



STRENGTH IN NUMBERS...PROTECT YOUR RIGHTS.

May 11, 2010

U.S. Fish and Wildlife Service
Division of Policy and Directives Management
Attn: Docket No. FWS-R9-FHC-2008-0015
4401 N. Fairfax Drive, Suite 222
Arlington, VA 22203

RE: **Docket No. FWS-R9-FHC-2008-0015**

Dear U.S. Fish and Wildlife Service,

The United States Association of Reptile Keepers (USARK) submits the following comments on the proposed federal rule submitted by the U.S. Fish and Wildlife Service (“the Service”), adding nine species of non-native snakes to the list of “injurious reptiles” under the Lacey Act.

USARK is a science and education based advocacy organization that promotes the responsible private ownership of, and trade in reptiles. Our goal is to facilitate cooperation between government agencies, the scientific community, and the private sector in order to produce policy proposals that will effectively address important husbandry and conservation issues. The health of the animals, public health & safety, and maintaining ecological integrity are our primary concerns.

USARK is OPPOSED to this proposed rule and encourages the Service to pursue alternative measures outside of the regulatory framework of the Lacey Act.

Simply by working cooperatively with various State Fish and Game Departments, the Service will gain firsthand knowledge about the regulatory measures that are currently in place among key States. These existing measures are effectively regulating public safety, ownership and the commerce of non-native reptile species. Ongoing efforts are successfully providing sensitive regional ecosystems, like the Everglades, significant protection from the introduction of the 9 species of snakes included in the proposed rule. USARK recommends that the Service abandon its draconian approach and put forth an alternative measure that compliments ongoing efforts by state and local governments.

Specific to the proposed rule, USARK offers the following comments and analysis:

The Proposed Rule Is Predicated on Flawed Information.

The Service has based the proposed rule on information obtained from the United States Geological Survey (USGS) Open-File Report 2009-1202 entitled, *Giant Constrictors: Biological and management profiles and an establishment risk assessment for nine large species of pythons, anacondas, and the Boa constrictor* (Constrictor Report). The

Constrictor Report is a compilation of, “summaries of the biology of nine very large constrictor species” and considers, “what effects these species may have on ecology, economy, and domestic tranquility of the United States were such snakes to become established.” The Constrictor Report then identifies a ‘perfect storm’ of consequences and risks, all predicated on supposition, assumption and inference, and very few if any predicated on data.

The information in the Constrictor Report, to the extent that it supports findings based on unpublished modeling, supported by nothing other than assumptions and preferences of the authors and untrammelled by the rigor of the presence/absence of data or empirical testing; represents a significant departure from existing practices that are based on data and empirically established relationships. This in effect is environmental regulation based purely on staff policy preferences, speculation, and inference rather than rigorous data-based science.

Information available on the species, which form the subject of the Constrictor Report, varies by species and much is unknown. However the Report draws conclusions, makes predictions and assesses risk based on speculation and hypothesis rather than data, which is required by USGS policy. Further, the Report contains derogatory remarks, inaccurate information, and is obviously biased in an attempt to advocate a particular public policy and actions. This approach violates the USGS Fundamental Science Practices Foundation Policy, the requirements of the Information Quality Act as specifically detailed in the February 22, 2002 Office of Management and Budget Guidelines, the Department of the Interior Guidelines, and the USGS requirements addressing information quality. USARK speculates that the Constrictor Report likely violates the Services own policies, if it were to have been processed internally.

In conclusion of this point, the Constrictor Report contains highly speculative and inaccurate information that is biased, unclear, inaccurate, incomplete and as a result is misleading and clearly advocates for regulatory control of these species. USARK members and affected industries will suffer immediate direct and indirect economic harm, and longer -term harm due to the replacement of the use of rigorous scientific data and analysis with ad hoc internal agency science based on arbitrary assumptions, speculation, and hypothesis driven by what can only be described as policy advocacy.

The Fish and Wildlife Services’ Initial Regulatory Flexibility Analysis (IRFA) does not provide a sufficient analysis of the impact on small businesses for the purposes of the rulemaking.

