



Implementation of the D.C. Circuit Court Decision in United States Association of Reptile Keepers, Inc. v. Zinke, No. 15-5199 (D.C. Cir. April 7, 2017)

SUMMARY OF BACKGROUND AND DECISION

On December 18, 2013, the United States Association of Reptile Keepers (USARK) filed a lawsuit in the D.C. District Court challenging a 2012 rule in which the U.S. Fish and Wildlife Service (Service) designated the Burmese python, Northern African python, Southern African python, and yellow anaconda as injurious wildlife under the Lacey Act (77 Fed. Reg. 3330; January 23, 2012).

In the final rule, the Service stated, “By this action, the 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 animal, gamete, viable egg, or hybrid of these four constrictor snakes is prohibited, except by permit for zoological, education, medical, or scientific purposes (in accordance with permit regulation) or by Federal agencies without a permit solely for their own use.”

The injurious wildlife provision of the Lacey Act (18 U.S.C. § 42(a)(1)) states, “The importation into the United States, any territory of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States, or any shipment between the continental United States, the District of Columbia, Hawaii, the Commonwealth of Puerto Rico, or any possession of the United States . . . is hereby prohibited.” The latter clause is known as the “shipment clause.”

USARK argued that the shipment clause speaks solely to shipments from one listed jurisdiction to another and, therefore, does not address interstate shipments within the continental United States itself. Thus, USARK argued, the Service lacks authority under the shipment clause of the injurious wildlife provision of the Lacey Act (18 U.S.C. § 42(a)(1)) to prohibit “interstate transportation” of the listed species between the 49 continental States.

On March 10, 2015, the Service amended the injurious wildlife list by designating four more species of large constrictor snakes—the reticulated python and the green, Beni, and DeSchaunsee’s anacondas (80 Fed. Reg. 12702). USARK subsequently amended their complaint, adding the four species in the 2015 final rule to their 2013 lawsuit.

On April 1, 2015, the Plaintiffs (USARK and others) filed for a Temporary Restraining Order to enjoin implementation of the 2015 rule as applied to the reticulated python and the green anaconda, which they voluntarily converted to a motion for preliminary injunction during a hearing before the court.

On May 19, 2015, the D.C. District Court found USARK likely to succeed on the merits of its claim challenging the Service’s longstanding interpretation of the statutory prohibition

against interstate transport of injurious species within the continental United States and issued an order enjoining the Service from implementing, enforcing, or otherwise giving effect to its March 10, 2015, rule with respect to the transportation of reticulated pythons and green anacondas by any of the Plaintiffs or other persons who were members of USARK as of April 8, 2015, between States within the continental United States, other than Texas and Florida. This allowed the plaintiffs to move reticulated pythons and green anacondas across State lines within the continental United States, except they could not transport into Texas and Florida (they could transport out of Texas and Florida).

The U.S. Department of Justice filed an appeal of the May 19, 2015, decision to the United States Court of Appeals for the District of Columbia (D.C. Circuit) on December 2, 2015.

On April 7, 2017, the D.C. Circuit upheld the District Court's May 19, 2015, issuance of a preliminary injunction against the Service and also reached a definitive judgment on the shipment clause's meaning. It held that 18 U.S.C. § 42(a)(1) does not prohibit transport of injurious wildlife between States within the continental United States. The D.C. Circuit found the shipment clause to be unambiguous and its interpretation consistent with the legislative history.

We hope the following section answers your questions on the effect of the D.C. Circuit Court's decision.

QUESTIONS AND ANSWERS

GENERAL

Q1. How does the D.C. Circuit Court's April 7, 2017, decision affect existing and future injurious wildlife regulations (what has changed)?

A. The Service interpreted the statute (18 U.S.C. § 42(a)(1)) to mean that transportation of injurious wildlife between States within the continental United States was prohibited. The D.C. Circuit held that the plain language of the statute does not prohibit transport of injurious wildlife between States within the continental United States.

