

September 26, 2008

## Lacey Act Amendment: Implementation Questions and Answers

1. Are the amendments effective immediately?

**The Lacey Act amendments included in the 2008 Farm Bill are effective as of May 22, 2008. As a practical matter, this means that enforcement actions may be taken for any violations committed on or after that date. Note, however, that the requirement to provide a declaration under 16 U.S.C. 3372(f) does not become effective until December 15, 2008 (180 days from the date of enactment). Moreover, enforcement of the declaration requirement will be phased-in and is anticipated to begin in the Spring of 2009.**

2. Will regulations be developed?

**At least some implementing regulations are anticipated. However, most of the statute is self-implementing and thus may be enforced prior to the promulgation of any implementing regulations. The amendments also include a number of provisions specifying the promulgation of regulations.**

- **Section 3(e)(3) of the Act provides that the Secretary, in cooperation with the Director of the Animal and Plant Health Inspection Service, shall promulgate regulations describing the persons covered by Section 3(e)(2) as to whom the prohibited wildlife species offense provisions do not apply. 16 U.S.C. § 3372(e)(3).**
- **Section 7(a)(1) of the Act provides the Secretary with general authority to issue regulations, after consultation with the Secretary of the Treasury, as may be necessary to carry out the provisions of sections 3(f), amongst others. 16 U.S.C. § 3376(a)(1).**
- **Section 7(c) of the Act provides that the Secretaries of Agriculture and the Interior shall, after consultation with appropriate agencies, jointly promulgate regulations to define the terms used in the exclusion from the definition of the term “plant” in Section 3371(f)(2)(A) for purposes of enforcement under this Act. 16 U.S.C. § 3376(c). That provision excludes from the definition of “plant” “common cultivars, except trees, and common food crops (including roots, seeds, parts, or products thereof).”**
- **Section 3(f)(4) of the Act provides that, not later than two years after enactment of these amendments, the Secretary shall review the new declaration requirements and the effect of the exclusion for packaging material. Not later than 180 days after completing this review, the Secretary may promulgate regulations to limit the applicability of any of the special declaration requirements imposed by Section 3(f)(2) to specific plant products; to make any other necessary modification to the special**

**declaration requirements in section 3(f)(2); and to limit the scope of the exclusion of packaging material from the declaration requirements if warranted. 16 U.S.C. § 3372(f)(6).**

3. How will affected importers/industries be notified of the amendment and the declaration requirement?

**Information on the Lacey Act and the recent amendments, including the declaration requirement, will be disseminated to the public and affected industries, for example through postings on agencies' web sites and notifications to industry and trade advisory committees.**

4. Why does Lacey now cover “any wild member of the plant kingdom” (excluding common food crops and common cultivars)? Are there plant products (other than timber and timber products) where illegal harvest and associated trade is a concern?

**Although considerable recent attention has been focused on illegal logging and associated trade, other wild plants also face the threat of illegal harvesting. Prior to the recent amendments, Lacey Act protections covered only endangered plants (such as those listed on appendixes of CITES), and there were prosecutions involving the illegal harvest and associated trade of non-timber plants species such as orchids, ginseng, saguaro cacti and others.**

5. What are the definitions of “common cultivars” and “common food crops”?

**There is no statutory nor, as yet, regulatory definition of either term. In the absence of a legal definition, the terms are currently afforded their plain meaning; however, APHIS and FWS intend to issue a rule defining the terms prior to the implementation of the declaration requirement.**

6. When does the requirement to declare species and location of harvest take effect?

**The new declaration requirement takes effect, by statute, on December 15, 2008 (180 days from the date of enactment of the 2008 Farm Bill); however, enforcement of the declaration requirement will be phased-in and will begin no earlier than Spring 2009. Again, the other Lacey Act amendments are already effective, and actions to enforce provisions of the Act other than the declaration requirement may be taken at any time.**

7. What is the purpose of the declaration requirement?

**Congress did not set forth within the Act an official purpose of the declaration requirement. Declarations generally serve several purposes including but not limited to data acquisition and accountability. Prior to the recent amendments, the Lacey Act already required similar declarations for imports (as well as exports) of wildlife.**

8. Has a form been developed to use for the declaration? Will this be a paper document or an electronic document?

**A paper declaration form will be available by December 15, 2008; however, enforcement of the declaration requirement will be phased-in and will begin no earlier than Spring 2009, when an electronic system for collecting the information is available. Note however, that while beginning December 15th, the declaration would be available and its use voluntary; the truthfulness of any declaration submitted would be enforced immediately**

9. Will the declaration require information on the “chain of custody” for products or the raw materials used to manufacture the products being imported?

