KELLEY DRYE & WARREN LLP

A LIMITED LIABILITY PARTNERSHIP

WASHINGTON HARBOUR, SUITE 400

3050 K STREET, NW

WASHINGTON, D.C. 20007-5108

(202) 342-8400

FACSIMILE

(202) 342-8451

www.kelleydrye.com

NEW YORK, NY

CHICAGO, IL

STAMFORD, CT

PARSIPPANY, NJ

BRUSSELS, BELGIUM

AFFILIATE OFFICES

MUMBAI, INDIA

DIRECT LINE: (202) 342-8638

EMAIL: jgalvin@kelleydrye.com

April 18, 2011

VIA HAND DELIVERY

The Honorable Cass Sunstein
Administrator
Office of Information and Regulatory Affairs
The Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Re: U.S. Fish & Wildlife Service's "Injurious" Finding with Respect to Nine Species of Snakes for Purposes of Application of the Lacey Act

Dear Administrator Sunstein:

As you are well aware, the Office of Information and Regulatory Affairs ("OIRA") is charged with ensuring that regulatory processes by executive departments and agencies comport with applicable substantive and procedural law, Executive Orders, Presidential Memoranda, and the President's regulatory policies.

Early this year, in part as a response to the economic crisis, President Obama issued Executive Order ("EO") 13563 (Jan. 18, 2011) and an accompanying Memorandum, "Regulatory Flexibility, Small Business, and Job Creation" (Jan. 18, 2011). These directives were promulgated subsequent to the U.S. Fish and Wildlife Service's ("FWS") issuance of its proposal to make a finding of "injuriousness" with respect to nine constrictor species – boa constrictors, four python species, and four anaconda species – and listing them under the Lacey Act. *See* 75 Fed. Reg. 11808 (March 12, 2010). As such, the proposed constrictor rule would end commerce in these species and their hybrids, spelling the demise of an industry worth hundreds of millions of dollars and comprised of tens of thousands of small businesses and entrepreneurs.

As explained below, this proposal is inconsistent with clear presidential policy regarding regulatory philosophy, particularly as it impacts small business and jobs. If the FWS constrictor rule is not fully vetted in accordance with presidential directives and sent back for further process required by law, thousands of men and women in the domestic reptile breeding, retail, transportation, equipment manufacture, trade show promotion, medical supply, herpetological

veterinary, and wholesale industries will suffer significant and likely permanent adverse economic impacts.

As a result, we respectfully request that OIRA carefully review the proposed rule in light of the Obama Administration's recent guidance and longstanding principles of regulatory review. As explained in depth below, any such review should result in finding that FWS's constrictor rule is inconsistent with presidential policy, unnecessary as a matter of public policy, and unjustified by any reasoned assessment of benefits and costs.

Small Business Impacts

The Small Business Administration's ("SBA") Office of Advocacy and the U.S. Association of Reptile Keepers ("USARK") have both detailed the deficiencies in the Initial Regulatory Flexibility Analysis ("IRFA") promulgated in support of the proposed rule. Among other things, the Office of Advocacy found that FWS:

1. Failed to "adequately describe the impacts of the proposed rule on small businesses";
2. Did "not discuss significant alternatives to the proposed rule";
3. Did "not properly identify the small entities directly affected by the rule"; and
4. "Underestimates the economic impact on small entities."

In addition to elements of an IRFA required by the Regulatory Flexibility Act ("RFA"), 5 U.S.C. § 603, FWS has failed to meet the letter and spirit of President Obama's January 18, 2011, Memorandum relating to small businesses and job creation.

As the President noted, "Small businesses play an essential role in the American economy; they help fuel productivity, economic growth, and job creation. . . . In the current economic environment, it is especially important for agencies to design regulations in a cost-effective manner consistent with the goals of promoting economic growth, innovation, competitiveness, and job creation." The FWS proposal to list these nine constrictor snakes under the Lacey Act and prohibit all importation and interstate trade in these animals has the diametrically opposite effect—it eliminates a whole category of small business with an annual economic impact potentially in excess of $100 million. Before this is allowed to occur, OIRA should be assured that all policy directives and legal mandates have been complied with scrupulously.

President Obama has emphasized the RFA's importance, directing agencies to produce impacts "analyses that give careful consideration to the effects of their regulations on small businesses and explore significant alternatives in order to minimize any significant economic impact on

small businesses." With respect to the former, FWS failed to accurately characterize the universe of small businesses affected by the rule and, as a result, utterly failed to apprehend the unraveling adverse impacts on whole classes of small businesses. As to the latter, although SBA, USARK, and many others offered a host of viable alternatives that meet the agency's objectives, FWS neglected to explore any different approaches to criminalizing a significant economic activity. The most notable alternative, appropriate to the problem's limited geographic scope, is better state-federal cooperation and joint education and outreach by the industry and government. And, in fact, much of this has already been accomplished vis-à-vis the legislative and regulatory process in the state of Florida in 2010.

The snake rule is not one mandated by law or regulation. It is purely a matter of policy and interpretation based on a single scientific document. As such, the rule's scope is entirely discretionary, making the consideration of alternatives an even greater imperative. The President specifically directs executive agencies acting in such circumstances – *i.e.*, "for reasons other than legal limitations" – to "explicitly justify its decision not to" provide small entities flexibility "in the explanation that accompanies that proposed . . . rule." FWS fails to justify, or even acknowledge, its failure to examine significant alternatives.

