



National Sea Grant Law Center Legislative Quick Take

Recent Proposals to Amend the Lacey Act: H.R. 4521 and S. 626

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Legislation recently introduced into Congress proposing amendments to the Lacey Act would, if enacted, impact the regulation of “injurious” species. This legislation appears designed to primarily accomplish two things: (1) restore the long-standing prohibition on the interstate transportation of injurious species and (2) provide the Department of Interior with additional authority to respond quickly and proactively to the threat of non-native species. Although it appears unlikely that Congress will pass these bills this session, future bills may raise similar questions about legislative reform efforts related to the import and interstate transport of nonnative species.

Bills

On February 4, 2022, the House of Representatives passed [H.R. 4521](#), the “America COMPETES Act.” Section 71102 of H.R. 4521 would amend the Lacey Act in four ways:

- 1) Add language to restore the prohibition on the transport of injurious species across state lines;
- 2) Add language to authorize the Department of Interior to prohibit, via an emergency designation, the import of injurious species if there is an imminent threat;
- 3) Clarify that enforcement requires a person to “knowingly violate” the law; and
- 4) Establish a presumptive prohibition on the import of any nonnative species, with some exceptions.

H.R. 4521 was passed in the Senate on March 28, 2022. However, the Senate did not actually pass the America COMPETES Act. Rather, the Senate voted to substitute the text of H.R. 4521 with the text of a completely different bill related to innovation. There is no language related to the Lacey Act in the version passed by the Senate. H.R. 4521 was sent back to the House, but a conference committee would likely need to be appointed to reconcile the differences between the two bills.

A similar bill was introduced in the Senate on March 9, 2021. [S. 626](#), “Lacey Act Amendments of 2021,” was referred to the Committee on Environment and Public Works. There has been no further action on the bill.

Historical Background

Some historical background on the drivers of legislative reform may be helpful in understanding the proposed changes. The Lacey Act is one of the oldest wildlife protection statutes in the United States. It was enacted in 1900 and has been amended several times.

Title 18 of the Lacey Act, often referred to as the “injurious species provision,” authorizes the U.S. Fish and Wildlife Service (FWS) to prohibit the importation and shipment of species “deemed to be injurious or potentially injurious to the health and welfare of human beings, to the interest of forestry, agriculture, and horticulture, and to the welfare and survival of the wildlife or wildlife resources of the United States.” 18 U.S.C. § 42(a)(1). The Act additionally bars “any shipment” of injurious species “*between* the continental United States, the District of Columbia, Hawaii, the Commonwealth of Puerto Rico, or any possession of the United States.” (emphasis added).

In 2017, the D.C. Circuit Court of Appeals held that 18 U.S.C. § 42 prohibits only the importation of listed injurious species into the United States and shipments of injurious species between the continental United States and listed territories. (U.S. Ark v. Zinke, 852 F.3d 1131 (D.C. Cir. 2017)). This ruling struck down a longstanding FWS interpretation that Title 18 prohibited the shipment of injurious species across state lines. According to the court, Congress’s use of “between” should be interpreted to refer to the relationship of individual listed jurisdictions – the continental United States (as a whole), the District of Columbia, Hawaii, Puerto Rico, and other U.S. possessions – to each other. The Court disagreed with the FWS that the statute could be read more broadly to prohibit shipment across state lines.

Proposed Reforms

Interstate Transport: If enacted, Section 71102 H.R. 4521 and S. 626 would strike the language “shipment between the continental United States” from Section 42 and replace it with “transport between the States.” This change would restore the FWS’s prohibition on interstate shipment that was lost in the U.S. ARK decision. Adding the language “interstate transport within the United States” would directly fill the gap in authority.

Emergency Designation: Both bills contain language that would grant the FWS new authority to prohibit the import of species via a regulatory emergency designation. Under the proposed language, the Department of Interior could prohibit the import of “any species of wild mammals, wild birds, fish (including mollusks and crustacea), amphibians, or reptiles, or the offspring or eggs of any such species” if necessary to address an imminent threat to human beings or agricultural, horticultural, forestry, or wildlife resources. Such emergency designation would take effect immediately upon publication in the Federal Register and could extend for no more than three years. During the time period when the emergency designation is in effect, the FWS is to study whether the prohibited species should be formally listed as an “injurious species” under the Lacey Act. This process is similar to the procedures for other emergency actions agencies can take through temporary or interim regulations.

Presumptive Prohibition on Import: Both bills contain language that would establish a presumptive ban on the import of non-native species into the United States with limited exceptions. Under the proposed language, importation into the United States of any non-native species of wild mammals, wild birds, fish (including mollusks and crustacea), amphibians, or reptiles, or the offspring or eggs of any such species would be prohibited. There would be two exceptions to this presumptive prohibition:

- Non-native species that were imported into the United States or transported between states/territories “in more than minimal quantities” during the 1-year period preceding the date of enactment.
- Species that the Secretary of the Interior determines do not pose a significant risk of invasiveness to the United States.

Some advocacy groups have interpreted this language as creating a “white list.” White lists refer to a management approach whereby the import, sale, and possession of non-native species are prohibited until designated as presenting a low risk of invasiveness. The more common approach in the United States is a “black list” approach, which identifies and prohibits species known to cause harm.

Neither bill defines or provides a threshold for “minimal quantities.” It is possible that this language could grandfather in (i.e., exempt from the prohibition) almost all non-native species currently being imported, sold, and traded in the United States. In practice, therefore, it is likely that this presumptive prohibition would only apply to “new” species imports.

Key Takeaways

It is important to note that the proposed presumptive prohibition only applies to species non-native to the United States. Further, the emergency designation only applies to non-native species that have been deemed harmful to humans or the environment. These provisions do not apply to all species of fish and wildlife being imported, sold, or transported in the United States.