Department of the Interior-USFWS Substantiation for Establishing a Categorical Exclusion for the Listing of Injurious Wildlife Under the Lacey Act

Introduction

The Secretary of the Interior is authorized under the Lacey Act (18 U.S.C. § 42, as amended; Lacey Act) to prescribe by regulation those wild mammals, wild birds, fish, mollusks, crustacea, amphibians, reptiles, and the eggs or offspring of any of the foregoing that are injurious to human beings, to the interests of agriculture, horticulture, or forestry, or to the wildlife or wildlife resources of the United States. This authority has been delegated to the Director of the U.S. Fish and Wildlife Service (the Service). The lists of injurious wildlife can be found at 50 CFR 16.11-15.

Listing a species as injurious wildlife under the Lacey Act is a Federal action subject to the provisions of the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* (NEPA). The Service has identified the need for a categorical exclusion (CE) for the Federal action of adding species to the lists of injurious wildlife under the Lacey Act. A CE would allow the Service to exercise its authority to protect the statutory interests listed above, in particular wildlife and wildlife resources, from harm caused by injurious wildlife species more effectively and efficiently by precluding the need to conduct a more extensive Environmental Assessment (EA) or Environmental Impact Statement (EIS) to meet the Service's NEPA responsibilities.

This document explains the substantiation for the new CE for listing species as injurious wildlife. The Service is amending its NEPA procedures in the Department of the Interior Manual (Departmental Manual or DM) at Part 516, Chapter 8 - Managing the NEPA Process, which lists categorical exclusions for specific categories of Service official policies, plans, programs, or projects (including resource management actions) determined to be appropriate for a CE.

Previously, the Service applied a departmental CE to two injurious species listings in 2002. At that time, the departmental CE was found in the Departmental Manual at 516 DM 2, Appendix 1.10. That CE is currently found in 43 CFR § 46.210(i):

"Policies, directives, regulations, and guidelines that are of an administrative, financial, legal, technical, or procedural nature and whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case."

Upon further review, the Service believes there is potential ambiguity surrounding the applicability of this CE to the listing of injurious species. Therefore, the Service is adding a CE that is specifically focused on the action of adding species to the lists of injurious wildlife under the Lacey Act.

Description of the Categorical Exclusion

The Service is proposing to amend its NEPA procedures in the Department of the Interior Manual (DM) at Part 516, Chapter 8 - Managing the NEPA Process, which lists the categorical exclusions for specific categories of Service official policies, plans, programs, or projects (including resource management actions) determined to be appropriate for a CE. The amendment will add a new CE in 516 DM section 8.5(C),

Permit and Regulatory Functions, for the listing of injurious wildlife under the Lacey Act.

The CE will read as follows in 516 DM 8.5 (C) (9):

"The adding of species to the list of injurious wildlife, regulated under the Lacey Act (18 U.S.C. section 42, as amended) as implemented under 50 CFR subchapter B, part 16, which prohibits the importation into the United States and interstate transportation of wildlife found to be injurious."

The process of adding a species to the list of injurious wildlife under 50 CFR subchapter B, part 16, will remain the same under the Lacey Act, and the Service must still prepare a thorough evaluation consistent with standards under the Lacey Act, the APA, and all other applicable laws and Executive Orders. This evaluation determines if a species is injurious and is prepared regardless of the type of NEPA review conducted. The public will still have the opportunity to comment on proposed rules, and will be able to comment on the appropriateness of applying the categorical exclusion whenever a proposed rule to list a new species is published in the *Federal Register*. The Service will also continue to comply with all other applicable statutes and Executive Orders, including the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.) and EO 12866, when making listing decisions. The public will continue to have the opportunity to review and comment on proposed rules and accompanying documents. The categorical exclusion will not affect a party's ability to legally challenge the listing of a species under the Lacey Act or the Service's compliance with NEPA.