The Service ignores and/or uses incomplete facts in the record. Instead of seeking out available information in a technically appropriate manner, the Service bases its industry/business information on groundless assumptions, extrapolations, and conjectures. In short, the Service’s regulatory flexibility analysis is not a complete, reliable, or convincing analysis of the impact of the proposed rule on small businesses involved in the trade of the nine snake species included in the proposed rule.

The Service relied on baseless assumptions and extrapolations and it ignored information submitted by industry participants and trade associations in response to its 2008 Notice of Inquiry. In addition, the Service misused the information it was provided by respondents to the notice. Therefore, the Service's regulatory flexibility analysis is not a complete, reliable, or convincing analysis of the impact of the proposed rule on small businesses involved in the buying and selling of the nine snake species included in the proposed rule. The IRFA grossly underestimates the scope of the impact of the proposed regulations.

The U.S. Fish and Wildlife Service Lacks Information

The Service lacks basic information about constrictor snake imports and domestic retail markets. With regard to the constrictor snake species included in the proposed rule, the Service admits that it lacks information on the sellers, purchasers, channels of distribution, and size of import, wholesale and retail markets. In its draft economic report, the Service stated that "we do not know where these breeders or wholesalers are located nor do we know where the snakes are shipped after purchase. Furthermore, we do not know the business profiles of these entities." (Draft Economic Report, p 12.) In the IRFA, the Service contends that "...data pertaining to interstate shipments and business profiles to determine the percent of revenues impacted by the proposed rule are currently unavailable." (IRFA, p. 3.)

The Service had not attempted to find this information at the time that the IRFA was written. It states that: "The snake market is below the commerce data radar with no time for a survey of the industry to determine the financial effects of the declaration of injurious." (Emphasis added, IRFA, p. 3.) Indeed, the United States Geological Survey states in its 2009 report, *Giant Constrictors: Biological and Management Profiles and an Establishment Risk Assessment for Nine Large Species of Pythons, Anacondas, and the Boa Constrictor*, that there are no data available pertaining to snake ownership, or the constrictor snake businesses. Yet, the Service provides no justification for the statement that "there was no time available for it to undertake a survey of the industry."

In sum, the Service neglected to obtain information on the industry from the relevant businesses and trade associations. Instead the IFRA, while replete with concessions that the Service does not have facts and data, is based solely on the Service's assumptions and extrapolations.

Data Unknown: Baseless Assumptions and Extrapolations

Where the Service has inadequate information, it makes baseless assumptions to estimate the information it lacks. For example, in the IRFA the Service states that:

- . . . data pertaining to interstate shipments and business profiles to determine the percent of revenues impacted by the proposed rule *are currently unavailable*. *Due to the limited data*, business profiles are extrapolated by NAICS (North American Industry Classification System) code and *assumptions are made* pertaining to interstate shipments. (Emphasis added, IRFA p.3.)
- The U.S. Small Business Administration defines a "small business" as one with annual revenue that meets or is below the established size standard, which is

\$750,000 for “All Other Animal Production” businesses (NAICS 112990) and \$6.0 million for “Pet and Pet Supplies Stores” businesses (NAICS 453910). *The U.S. Census Bureau does not publish detailed data for NAICS 112990.* The most recent data for NAICS 11 shows that about 85 percent of establishments qualify as small businesses (less than 10 employees). The most recent data for “Pet and Pet Supplies Stores” (NAICS 453910) shows that about 62 percent of establishments qualify as small businesses (less than 10 employees). (Emphasis added, IRFA p.3.)