Because of this decision, existing and future injurious wildlife listings, including those listed by Congress through statutes (fruit bats (genus *Pteropus*), mongoose, zebra mussel, brown tree snake, bighead carp), no longer result in a statutory prohibition on interstate transport of injurious wildlife between States within the continental United States. This means that transportation of injurious wildlife between the 49 States within the continental United States (the contiguous 48 States and Alaska) is not prohibited by the statute, unless such movement of the wildlife is restricted due to conditions associated with previously issued permits (see below Q2). Thus, an injurious-wildlife permit is generally not required to transport injurious species between any of the 49 continental States (please see the exceptions that are described under "Permits" section below).

Q2. What prohibitions remain?

A. Import of injurious wildlife into the United States remains prohibited. In addition, transport of injurious wildlife between the listed jurisdictions in the shipment clause (the continental United States, the District of Columbia, Hawaii, the Commonwealth of Puerto Rico, and any possession of the United States) remains prohibited.

This means that an injurious species cannot be transported, for example, from Guam to Hawaii or from Hawaii to Guam, from Hawaii to California or the reverse, or from the District of Columbia to Maryland or the reverse, or from Guam to U.S. Virgin Islands or the reverse. Also, designated species may not transit through the District of Columbia when being transported from Maryland to Virginia or the reverse. Similarly, designated species may not transit through Canada on Canadian soil when being transported between Alaska and another continental State, because that would involve importation from Canada, which continues to be prohibited.

Injurious-wildlife permits under 50 C.F.R., part 16, continue to be required to import injurious wildlife and to transport injurious wildlife between the listed jurisdictions for zoological, educational, medical, and scientific purposes. Violation of conditions attached to injurious-wildlife permits issued for purposes of importation or transport between the listed jurisdictions remains prohibited. For example, if a permit is issued allowing import into the United States and the permit contains terms and conditions restricting transport of the specimen and its progeny within the continental United States, those permit terms and conditions continue to apply.

Q3. Will the Service revise the current Federal regulations in 50 C.F.R. part 16 because of the D.C. Circuit decision?

A. The regulations under 50 C.F.R. §§ 16.11-16.15 do not need to be revised because of the D.C. Circuit decision. The regulations will be enforced to the full extent provided by the Lacey Act, consistent with the D.C. Circuit decision.

Q4. What effect, if any, will allowing interstate transportation have on the Federal Government's ability to reduce harm from injurious wildlife?

A. The decision will result in a significant reduction in the ability of the Federal government under the Lacey Act to combat the introduction, establishment, and spread of injurious wildlife into new ecosystems and localities within the continental United States. As a result, it will impede the Federal government's efforts under title 18 of the Lacey Act to prevent harm to human beings; to the interests of agriculture, horticulture, and forestry; and to wildlife and the wildlife resources of the United States.

LAW ENFORCEMENT (LACEY ACT)

Q5. What is the difference between the two parts of the Lacey Act: 18 U.S.C. § 42(a)(1) and 16 U.S.C. § 3372?

A. 18 U.S.C. § 42(a)(1) (injurious wildlife provisions, sometimes referred to as title 18 of the Lacey Act) authorizes the Secretary of the Interior through the Service to list wildlife as injurious if determined to be harmful to "to human beings, to the interests of agriculture, horticulture, forestry, or to wildlife or the wildlife resources of the United States." This act prohibits importation and the transport between the listed jurisdictions in the shipment clause (the continental United States, the District of Columbia, Hawaii, the Commonwealth of Puerto Rico, and any possession of the United States) of species listed as injurious.

16 U.S.C. § 3372 (wildlife and plant trafficking provisions of the Lacey Act Amendments of 1981, sometimes referred to as title 16 of the Lacey Act) makes it unlawful to engage in interstate or international commerce of wildlife or plants taken, possessed, transported, or sold in violation of Federal, State, tribal, or foreign law. This section makes it unlawful 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. See 16 U.S.C. § 3372(a)(1). It also makes it unlawful 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. See 16 U.S.C. § 3372(a)(2) (A). This section enables the Service to help facilitate enforcement of other Federal laws and also helps States, tribes, and other jurisdictions uphold protections they deem appropriate for their wildlife and plant resources. These protections may include State laws that prohibit certain activities with species identified as invasive under State law. Interstate movement of these species in violation of State law could be a violation of one of these provisions of the Lacey Act.

Q6. Is it still illegal to import a species listed as injurious under 18 U.S.C. § 42(a)(1)?

