 2016) (on file at Regulations.gov).

<sup>6</sup> Meeting with Phil Goss, President of USARK (February 16, 2016).

<sup>7</sup> Draft IRFA, p.36.

<sup>8</sup> Draft IRFA, p. 48.

<sup>9</sup> Draft IRFA, p. 32.

industry. The difference between the limited information in the IRFA and that provided by commenters indicates that the IRFA underestimates the effect of the prohibition of interstate transport.

### **The Lacey Act Likely Does Not Allow for the Prohibition of Interstate Transport between the States**

The Service argues that the Lacey Act prohibits both the importation into the U.S. and all interstate transportation between the States, the District of Columbia, Puerto Rico, or any territory or possession of the U.S., including interstate transport between the States within the continental U.S. of any listed species.<sup>10</sup> The Service argues that this interpretation is supported by statutory language and legislative history.

Advocacy notes that for many years following the enactment of the Lacey Act the Service interpreted the Act as prohibiting solely the importation of listed species. In a 1974 hearing, a representative of the Service testified before Congress that “As far as the regulatory aspects of your question, there is no restriction that we find in section 42 of the Lacey Act to interstate shipment, with the possible exception of restrictions from the areas off the continental United States, such as Puerto Rico, the Virgin Islands and Hawaii... The restrictions, Mr. Chairman, apply to imports.”<sup>11</sup> The Service held this position throughout the 1970s.<sup>12</sup>

More recently, the Service’s interpretation of the Lacey Act as prohibiting interstate transportation of listed species has been rejected by the U.S. District Court for the District of Columbia, the only court to Advocacy’s knowledge to deal directly with the issue of whether the Lacey Act prohibits interstate transportation.<sup>13</sup> The underlying case involves the listing of the reticulated python and green anaconda under the Lacey Act.

The plaintiffs argued that the Lacey Act does not give the Service the authority to prohibit the interstate transport of species within the continental United States. The Service argued is that it is the Service’s longstanding position that Lacey applies to both importation into the U.S and interstate transport between the States and that this position is supported by statutory language and congressional intent and history.<sup>14</sup>

The District Court rejected the Service’s interpretation of the Lacey Act.<sup>15</sup> The Court acknowledged that the language in the Lacey Act could support either the plaintiffs’ or the Service’s interpretations. However, the Court found that “legislative history of the 1960 Lacey

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<sup>10</sup> 81 Fed. Reg. at 1535.

<sup>11</sup> *Proposed Injurious Wildlife Regulations*, 93<sup>rd</sup> Cong. 151 (1974).

<sup>12</sup> See e.g. *Proposed Importation Requirements*, 40 Fed. Reg. 7935, 7936 (Feb. 24, 1975) (“Interstate shipments are not affected, except shipments between the noncontinental parts of the United States (island ecosystems such as Hawaii and Puerto Rico) and the continental United States); *Proposed Importation and Shipment Requirements*, 42 Fed. Reg. 12972, 12974 (“Pursuant to the statute, the proposed regulations would also prohibit the shipment of injurious wildlife between any two of the following geographic areas: the continental United States, the State of Hawaii, Puerto Rico, or any possession of the United States.”)

<sup>13</sup> *United States Ass’n of Reptile Keepers v. Jewell*, 103 F.Supp. 3d 133 (D.D.C., May 12, 2015).

<sup>14</sup> 81 Fed. Reg. at 1535

<sup>15</sup> 103 F.Supp. 3d at 146.

Act amendments unambiguously supports plaintiffs' position."<sup>16</sup> The House and Senate Reports reflect a discussion based solely on the impacts of prohibiting importation of listed species.<sup>17</sup> The Court notes further that during a hearing on the 1960 Amendments to the Lacey Act, a representative of the Department of Interior confirmed that the Lacey Act "prohibit[s] the shipment between the continental United States and Hawaii, Puerto Rico and the Virgin Islands."<sup>18</sup> Based upon this reasoning, the Court issued an injunction barring the prohibition of interstate transport of the snakes at issue in the case, finding that the plaintiffs were likely to succeed on the merits of their argument that the Lacey Act does not apply to interstate transportation within the continental United States of listed species.<sup>19</sup>

### **Conclusion**

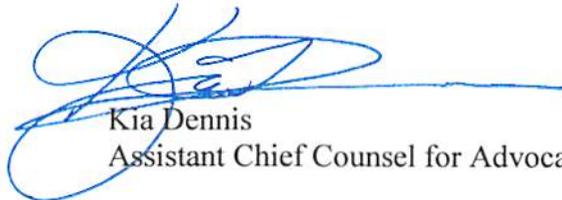
Bsal is not currently in the United States. By prohibiting any importation of salamanders the Service will be protecting against its introduction into the U.S. Interstate transportation of salamanders in the continental U.S. cannot result in the spread of Bsal and given the District Court's opinion it is questionable whether the Service has the authority to prohibit the interstate transport of salamanders or any other species under the Lacey Act. Prohibiting importation but allowing interstate transportation of salamanders appears to be an alternative that would have no detrimental effect on the spread of the fungus in the U.S. Advocacy encourages the Service to adopt this alternative.

If you have any questions please do not hesitate to call me or Assistant Chief Counsel Kia Dennis at [kia.dennis@sba.gov](mailto:kia.dennis@sba.gov) or 202-205-6936.

Sincerely,



The Honorable Darryl L. DePriest  
Chief Counsel for Advocacy



Kia Dennis  
Assistant Chief Counsel for Advocacy

Cc: The Honorable Howard Shelanski  
Administrator Office of Information and Regulatory Affairs  
Office of Management and Budget

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<sup>16</sup> Id.

<sup>17</sup> Id. at 127-128.

<sup>18</sup> Id. at 128.

<sup>19</sup> United States Ass'n of Reptile Keepers v. Jewell, 106 F. Supp. 3d 12 (D.D.C., May 19, 2015).