Extraordinary Circumstances

Extraordinary circumstances are factors or circumstances that cause an otherwise categorically excludable action to require further analysis in an EA or EIS. Guidance from CEQ recommends that agencies evaluate the extraordinary circumstances described in their NEPA procedures when proposing new or revised categorical exclusions to ensure that they adequately account for those situations and settings that could affect the use of the categorical exclusion. The categorical exclusion would be subject to extraordinary circumstances established in regulation by the Department of the Interior (43 CFR § 46.215).

The Service will consider each potential listing on a case-by-case basis to determine whether the listing of that particular species would trigger one of the extraordinary circumstances found at 43 CFR § 46.215, in which case a categorically excludable action would require additional NEPA analysis through an EA or EIS.

While all extraordinary circumstances will be considered, some may be more relevant to listing injurious species than others in certain cases, such as when the species is already established in U.S. ecosystems. The list of all extraordinary circumstances (found at 43 CFR § 46.215) is:

(a) Have significant impacts on public health or safety.

¹ CEQ Memorandum to Heads of Federal Departments and Agencies "Establishing, Applying, and Revising Categorical Exclusions Under the National Environmental Policy Act" November 23, 2010.

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- (b) Have significant impacts on such natural resources and unique geographic characteristics as historic or cultural resources; park, recreation or refuge lands; wilderness areas; wild or scenic rivers; national natural landmarks; sole or principal drinking water aquifers; prime farmlands; wetlands (Executive Order 11990); floodplains (Executive Order 11988); national monuments; migratory birds; and other ecologically significant or critical areas.
- (c) Have highly controversial environmental effects or involve unresolved conflicts concerning alternative uses of available resources [NEPA section 102 (2) (E)].
- (d) Have highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks.
- (e) Establish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects.
- **(f)** Have a direct relationship to other actions with individually insignificant but cumulatively significant environmental effects.
- (g) Have significant impacts on properties listed, or eligible for listing, on the National Register of Historic Places as determined by either the bureau or office.
- (h) Have significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species, or have significant impacts on designated Critical Habitat for these species.
- (i) Violate a Federal law, or a State, local, or tribal law or requirement imposed for the protection of the environment.
- (j) Have a disproportionately high and adverse effect on low income or minority populations (Executive Order 12898).
- (k) Limit access to and ceremonial use of Indian sacred sites on Federal lands by Indian religious practitioners or significantly adversely affect the physical integrity of such sacred sites (Executive Order 13007).
- (1) Contribute to the introduction, continued existence, or spread of noxious weeds or non-native invasive species known to occur in the area or actions that may promote the introduction, growth, or expansion of the range of such species (Federal Noxious Weed Control Act and Executive Order 13112).

What the Categorical Exclusion Does Not Cover

The Lacey Act does not authorize any control actions undertaken to reduce or eliminate injurious species from a particular area. Control measures are generally site-specific actions that are implemented based on the species and habitat conditions involved, such as constructing barriers or applying pesticides. The Service recognizes that such actions are different enough from the listing action as to not be appropriate under the new CE. Therefore, the new CE will address only the regulatory action of listing species as injurious through the rulemaking process. All eradication and control actions associated with listed species must be authorized under other authorities of the Service, other Federal agencies, State, territorial, or tribal governments. Any such control measures conducted by a Federal agency would have to undergo appropriate NEPA analysis and documentation prior to the control measure being implemented.

Delisting a species (removing a species from the list of injurious wildlife), while authorized under the Lacey Act, would not be categorically excluded.

Permits that are granted by the Service to allow importation and interstate transport of injurious wildlife for scientific, educational, medical, and zoological purposes are covered under an existing categorical exclusion (DM 516 section 8.5 C(1), "The issuance, denial, suspension, and revocation of permits for activities involving fish, wildlife, or plants regulated under 50 CFR Chapter 1, Subsection B, when such permits cause no or negligible environmental disturbance." We will continue to utilize that CE, when appropriate, for the issuance of such permits.

Rationale Supporting the CE

The Department and the Service find that the category of actions described in the categorical exclusion above does not individually or cumulatively have a significant effect on the human environment. This finding is based on the analysis that the listing action preserves the environmental status quo: The action maintains the baseline population of the species and any environmental effects related to the presence or absence of the species. All previous NEPA reviews of injurious species listings have consistently resulted in Findings of No Significant Impact. Finally, the categorical exclusion is consistent with existing approved Service categorical exclusions involving introduction of nonindigenous species.