- *However, this rulemaking would have an unknown dollar impact on these small businesses because it is not known* (1) whether these businesses sell other snakes and reptiles as well, (2) if the listed snakes are more profitable than non-listed snakes or other aspects of the business, (3) if consumers would substitute the purchase of other snakes that are not listed, and (4) what proportion of constrictor snake sales small businesses account for. (Emphasis added, IRFA p.4.)
- While PIJAC [Pet Industry Joint Advisory Council] provided data on the number of U.S. bred snakes and their retail value in 2008, *we were unable to find any other data sources* for U.S. bred snakes. Thus, *we do not know* the number of breeders or wholesalers, where these breeders or wholesalers are located, nor do we know where the snakes are shipped after purchase. Furthermore, *we do not know* the business profiles of these entities. *That is, it is unknown* if these businesses are diversified by earning income in other areas in addition to the breeding and/or selling of large constrictor snakes that would be listed under the *proposed rule.* (Emphasis added, IRFA p.4.)
- *It is unknown* whether these companies predominately breed snakes or whether they predominately sell the snakes through pet stores. Thus, these businesses could be categorized as “Other Animal Production” (NAICS 112990) or as “Pet and Pet Supplies Stores” (NAICS 453910). *Assuming the size distribution for these industries can be extrapolated* to the large constrictor snake market, then approximately 62 to 85 percent of entities breeding or selling large constrictor snakes would qualify as small businesses. (Emphasis added, IRFA p.4.)
- . . . *Since information is not currently available* on interstate sales of large constrictor snakes, it is assumed that a sales reduction of between 20 and 80 percent would most likely include the actual impact on out-of-state sales. (Emphasis added, IRFA p.4.)
- Impacts also are dependent upon whether or not consumers would substitute the purchase of an animal that is not listed, which would thereby reduce economic impacts. There are no marketing data that estimate how consumer preference may change due to the listing thus changing the types of snakes that businesses sell. This analysis does not account for this type of substitution effect. . . . (Emphasis added, IRFA p.5.)

A primary issue (if not the whole purpose) of a regulatory flexibility analysis is the identification of the small businesses that are impacted by the proposed regulation. Yet, the IRFA fails to identify the businesses that are affected by the proposed regulations. Instead, the IRFA relies on some data from the Service's Law Enforcement and extrapolates from U.S. Census Bureau employment data to conclude that:

Over the last 10 years, 481 companies or individuals imported all species of live constrictor snakes (USFWS Law Enforcement). It is unknown whether these companies predominately breed snakes or whether they predominately sell the snakes through pet stores. Assuming the size distribution can be extrapolated from the U.S. Census Bureau employment data, then approximately 298 to 409 companies (62 to 85 percent) would qualify as small businesses. (Emphasis Added, IRFA pp.3-4.)

It is unclear what specific source the Service relied on to determine that "The maximum impact of the rule would result in only 66% of all businesses that imported snakes imported the nine prohibited snakes. (IRFA, p.4) Instead, it provides in the IRFA only that "Of these, 197 to 270 companies or individuals (66 percent) imported live constrictor snakes that are included in the proposed rule." (IRFA, p. 4.) There is no substantiation for these calculations. Further, what can be substantiated is that Census data are aggregated to such a high level that they are unreliable estimators of the number of small businesses selling constrictor snakes.

The Service Ignored Information Provided

The Service omits from its analysis a large number of businesses that will be impacted by the proposed regulation. The Pet Industry Joint Advisory Council ("PIJAC") provided detailed data to the Service on estimates of the number of retailers. Yet the Service omits these data. PIJAC's submission indicates that the number of businesses that sell constrictor snakes includes "10 importers, 50 distributors, 5,100 retailers, 25 hobbyist show promoters hosting between 350-400 reptile shows in the US annually, and 2,000-5,000 individual hobbyists." (PIJAC submission p. 3.) In addition, PIJAC estimates there are 2,500 to 5,000 businesses and individuals that breed constrictor snakes. (Id.) PIJAC also states that "Individual hobbyists often specialize in a small number of species/subspecies and may gross sales in the \$10,000s for specific color morphs or locality-based varieties" (PIJAC Submission, p. 28.) If these hobbyists receive revenues in excess of \$10,000 per year in snake sales, they might be properly thought of as (very) small businesses or nascent small businesses, and they should be included as affected entities.

