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The Future of Herpetoculture

1. The proposed categorical exclusion bypasses the requirement to consider economic and social impacts under NEPA.

The Service believes that there “cannot [be] a significant effect on the human environment” when it prohibits a nonindigenous invasive species from being introduced into an area. It reasons that a prohibition merely maintains the “environmental status quo.” As a result, nothing about the physical environment changes.

This interpretation of the term “human environment” is flawed. It assumes that the only environmental effects that matter under NEPA are “ecological” impacts, such as interactions between nonindigenous species and native wildlife. In reality, NEPA defines environmental impacts extremely broadly to include “economic” and “social” impacts. For this reason, NEPA regulations require agencies to interpret “human environment” comprehensively to include “the natural and physical environment and the relationship of people to that environment.” Further, environmental “effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.” 40 C.F.R. § 1508.8.

While not every listing decision under the Lacey Act will have significant economic and social impacts, some listings affect broad segments of the economy and millions of citizens across every state. For example, the recent listing of four constrictor snakes has had crippling economic impacts. According to FWS's own economic analysis, the “annual retail sales losses for” listing the four constrictor snakes “are estimated to range from \$3.7 million to \$7.6 million” with much of this impact falling disproportionately on small businesses. These impacts on the “human environment” will only worsen if the Service finalizes the proposed CatX and applies it to the future listings of additional reptile and amphibian species. FWS has already proposed to list five additional constrictor species and has been petitioned to list all amphibian species. If it finalizes those listings in the future, the economic impacts would dwarf the \$7.6 million estimate.

In these situations, an environmental assessment (EA) or environmental impact statement (EIS) forces FWS to carefully consider the widespread economic harm resulting from its proposed action. But by relying on a CatX, FWS would consider only the “ecological” impacts, ignoring NEPA's requirement to consider “economic” and “social” impacts--and ultimately subverting NEPA's goal of “balanc[ing] environmental concerns with the social, economic, and other requirements of present and future generations of Americans.”

The careful consideration of economic impacts is especially important in Lacey Act decisions because the act, on its own, doesn't explicitly require FWS to consider economic impacts in



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listing or permitting decisions. This is unlike many other federal environmental laws, which require federal agencies to consider economic impacts at these critical junctures. For example, under the Endangered Species Act, FWS must consider the economic impacts of designating critical habitat. The Lacey Act is very different from many other federal environmental laws. As a result, the only meaningful opportunity to consider economic and social impacts is through the NEPA analysis. A CatX would circumvent this critical analysis.

An economic impact analysis, such as the one FWS completed for its decision to list the four constrictor snakes, is not an effective substitute for an EA or EIS. The main reason is that an economic impact analysis generally only identifies the positive and adverse economic impacts. It does not actually weigh the economic impact of one alternative action against the impact of all other alternatives. By contrast, NEPA specifically requires agencies to weigh competing factors and explain the decision to select their preferred alternative. Put differently, an economic impact analysis is necessary, but not sufficient, to the task of deciding whether to list a species under the Lacey Act.

The value of weighing the economic impacts of alternative actions has real world consequences. Imagine if FWS did not complete an EA on its proposed listing of the nine constrictor species. FWS would not have considered the economic impacts as thoroughly as they did (even though they did a poor job at it). As a result, they probably would have listed most or all nine species, instead of only four.

2. A categorical exclusion would not allow FWS to fully consider the beneficial impacts of declining to list a species under the Lacey Act.

As noted earlier, NEPA requires agencies to consider both the adverse and beneficial impacts of their proposed decision. In proposing the CatX, FWS acts as if nonindigenous invasive species have only negative or “undesirable environmental effects,” and that listings have entirely positive impacts. Through a CatX, FWS would ignore the numerous beneficial environment impacts of not listing certain species under the Lacey Act.

The most important are beneficial economic and social impacts. For example, the economic value of market for the nine constrictor snakes is up to \$30.1 million by FWS's own estimate, which actually understates the value. Further, there are many “social” benefits of allowing people to keep certain species of reptiles and amphibians as companion animals. Hundreds of thousands of people spend millions of dollars annually on constrictor snakes and their care. As a result, these animals offer a social utility that FWS would never consider through a CatX. Currently,

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FWS acts as if these social benefits are irrelevant for purposes of listing, thus flatly contradicting the requirements of NEPA to broadly interpret the term “human environment”.