A. Yes. The D.C. Circuit Court ruling affected only our authority to enforce a statutory prohibition on interstate movement within the continental United States. Unless authorized by a permit, it is still illegal to import any species listed as injurious.

Q7. Is transport of a species listed as injurious under 18 U.S.C. § 42(a)(1) allowed between the States within the continental United States?

A. Generally. The D.C. Circuit Court held that the plain language of the statute does not prohibit transport of injurious wildlife between States within the continental United States. However, as explained above in Q5, where there has been a predicate violation of Federal, State, tribal, or foreign law, subsequent interstate transport could be a violation of Federal law. Also, as explained above in Q2, injurious wildlife imported or transported between the listed jurisdictions pursuant to an injurious-wildlife permit may include terms and conditions restricting transport of the specimen and its progeny within the continental United States (also see “Permits” section below).

PERMITS

Q8. Are permits required to import injurious wildlife into any part of the United States?

A. Yes. The Lacey Act prohibits the importation of any species listed as injurious. The D.C. Circuit’s decision did not affect the import clause of the Lacey Act or how the Service will implement the injurious wildlife regulations for import. To import a specimen that has been identified as injurious wildlife, an injurious-wildlife permit must be issued by the Service prior to the import occurring.

Q9. Are permits required to transport injurious wildlife between the listed jurisdictions in the shipment clause (the continental United States, the District of Columbia, Hawaii, the Commonwealth of Puerto Rico, and any possession of the United States)?

A. Yes. The Lacey Act prohibits the transport of any species listed as injurious between the listed jurisdictions in the shipment clause. As explained above in Q2, the D.C. Circuit’s decision did not affect that aspect of the shipment clause or how the Service will implement the injurious wildlife regulations for transport between the listed jurisdictions. To transport a specimen that has been identified as injurious wildlife between the listed jurisdictions, an injurious-wildlife permit must be issued by the Service prior to the transport occurring.

Q10. In the past, I had to get a permit to move my injurious wildlife from my facility to another State or even within the same State. Do I still need a permit to do interstate movements within the continental United State or movements within my State of residence?

A. In many cases, you will no longer need to obtain an injurious-wildlife permit or other authorization from the Service to move injurious wildlife within a State or across State lines within the continental United States. With the D.C. Circuit's decision, the court ruling clarified that the Lacey Act's shipment clause does not prohibit transport of injurious wildlife between States within the continental United States.

However, as explained above in Q2 and Q7, movements within the continental United States may be subject to conditions from a previously issued permit. For example, when the Service issues injurious-wildlife import permits under 50 C.F.R. § 16.22, the permit is conditioned to require that any imported specimen (including all progeny of the imported specimen) must be maintained in double escape-proof containment, that the Office of Law Enforcement must be notified if a specimen escapes this confinement, and that any future movements of a specimen out of the facilities identified in the application must be permitted by the Service. Therefore, if the specimen or any of its parental stock (that is, ancestors) was imported into the United States under an injurious-wildlife permit issued by the Service, the conditions associated with that permit would apply and a permit would be required to move the specimen anywhere within the United States or its possessions. Accordingly, the facility or individual moving the specimen should first determine if the specimen was covered by a previously issued injurious-wildlife permit to import or transport between the listed jurisdictions and if a permit would be required for additional transport.

Q11. I am planning to import, export, or transport an injurious specimen that is also subject to another provision of law, such as the Endangered Species Act or the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). Does the D.C. Circuit's decision affect whether I need a permit under other laws and regulations?

A. No. If a permit is required under another provision of law, then that permit is still required. The D.C. Circuit's decision affects only the Service's interpretation of the shipment clause of the injurious provisions of the Lacey Act (18 U.S.C. § 42(a)(1)).

Q12. I am conducting research on some of the listed salamander species and will be moving samples across State lines within the continental United States to my research institution. Do I need to obtain a permit from the Service before moving the samples?

A. You would not need a permit, provided the samples to be moved were not imported or transported between the listed jurisdictions after the salamander species were listed as injurious and thus covered by a previously issued injurious-wildlife permit. Any samples that were imported before the listing or any samples collected before or after the listing within the continental United States would not require an injurious-wildlife permit from the Service to move across State lines within the continental United States. An injurious-wildlife permit would be required prior to moving the samples between the continental United States and one of the listed jurisdictions, such as the District of Columbia.