The Service concentrates only on snake retailers, ignoring snake wholesalers and intermediaries mentioned in submissions. "Gross revenue per company for the sale of species and subspecies of Python, Boa, and Eunectes is highly variable – *depending on whether or not the company focuses on wholesale or retail*, the size of the operation, what species/subspecies are involved, and if the focus is on a) imported or US bred animals and b) normal ('wild type') specimens or color morph/locality-specific varieties."(Emphasis added, PIJAC submission, p 3.) Ignoring wholesale operations

reduces the volume of snake sales, because the same snake is often sold multiple times in the chain of distribution to its final owner.

The Service ignores pricing premiums for snakes. PIJAC's tables detail the pricing and import volumes for Pythons, Boas and Anacondas. (See: PIJAC submission pp11-15.) These tables show price premiums given for snakes of different morphological features and that were taken from different localities. These pricing premiums reach up to 60 times the price of a "normal" snake. Yet, the Service does not factor pricing premiums into total sales estimates. For example, for the *Boa constrictor* a few sales of premium-priced *Imperator* could considerably increase the estimates total revenues for Boas.

The Service ignores the ancillary sales that snake sellers make due to these nine species. For snakes that cost less than \$200, it is likely that ancillary sales will exceed revenues from the sale of the snake. As snakes grow, new cages and greater quantities of food will need to be purchased. For some species, the impact of omitting ancillary sales will underestimate their impact on small business revenues by half.

The Service's Proposed Rule is Pre-decisional.

The proposed rule, as written and published in the Federal Register, is prejudicially constructed and telegraphs a predetermined end. The Service fails to make a good faith effort to gather new information. Rather, the Service appears to be in full support of policy and legislative proposals seeking to accomplish the same result as proposed in the rule change. It is well known within the scientific community that there are a number of studies soon to be published which are likely to challenge unsupportable claims in the USGS Constrictor Report. The Service's actions are giving the appearance of rushing forward in order to avoid any contradictions these future studies are likely to present.

The Service has failed to adequately formulate meaningful questions in the proposed rule for the public to comment upon. Simply, the Service recycled the same questions from its previous public comment request contained in the 2008 Notice of Inquiry on this same issue. In the context of this proposed rule, the questions have minimal value as providing valid information that can be honestly applied to the rulemaking administrative process.

Lastly, the Service has failed to put forth commonsense alternatives that will address invasive species issues. The Lacey Act is widely seen as an inappropriate tool that would do little more than shut down legal trade and create a new class of criminal. There is nothing in the proposed rule that gives the public the opportunity to provide the Service technical comments on a specific framework outside of the Lacey Act, other than outright support to do nothing. The Service is forcing those who do not agree with the Service's approach, to be viewed as not caring about the issue, by making them oppose the Lacey Act process. This is very unfortunate, as the Service would have been better served to put forth true alternatives with implementation details for the public to comment upon. Instead, it again has painted a picture that the Service is willing to consider anything but implementing pre-decisional policies.

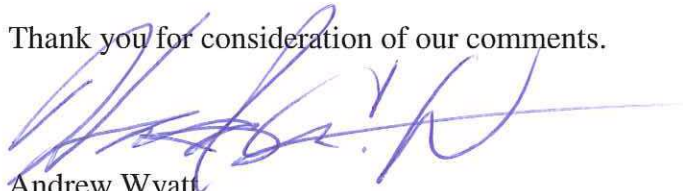
Conclusion

For the reasons stated above, USARK strongly urges the Service and the Department of the Interior to review its stated objectives and determine if proceeding as proposed in this rule is truly in the best interest of the United States of America. Or, rather, is it a poorly crafted solution to a politically driven and isolated media-hyped problem?

USARK is committed to working with the Service on the principals of responsible pet reptile ownership and commerce. Unfortunately, this proposed rule does nothing to advance those ideals, but rather will destroy those who are poised best to offer immediate and lasting solutions.

USARK reserves the right to make further public comment in the event of an extension or re-opening of the public comment period.

Thank you for consideration of our comments.



Andrew Wyatt
President