1) Preserving the Environmental Status Quo

These listings have resulted in prohibitions on the importation and interstate transport of harmful nonnative species throughout the country. The nature of these prohibitions is to prevent potential future actions from occurring as the result of the introduction of the species and the associated effects of those introductions on the human environment. These listings ensure that certain potential effects associated with introduction of the species *do not* occur. In this way, injurious wildlife listings maintain the state of the affected environment into the future—the state of the environment prior to listing or potential introduction in the absence of a listing. A listing results in certain actions (importation and interstate transport of harmful nonnative species) *not* occurring.

Because the listing action is more like a typical "no action" alternative, it can be confusing. A hypothetical example of listing two nonindigenous species "Alpha" and "Beta" as injurious may help describe it. The baseline condition before the action is that species Alpha does not exist in the United States, and species Beta exists in five States. After the rule goes into effect (prohibiting importation and interstate transportation of that nonindigenous species), species Alpha still does not exist in the United States, and species Beta still exists in five States. Therefore, by listing Alpha and Beta species (the proposed action), there would be no change to the baseline populations of those species (similar to a more typical "no action").

Adding species to the list of injurious wildlife meets the standard for a category of actions that does not individually or cumulatively have a significant effect on the human environment because it merely preserves the environmental status quo within the United States. The Lacey Act prohibits importation into the United States and interstate transport of any animals already located within the United States. Therefore, the Lacey Act has two regulatory and environmental effects. For species not yet imported into the United States, it prevents them from entering the country and thereby avoids any environmental impact—positive or negative—that otherwise would be caused by the species. For injurious animals that were imported into the United States prior to the species' listing, it

prohibits interstate transport to prevent the species spread to additional States and U.S. territories where it does not yet occur and thereby avoids any environmental impact—positive or negative—from the species in these other areas. But the Lacey Act does not prohibit possession or transport within a State or U.S. territory where the species already occurs. Therefore, a Lacey Act listing may do little to prevent environmental effects in States and territories where injurious animals already occur. Federal, State, territorial, and tribal agencies; environmental groups and associations; and individuals may undertake control measures to reduce or eliminate the species already in their State or territory, but these actions are not taken under the authority of the Lacey Act. Likewise, State, territorial, or tribal governments may enact laws that prohibit possession or other activities with the species within their State or territory, but these also are not under the authority of the Lacey Act. In the absence of such additional actions, people can continue to own, possess, breed, and sell injurious animals already located within their State or territory, as allowed under State, territorial, or tribal law.

Thus, listing species under the Lacey Act ensures that certain adverse effects associated with the introduction of injurious species will not occur. Injurious wildlife listings have served to maintain an environmental status quo, preventing potentially undesirable environmental effects. The injurious species listings maintain the state of the affected environment into the future—the state of the environment prior to listing and prior to potential introductions in the absence of a listing. Thus, preventing nonindigenous injurious species or additional individuals of those species from being introduced into an area in which they do not naturally occur, and therefore do not produce a change in the resources constituting the environment, do not have a significant effect on the human environment.

2) Previously implemented actions - Record of FONSIs

Since the enactment of NEPA, the Service has conducted formal NEPA analyses for injurious species listings spanning 33 years for the following taxa: raccoon dog (1982), Chinese mitten crab (1989), brown tree snake (1990), silver carp (2007), black carp (2007), largescale silver carp (2007), and eight species of large constrictor snakes (2012, 2015). The EAs prepared for these injurious species listings address the following factors: biology of the species (countries of origin, native range, habitat requirements, food species), introduction and dispersal pathways, ecological impacts, including impacts to native species, threatened and endangered species, human impacts (including pathogens, impacts on recreation, water quality), economic impacts (including industry and agriculture), and cumulative impacts. These assessments all resulted in findings of no significant impact (FONSIs) without requiring mitigation measures, and, therefore, did not require further analysis and preparation of an EIS (see Appendix). For most of these EAs and most factors in these EAs, the examination of factors showed, although not specifically in these words, that the effects of listing the species as injurious would maintain the status quo of the factors. The exceptions, for example, were for the black carp and several constrictor snakes, which were in trade, and could affect the economics of some industries.