Given that the agency ignored SBA's call to issue a new IRFA and the rule has been submitted for OIRA in final form, it is clear that all these failures persist.

Executive Order 13563

EO 13563 "supplement[s] and reaffirms the principles, structures and definitions" established in EO 12866, the charter of modern regulatory policy and review. As such, this Order highlights the elements of current regulatory law and policy of particular importance to the President, along with new specific guidance designed to achieve this policy.

As to the general principles governing his view of regulatory development and policy, President Obama states:

> Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation. It must be based on the best available science. It must allow for public participation and an open exchange of ideas. . . . It must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends. It must take into account benefits and costs, both quantitative and qualitative.

In all these respects, the constrictor rule falls short. As a general matter, though not exhaustively, the rule suffers fundamental flaws in terms of (1) the quality and objectivity of its supporting science and (2) the (related) failure to meaningfully capture the benefits and costs of the rule for society, regulated individuals, and consumers. These are taken up briefly in turn.

1. The rule fails to meet the President's scientific integrity standards

In EO 13563, the President incorporates his previous guidance on "Scientific Integrity" (March 9, 2009), explaining that "each agency shall ensure the objectivity of any scientific and technological information and processes used to support the agency's regulatory actions." Scientific and technical findings are to be provided in an "open format" with ample opportunities for meaningful public comment. The clear import of the "open format" requirement is to allow not just access to influential scientific reports, but to further provide access to underlying data. This helps fulfill agency duties under the Information Quality Act ("IQA"), § 515 of the Treasury and General Government Appropriations Act for the Fiscal Year 2001 (Pub. L. No. 106-554); specifically by allowing the public opportunities to investigate the quality, utility, objectivity, and integrity of influential science upon which an agency bases regulatory action.

The U.S. Geological Survey's Open File Report 2009-1202, *Giant constrictors: biological and management profiles and an establishment risk assessment for nine large species of pythons, anacondas, and the boa constrictor*, is "highly influential information" with in the meaning of the IQA and Office of Management and Budget ("OMB") guidelines. The report forms the sole justification for outlawing a sector of the domestic pet industry. The "Scientific Integrity" memorandum encourages subjecting such scientific or technological information "to well-established scientific processes, including peer review where appropriate." The USGS study was "reviewed," but only by individuals, not a formal peer review process conforming to OMB's "Final Information Quality Bulletin for Peer Review," Department of Interior, or USGS IQA standards. The *Giant constrictors* report is highly influential no matter how the annual economic impacts are assessed because this is the first time the Lacey Act has been used to ban trade in a widely held household pet.

USARK is supplying OIRA with the detailed history and substance of its IQA challenge to the USGS study. Particularly noteworthy is the agency's refusal to consider contrary science and reliance on the study's flawed climate-matching model. In short, on the thinnest veneer of scientific polish, overlying speculation, surmise, and unfounded assumptions, this report purports to create a national problem from what is, and has long been, a highly localized phenomenon in the most suitable habitat for these species in southern Florida. There is no objective evidence to suggest that these tropical constrictor species have or will be able to colonize large swaths of the United States, despite their long history of broad pet ownership throughout the country.

2. FWS has utterly failed to assess the benefits or costs of the proposed rule

Despite the focus in EO 13563 on ensuring that "a regulation [be proposed or adopted] only upon a reasoned determination that its benefits justify its costs," FWS studiously ignored economic data provide by USARK, the Pet Industry Joint Advisory Council, and others with respect to the burdens and debilitating economic costs of its rule. Nor did it attempt to quantify the benefits of a national prohibition on interstate sales and imports of these constrictor species. In our view, any benefits derived from the prohibition are slim to non-existent given the current widespread ownership of these species. (Parenthetically, even agency personnel at FWS opined on the inappropriateness of using the Lacey Act to ban this trade, stating "the agency clearly never envisioned that a pet species that is commonly bred, traded, and possessed in the U.S. would be listed as injurious.") Perhaps FWS agrees, which is why the cost/benefit and net benefit analyses have never, to our knowledge, been conducted. Yet, to be consistent with presidential policy, this must be done prior to finalization of the rule.

Moreover, the public should have the opportunity to see and be able comment on all new economic and benefits analysis. Initial EO 12866, RFA, and Small Business Regulatory Enforcement Fairness Act analyses in the proposed rule were so vague and incomplete as to render meaningful public comment impossible. Section 2 of EO 13563 emphasizes the importance of informed public comment, open science, and give-and-take between regulators, the regulated, and the public at large. The letter and spirit of the presidential directive have been violated here.

Finally, according to President Obama, "each agency shall identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public." And yet this rule will eliminate choices for the public while crushing an industry comprised primarily of small businesses. Before so drastic a step is taken, OIRA should be thoroughly convinced that FWS has fully complied with the letter and spirit of the President's regulatory policy.

We greatly appreciate your time and attention to this very serious matter. OIRA's mandate is to ensure that federal regulations conform to Administration policy, that regulations be consistent with an agency's legal authority, and that the costs of a regulation are well justified in terms of law and policy. We do not believe the constrictor rule meets these standards. Please let us know if we can provide you more information.

Sincerely,

/s/
Andrew E. Minkiewicz
Counsel to United States Association of Reptile Keepers

Joan Galvin
Government Relations Advisor to United States Association of Reptile Keepers