

Lacey Act Amendments of 2008

Potomac Forum

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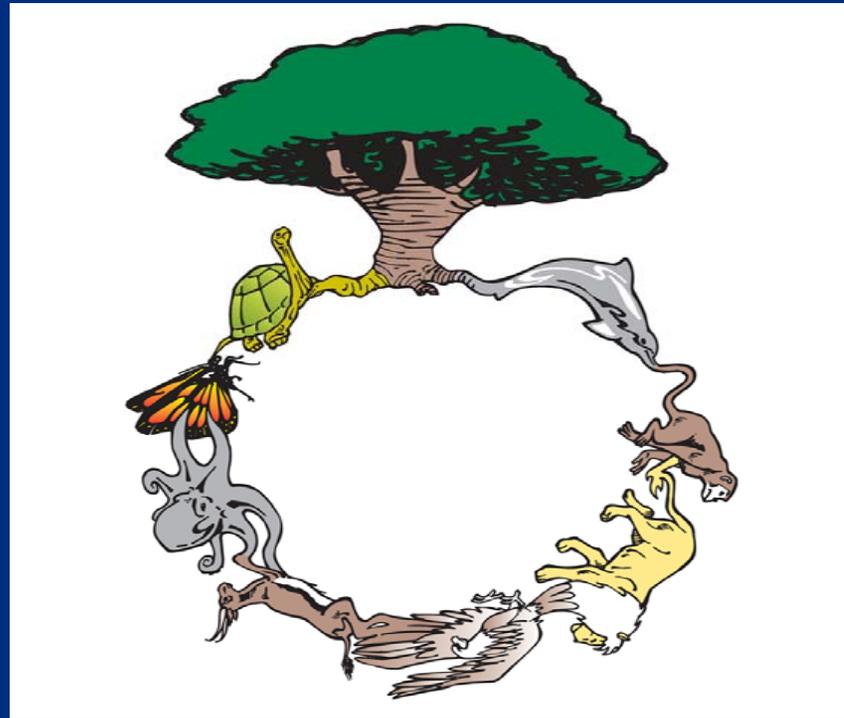
Environmental Crimes Section
Environment and Natural Resources Division,
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Background: The Lacey Act

- The nation's oldest wildlife protection statute
 - First enacted in 1900 to combat impact of:
 - hunting to supply commercial markets,
 - interstate shipment of unlawfully killed game,
 - introduction of harmful exotic species and
 - killing of birds for feather trade
 - Significantly amended in 1981 and 1988
- A tool to combat trafficking in “illegal” wildlife, fish or plants and products thereof
- Until recent amendments covered all wild animals, but plant defined to include only those both native to the United States and protected.

The Food, Conservation and Energy Act of 2008

- *Section 8204. Prevention of Illegal Logging Practices*
 - Expands Lacey protection to broader range of plants
 - New declaration requirement relating to plant products



- Passed May 22, 2008 (effective immediately)

The Lacey Act, as amended

- The Lacey Act, as amended, is an important new tool that will help the United States to minimize the U.S. market for illegal plants and thus support the efforts of other countries, and its own States, to combat illegal trade in plants, including particularly illegal logging.

The Lacey Act makes it unlawful to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any plant, with some limited exceptions, taken or traded in violation of the laws of the U.S., a U.S. State, or most relevant foreign laws.

Examples of relevant underlying foreign law violations:

- Theft of timber, including from parks and protected areas
- Harvesting without permission
- Failure to comply with harvesting regulations
- Failure to pay royalties, taxes or fees



The Lacey Act, as amended

- The Lacey Act also makes it unlawful to make or submit any false record, account or label for, or any false identification of, any plant.



- The Lacey Act now makes it unlawful to import any plant product without a declaration.



Definition of “plant”

- “Plant” means:
 - “Any wild member of the plant kingdom, including roots, seeds, parts or products thereof, and
 - Expressly including “trees from either natural or planted forest stands”



Exclusions

- Excluded from Lacey Act coverage
 - Common cultivars* (except trees)
 - Common food crops*
 - Scientific specimens for research and plants to remain planted or be replanted, that are NOT listed on CITES, under the ESA or under any State law that provides for the conservation of species



**U.S. Departments of the Interior and Agriculture are working together, with other agencies, to define these terms. A proposed regulation may be published by this summer.*

New Declaration Requirement Relating to Plant Products

- Declaration must be made at time of importation
- Declaration must contain:
 - **Scientific name** of plant (including genus & species)
 - Value of importation
 - **Quantity** of the plant
 - **Name of the country** in which the plant was harvested
 - For paper and paperboard products with recycled content, state the average % recycled content without regard for species or country of harvest
- Declaration requirement does not apply to packaging material used to support, protect or carry another item (unless the packaging material itself is the item being imported)

What if Information is Unknown?

- If species varies and is unknown:
 - Declare the name of each species that may have been used to produce the product
- If the species is commonly harvested in more than one country, and the country is unknown:
 - Declare the name of each country from which the plant may have been harvested



Phased-in Declaration Enforcement

- Enforcement of the declaration *requirement* will be phased in beginning April 1, 2009, in six month increments.
- A Federal Register notice published February 3, 2009, sets forth the initial schedule and solicits comments, due by April 6, 2009. Copies of the notice are available through http://www.aphis.usda.gov/plant_health/lacey_act/index.shtml

The Federal Register notice solicited comments by April 6, 2009, on

- the products covered under the next two phases after the one above
- whether any additional HTS chapters should be included in the first three groups
- enforcement of the declaration requirement as to informal entries, personal importations, mail, transportation and exportation entries, in-transit movements, carnet importation and foreign trade zone and warehouse entries
- the paper declaration form.