None of the FONSIs that the Service has prepared for injurious listings has proven inappropriate. On the contrary, we have clearly seen that species that we listed as injurious after they were already here and continued to spread have caused substantial

harm to the environment. For one example, the nonnative silver carp (listed as injurious in 2007; see Appendix) has outcompeted some native fish species in parts of the Mississippi river drainage basin and cause physical injury to boaters when these large fish (40 pounds or more) jump out of the water and hit boaters. The FONSI for this species concluded that: 1) There will be no significant ecological impacts; 2) there will be no significant impacts to native species; 3) there will be no significant effects on public health and safety; 4) the cumulative impacts of listing live silver carp in order to protect native species are not significant; and 5) the action will not adversely affect any endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species act of 1973. Silver carp were not being aquacultured in the United States at the time of listing, so the effect on industries of listing on aquaculture was considered as not significant. Another example is the Burmese python, one of the largest snakes in the world and a truly powerful predator. Pythons prey on small- to large-sized wildlife species and are linked to the decline of populations of some mammals in the Everglades. If the pythons had been listed as injurious before they were introduced into the United States, the listing would have been expected to prevent these effects. The FONSI for this species concluded (among other factors) that: 1) There will be no significant ecological impacts; 2) there will be no significant adverse impacts to native species; 3) there will be no significant effects on public health and safety; and 4) the action will not adversely affect any endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

Conversely, the Service has listed numerous species as injurious before they were introduced into the United States or before they became established, and they have not subsequently become established (thus not causing impacts to the environment). For example, at the same time the Service listed the silver carp, we also listed the closely-related large-scale silver carp, which was not yet found in the United States. The listing prevented its introduction, and the large-scale silver carp is still not found in U.S. ecosystems, thus preserving the environmental status quo. Also at the same time the Service listed the northern snakehead, a fish that was already established in several States, the Service listed all other species in the snakehead family (27 other species), and none of the species that were not yet in the United States have established in U.S. ecosystems, again preserving the environmental status quo.

3) Consistent with existing categorical exclusions

The purpose of this categorical exclusion is to facilitate listing of species as injurious, thus prohibiting the initial introduction or further introduction of injurious organisms not indigenous to the affected ecosystem. This is consistent with an existing categorical exclusion that allows for certain activities (specifically, research, inventory, and information collection activities directly related to the conservation of fish and wildlife resources) to be categorically excluded as long as they involve, among other things, "no introduction of organisms not indigenous to the affected ecosystem" (see 516 DM 8.5 B (1)). Thus, the activities related to conservation of fish and wildlife resources that would allow the initial introduction or further introduction of nonindigenous species would require additional NEPA review, while the absence of that effect, among other things, does not. That categorical exclusion, therefore, recognizes the potential

environmental impact from nonindigenous species introductions that should be analyzed through an EA or EIS. Here, adding a species as injurious under the Lacey Act prevents the initial introduction of a nonindigenous species not already present (either in particular States and territories or, for species not yet imported, in the United States overall) or further introductions, thereby avoiding any environmental effect that would be caused by the species.

Conclusion

The Service proposes to amend its NEPA procedures by establishing a categorical exclusion covering the addition of species to the lists of injurious wildlife under the Lacey Act (18 U.S.C. § 42, as amended). The Lacey Act authorizes the listing of certain wildlife species by regulation, which then prohibits them from being imported into the United States or transported across State (including U.S. territories) lines. The Service's rationale supporting establishment of the categorical exclusion is three-fold:

- Maintaining the status quo. The act of listing injurious species does not have effects on the human environment (40 CFR § 1508.14). Instead, injurious wildlife listings maintain the state of the affected environment into the future by preventing potential future actions from occurring as the result of the introduction of a species and the associated effects of those introductions on the human environment.
- Thirty-three years of NEPA experience. The Service has prepared eight EAs covering 44 injurious species since 1982. All resulted in FONSIs without requiring mitigation measures.
- Consistent with existing categorical exclusions. This categorical exclusion is consistent with existing Service categorical exclusions.