**No. The declaration will require information on the species of plant (the scientific name), the name of the country where the plant was taken (harvested) and the value and quantity of the plant.**

10. If I genuinely do not know the species or the country from which the plant was taken, should I guess?

**No. In order to import plant products that fall under the scope of the declaration requirement, you are required to declare this information.**

11. Will shipments be refused entry if this information is not known and not provided?

**The declaration requirement takes effect, by statute, on December 15, 2008 (180 days from the date of enactment of the 2008 Farm Bill) and a paper declaration form will be available at that time; however, enforcement of the declaration requirement will be phased-in and will begin no earlier than Spring 2009, when an electronic system for collecting the information is available. A policy for how to handle non-compliant shipments is under development.**

12. 16 U.S.C. Section 3372(f)(2)(A) says that if the species use varies and the actual species is unknown, then the declaration should “contain the name of the species that may have been used...” Can the product be seized and/or forfeited if I am wrong?

**Yes. A product covered by the declaration requirements in Section 3(f) of the Lacey Act, 16 U.S.C. § 3372(f), is subject to seizure and forfeiture pursuant to Section 5 of the Act, 16 U.S.C. § 3374, if the declaration is inaccurate. Section 5(a)(1) provides: “All fish or wildlife or plants imported, exported, transported, sold, received, acquired, or purchased to the provisions of section 3 of this Act (other than subsection 3(b)), or any regulation issued pursuant thereto, *shall be subject to forfeiture to the United States notwithstanding any culpability requirement for civil penalty assessment or criminal prosecution included in section 4 of this Act.*” (emphasis added). Several courts have held that the Lacey Act’s civil forfeiture provisions are imposed on a strict liability**

basis. *See United States v. 144,774 Pounds of Blue King Crab*, 410 F.3d 1131, 1133-34 (9<sup>th</sup> Cir. 2005); *United States v. One Afghan Urial Ovis Orientalis Blandfordi Fully Mounted Sheep*, 964 F.2d 474, 476 (5<sup>th</sup> Cir. 1992) (per curiam). However, any potential harshness resulting from such a forfeiture is subject to relief under remission or mitigation provisions that may be adopted by the seizing agency.

13. 16 U.S.C. Section 3372 (f)(2)(B) says that if the species used commonly comes from more than one country and the actual location of harvest is unknown, then the declaration should “contain the name of the country from which the plant may have been taken...” Can the product be seized and/or forfeited if I am wrong?

**Yes. See Response to Question 12.**

14. What agency/office will collect the information on the declaration forms?

**The declaration information will be collected by Customs and Border Protection, Department of Homeland Security.**

15. Will there be an “implementation plan?” If so, will this be a public document with an opportunity for public comment?

**USDA-APHIS will publish a notice in the Federal Register that will describe how the Lacey Act declaration requirement will be implemented, including projected enforcement dates, forms to be used, and other critical details relevant to implementation. We will also conduct a variety of outreach activities to clarify the implementation plan once it is ready for public release.**

16. Will there be an “enforcement plan?” Will specific countries/products be targeted?

**There will not be an “enforcement plan” with respect to the new provisions of the Lacey Act. However, the new Lacey Act provisions (other than the declaration requirement) enacted as part of the 2008 Farm Bill are now effective, and responsible federal agencies fully intend to enforce these new provisions. How enforcement resources will be allocated is yet to be determined; in general, enforcement priorities and plans are not discussed in detail. In most enforcement work, if information is developed indicating a high likelihood of violations of a particular type, enforcement resources will likely focus on those types of activities.**

17. How soon can we expect enforcement actions based on this new authority? Are there cases currently under investigation?