There are also indirect “ecological” benefits of allowing interstate commerce in constrictor snakes and amphibians. Many of these animals are kept as pets, which increases awareness of wildlife and the need to conserve them in their native habitats. This is evident from the numerous pythons and amphibians used for conservation education in zoos. In a world in which society is becoming increasingly “nature deficient,” reptiles and amphibians provide many children and adults with their only link to the natural world. These benefits are very real and exactly the types of “indirect beneficial” effects that NEPA contemplates.

3. The proposed categorical exclusion is much broader than any of the other eight exclusions that FWS has approved under “permitting and regulatory functions”.

Compared to the eight other categorical exclusions that FWS has approved to date, the proposed CatX is extremely broad and inappropriate. The other eight exclusions for “permit and regulatory functions” are limited to actions with minimal impacts or ministerial activities. In brief, they are as follows:

- Wildlife permitting that “cause no or negligible environmental disturbance”
- The issuance of low-effect habitat conservation plans under the Endangered Species Act
- The issuance of special regulations for Service-managed lands, where those uses are generally the same as existing uses of those lands
- Permitting for limited facilitates expansion or maintenance
- Permitting for special uses of refuge lands where those uses have no or limited environmental impacts
- Denying a permit for uses that are incompatible with refuges
- Enforcement of fish and wildlife laws
- Actions that are categorical exclusions for another federal agency that shares approval authority with the Service

Importantly, none of these actions involve the multi-million or -billion dollar impacts that result from listing certain reptiles and amphibians under the Lacey Act. They are all *de minimus* or ministerial actions that do not affect millions of Americans. In fact, not a single one of those actions involve listing decisions. And listings under the Lacey Act are extremely consequential

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because once a species is listed, there are few opportunities to obtain permits to conduct activities that are otherwise prohibited. The Lacey Act is among the most inflexible of our wildlife laws. By contrast, under laws like the Endangered Species Act or the Bald and Golden Eagle Protection Act, the public can readily acquire permits to conduct activities that would otherwise violate the act's prohibition on “taking” of listed species. Thus, the Lacey Act is the worst candidate for a CatX.

4. The FWS's “extraordinary circumstances” exception to a categorical exclusion is unhelpful because it does not apply to actions with high economic impacts.

There are twelve extraordinary circumstances exceptions to categorical exclusions. None of those pertain to extraordinarily high economic impacts. Further, FWS has not explained how any of the existing exceptions might apply to a future reptile or amphibian listing decision.

5. Even if FWS proceeds with a categorical exclusion for injurious species, the current proposal is too broad.

The proposed CatX does not describe any situations that would require FWS to conduct an EA or EIS. It thus assumes that the environmental impacts of all listing decisions are sufficiently similar. In reality, the pathway of invasion, biological response, and other aspects of how indigenous species become invasive vary substantially. Aquatic zebra mussels and silver carp are unlike constrictor snakes in many ways, and thus their impacts on the human environment vary significantly. Under the CatX, FWS would ignore these differences for purposes of its NEPA analysis. CatXs were not designed for these situations.

The CEQ's regulations recognize the need to ensure that CatXs are not overly broad:

Some activities may be variable in their environmental effects, such that they can only be categorically excluded in certain regions, at certain times of the year, or within a certain frequency. For example, because the status and sensitivity of environmental resources varies across the nation or by time of year (*e.g.*, in accordance with a protected species' breeding season), it may be appropriate to limit the geographic applicability of a categorical exclusion to a specific region or environmental setting....

Categorical exclusions for activities with variable impacts must be carefully described to limit their application to circumstances where the activity has been shown not to have significant individual or cumulative environmental effects. Those limits may be spatial (restricting the extent of the proposed action by distance or area); temporal (restricting



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the proposed action during certain seasons or nesting periods in a particular setting); or numeric (limiting the number of proposed actions that can be categorically excluded in a given area or timeframe). Federal agencies that identify these constraints can better ensure that a categorical exclusion is neither too broadly nor too narrowly defined.

The proposed CatX is also inappropriate because it explicitly excludes the removal of listed species from Lacey Act. It thus creates a one-way ratchet, in which it is always easier to list a species than to delist it. In effect, the CatX creates a presumption of indefinite listing unless overcome by a mountain of countervailing evidence.

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