APPENDIX

Previously Implemented Actions Injurious Wildlife Listings under the Lacey Act

The Service's environmental assessments are mostly qualitative because of the type of information available. When predicting the effect of something that has not occurred but could without the action alternative—that is, what would the effect be of a new species arriving in the United States or a new part of the United States—the Service uses primarily the history of invasiveness of that species in other countries with similar climates as the United States. The Service can reasonably predict if a species will become invasive but cannot quantify those effects and for some United States ecology, limited information related to potential effects is available. Information is limited further by what is reasonably foreseeable at the time of the proposed listing and whether and what individual State actions would occur without the Service listing the nonindigenous species. Therefore, ecological quantitative analyses were not prepared, other than describing the number of endangered and threatened species that could be affected by listing a nonindigenous species.

The Service's environmental assessments have addressed the following types of impacts (depending on the type of species): Ecological effects, such as water quality degradation; impacts to native wildlife species (including endangered and threatened species), such as carrying diseases and parasites, preying on native species, and competing with native species for resources; impacts to recreation (such as reducing fishing and boating opportunities); harm to people, and economic impacts to industry, agriculture, and aquaculture. Negative environmental impacts would be expected to occur *in the absence of listing the species*—that is, the no-action alternative, where the species was allowed to continue to be imported and transported across State lines. The action alternative (listing the species) would protect native wildlife and wildlife resources and the health and welfare of human beings from potential, or further potential, negative effects and not be expected to have significant environmental effects on such resources.

A. Environmental Assessment and FONSI prepared

1. Raccoon Dog (Nyctereutes procyonoides)

Federal Register: December 16, 1982 (Volume 47, Number 242) (link)

"An assessment of the environmental effects of this rule has been prepared as required by the National Environmental Policy Act of 1969. A determination has been made that this rulemaking action is not a major Federal action significantly affecting the quality of the human environment."

Environmental Assessment and FONSI (link)

2. Mitten Crabs (Genus *Eriocheir*; 3 species) (EA and FONSI not locatable) Federal Register: May 23, 1989 54 FR 22286 (link)

"An assessment of the environmental effects of the proposal to list mitten crabs as injurious was prepared and a determination made on October 24, 1988, that it is not a major Federal action under the National Environmental Policy Act. The comments submitted to the Service in response to our November 14, 1988, proposed rule provided no new information on environmental impacts that might be expected or attributable to this action; it has been determined, therefore, that the October 24, 1988, "Finding of No Significant Impact" for the Environmental Assessment is still a valid finding for this final rule."

3. Brown Tree Snake (*Boiga irregularis*) (EA and FONSI not locatable) Federal Register: May 23, 1989 54 FR 22286 (link)

"An assessment of the environmental impacts of this rule has been prepared and a determination has been made that the rule is not a major Federal action under the National Environmental Policy Act. The comments submitted to the Service in response to our January 19, 1990, proposed rule provided no new information on environmental impacts that might be expected or attributed to this action; it has been determined, therefore, that the December 5, 1989, "Finding of No Significant Impact" for the Environmental Assessment is still valid for this final rule."

4. **Silver Carp** (Hypophthalmicthyes molitrix)

Federal Register: July 10, 2007 72 FR 37459 (link)

"We have prepared environmental assessments (EAs) in conjunction with this rulemaking, and have determined that this rulemaking is not a major Federal action significantly affecting the quality of the human environment within the meaning of section 102(2)(C) of the National Environmental Policy Act (NEPA of 1969 (42 U.S.C. 4321 et seq.))."