**The new Lacey Act provisions are applicable to activities occurring on or after May 22, 2008. Enforcement actions can be anticipated if and when there is legally sufficient evidence of a violation that was committed on or after that date. It is government policy to neither confirm nor deny the existence of any particular criminal ongoing investigations.**

18. Will additional resources be made available for enforcement? Will additional investigators and prosecutors be hired?

**Congress has not allocated any specific funds for the hiring of additional investigators or prosecutors to enforce the new provisions. Existing enforcement resources already are committed to enforcing the Lacey Act and will enforce the new provisions as well. Enforcement resources are regularly reassessed and reallocated to ensure their best use.**

19. What sources and/or types of information will be used to take enforcement actions? Will enforcement be based on information provided by the public?

**As with other statutes, federal investigators and prosecutors make use of reliable information from a variety of sources in investigation and enforcement of the Lacey Act, including but not limited to the public.**

20. What are the penalties for violating the amended Lacey Act?

**Violations of the Lacey Act provisions for timber and other plants, as well as fish and wildlife, may be prosecuted in three basic ways:**

- 1) Civilly – meaning monetary penalties**
- 2) Criminally – fines and penalties and potential incarceration**
- 3) Forfeiture – dispossession of the plant, fish, or wildlife in question**

**1) Civil Penalties.**

**The Lacey Act allows for the imposition of civil administrative monetary penalties against a party who in the exercise of due care should have known of the illegal nature of the plant or wildlife in question. [16 U.S.C. § 3373(a)]. Civil penalties of up to \$10,000 may be imposed, with the size of the penalty depending on the nature, circumstances, extent, and gravity of the prohibited act committed and the violator’s culpability, ability to pay, and such other matters as justice may require. [16 U.S.C. § 3373(a)(6)].**

**2) Criminal Penalties.**

**Criminal penalties may also be imposed, with the offense being either a felony or misdemeanor depending on the defendant’s knowledge, or mens rea, of the underlying law violations.**

**Misdemeanor. In order to impose a misdemeanor criminal penalty, the government must show that the defendant “in the exercise of due care” should have known of the illegal nature of the plant, fish, or wildlife in question, although not necessarily the specific law violated. [16 U.S.C. § 3373(d)(2)]. A defendant found guilty of a Lacey Act misdemeanor shall be fined not more than \$100,000 for**

**individuals or \$200,000 for organizations, or imprisoned not more than one year, or both, for each violation.**

**Felony. In order to impose a felony criminal penalty, the government must show that the defendant “knew” or was generally aware of the illegal nature of the plant, fish, or wildlife, although not necessarily the specific law violated. [16 U.S.C. § 3373(d)(1)]. Felony violations, in addition to a “knowing” scienter or mens rea requirement, require either proof that the defendant knowingly imported or exported plants or wildlife, or “knowingly” engaged in conduct during the offense that involved the sale or purchase of, the offer for sale or purchase of, or the intent to sell or purchase plants or wildlife with a market value of over \$350. A defendant found guilty of a Lacey Act felony shall be fined not more than \$250,000 for individuals or \$500,000 for organizations or twice the amount of the gross gain or loss, or imprisoned not more than 5 years, or both, for each violation.**

**3) Forfeiture.**

**The Lacey Act’s civil forfeiture provisions are enforced on a strict liability basis. If illegal timber or a product made from illegal timber (as well as illegal wildlife or fish) is brought into the U.S., that timber or timber product may be seized whether or not the person from whom it is seized knew of the illegal nature of the product. Nonetheless, the government must still show that a plant, plant product, or wildlife has been imported or received in violation of a State or foreign law or regulation.**

21. Will third party certification guarantee that products cannot be held based on suspicion of illegality?

**No. For example, although most certification systems for forest products include legality of harvest among their criteria, these are voluntary, private sector systems, the accuracy of which cannot be readily determined by the government. Nevertheless, such certification systems may provide information useful to manufacturers and importers in their efforts to exercise due diligence regarding sources and species of timber.**