Environmental Assessment (link) FONSI (link)

5. **Largescale Silver Carp** (*Hypophthalmicthyes harmandi*)

Federal Register: July 10, 2007 72 FR 37459 (link)

"We have prepared environmental assessments (EAs) in conjunction with this rulemaking, and have determined that this rulemaking is not a major Federal action significantly affecting the quality of the human environment within the meaning of section 102(2)(C) of the National Environmental Policy Act (NEPA of 1969 (42 U.S.C. 4321 et seq.))."

Environmental Assessment (link) FONSI (link)

6. Black Carp (*Mylopharyngodon piceus*)

Federal Register: October 18, 2007 72 FR 59019 (link)

"We have prepared an Environmental Assessment (EA) in conjunction with this rulemaking, and have determined that this rulemaking is not a major Federal action significantly affecting the quality of the human environment within the meaning of section 102(2)(C) of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*)."

Environmental Assessment (link) FONSI (link)

7. Large Constrictor Snakes:

Burmese python (*Python molurus*)

Northern African python (*Python sebae*)

Southern African python (Python natalensis)

Yellow anaconda (Eunectes notaeus)

Federal Register: January 23, 2012; 77 FR 3330 (link)

"An assessment of the environmental impacts of this rule has been prepared and a determination has been made that the rule is not a major Federal action under the National Environmental Policy Act. The comments submitted to the Service in response to our March 12, 2010, proposed rule provided no new substantive information on environmental impacts that might be expected or attributed to this action; the "Finding of No Significant Impact" for the Environmental Assessment was signed on January 9, 2012."

Environmental Assessment (link)

FONSI (link)

8. Large Constrictor Snakes:

Reticulated python (*Python reticulatus*)

Green anaconda (Eunectes murinus)

Beni anaconda (Eunectes beniensis)

DeSchauensee's anaconda (Eunectes deschauenseei)

Federal Register: March 10, 2015; 80 FR 12702 (link)

"We have reviewed this rule in accordance with the criteria of the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), Department of the Interior NEPA regulations (43 CFR part 46), and the Departmental Manual in 516 DM 8. This action is being taken to protect the natural resources of the United States. A final environmental assessment and a finding of no significant impact (FONSI) have been prepared and are available for review by written request (see **ADDRESSES**) or at http://www.regulations.gov under Docket No. FWS-R9-FHC-2008-0015."

Environmental Assessment (link) FONSI (link)

B. Categorically Excluded Under Department Procedures

Snakeheads (family Channidae; 28 species)

Federal Register: October 4, 2002 (67 FR 62193) (link)

"We have reviewed this rule in accordance with the criteria of the National Environmental Policy Act and our Departmental Manual in 516 DM. This rule does not constitute a major Federal action significantly affecting the quality of the human environment. Since only 16,554 snakehead fishes were imported between 1997 and 2000 for a declared value of \$85,000, the maximum annual loss to the few entities that deal in these species is estimated to be \$22,000. Therefore, an environmental impact statement/assessment is not required. The action is categorically excluded under the Department's NEPA procedures (516 DM 2, Appendix 1.10), which apply to policies, directives, regulations, and guidelines of an administrative, legal, technical, or procedural nature; or the environmental effects of which are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will be subject later to the NEPA process, either collectively or on a case-by-case basis."

Brushtail Possum (*Trichosurus vulpecula*)

Federal Register: June 11, 2002 (67 FR 39865) (link)

"This rule does not constitute a major Federal action significantly affecting the quality of the human environment. An environmental impact statement is not required. The action is categorically excluded under the Departmental NEPA procedures (516 DM 2, Appendix 1.10), which apply to policies, directives, regulations, and guidelines of an administrative, legal, technical, or procedural nature; or the environmental effects of which are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will be subject later to the NEPA process, either collectively or case-by-case."

C. Listed by Congress without Environmental Assessment

Zebra mussel (*Dreissena polymorpha*): Listed by Congressional statute and thus no environmental assessment was prepared.

Federal Register: November 7, 1991; 56 FR 56942 (link)

Bighead carp (*Hypophthalmichthys nobilis*): Listed by Congressional statute and thus no environmental assessment was prepared.

Federal Register: March 22, 2011; 76 FR 15857) (link)