Initial Enforcement Phase of the Declaration Requirement

April 1, 2009 – September 30, 2009

HTS Chapters: 4401 (Fuel Wood)
4403 (Wood in the rough)
4404 (Hoopwood; poles, piles, stakes)
4406 (Railway or tramway sleepers)
4407 (Wood sawn or chipped lengthwise)
4408 (Sheets for veneering)
4409 (Wood continuously shaped)
4417 (tools, tool handles, broom handles)
4418 (Builders' joinery and carpentry of wood)

NOTE: Chapter descriptions are for ease of reference only.

- Failure to submit a declaration will not be prosecuted and customs clearance will not be denied for lack of a declaration until after the phase-in date for the product at issue, but declarations are legally required now.
- Enforcement of the *truthfulness of any* declaration submitted is enforceable now.

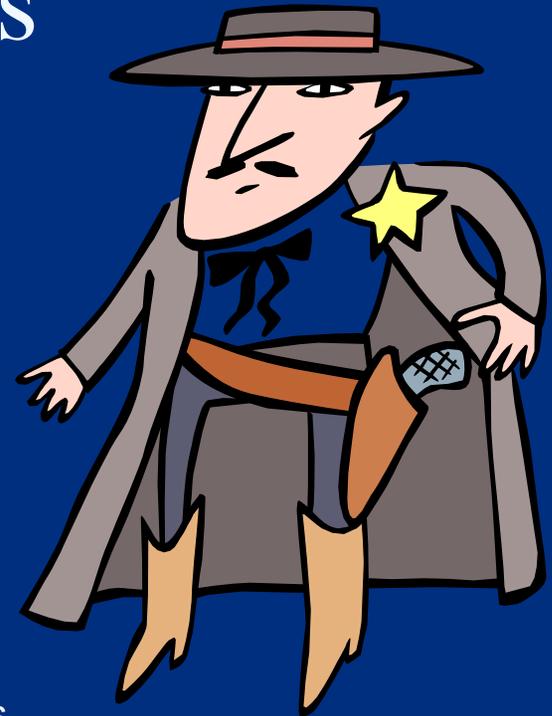
Lacey Act Violations and Penalties

- Forfeiture – strict liability
- Misdemeanors punishable by 1 year in prison and a fine of \$ 100,000 (\$200,000 for corporations)
 - In the exercise of due care should have known plant was illegally taken, possessed, transported or sold
 - Or knew, but did not involve import or export or commercial conduct with plant value of more than \$350
 - Applicable only to substantive violations, NOT to declaration requirements
- Felonies punishable by 5 years in prison and a \$250,000 fine (\$500,000 for corporations)
 - Knowing violation– knowledge of facts and illegality, not specific law violated
 - Involves import or export or commercial conduct with plant value of more than \$350



Enforcement Basics

- Fact based, not document based
- Government burden to prove to a jury of defendant's peers
- Information gained from
 - Foreign governments
 - NGOs
 - Private citizens
 - Anonymous tips
 - Data analysis - declarations
 - Industry members – individuals within a company, competitors
 - Agents on the border
- Always evaluate and substantiate initial information before launching full investigation
- Enforcement/investigating agencies include USFWS, ICE, CBP, APHIS, USDA OIG, FBI, USFS



Due Care

■ Ninth Circuit Pattern Jury Instructions

- “Due care means that degree of care which a reasonably prudent person would exercise under the same or similar circumstances.”

■ Legislative History

- “Due care simply requires that a person facing a particular set of circumstances undertakes certain steps which a reasonable man would take to do his best to insure that he is not violating the law.”
- Due care “is applied differently to different categories of persons with varying degrees of knowledge and responsibility. For example, zoo curators, as professionals, are expected to apply their knowledge to each purchase of wildlife. If they know that a reptile is Australian and that Australia does not allow export of that reptile without special permits, they would fail to exercise due care unless they check for those permits. On the other hand, the airline company which shipped the reptile might not have the expertise to know that Australia does not normally allow that particular reptile to be exported. However, if an airline is notified of the problem and still transships the reptile, then it would probably fail to pass the due care test.”

Due Care (con't)

- Useful tools to demonstrate due care:
 - Asking questions
 - Compliance plans
 - Industry standards
 - Records of efforts
 - Changes in above in response to practical experiences

COMMON SENSE

Recent case example:

- United States v. Virginia Star, C.D. Ca.
 - Purchasers not charged – reasonable claim of no reasonable knowledge (for example, new to industry, short term behavior, called and asked about discrepancy and was given a plausible, to a neophyte, explanation,)
 - Purchasers charged with misdemeanors – lack of due care in consideration of totality of the circumstances (for example, long time in industry, recognized bargain basement price, knew label was wrong, repeated such transactions, prior lack of due care violation involving illegal trade in same industry)
 - Purchasers charged with felonies – those for whom it was believed there was affirmative evidence beyond a reasonable doubt that the person acted with personal knowledge of illegality



Due Care (con't)

- EXAMPLES OF SOME COMMON-SENSE RED FLAGS



Goods significantly below going market rate



Cash only, or lower price for goods without paperwork



Paperwork facially invalid or otherwise suspect,
such as does not match product ordered or anticipated/possible
country of origin



Unusual sales methods or practices – deserted loading dock at midnight



Transactions fit description of illegal transactions discussed in
industry publication



News articles or internet information indicating a potential problem



Inability to get rationale answers to questions

OTHER LACEY ACT BASICS

- **The underlying foreign law violation does not have to be a criminal violation, nor one actively enforced in the foreign country.**
- **The underlying violation need not be committed by the person charged with violating the Lacey Act – a third party might have taken the product illegally.**
- **The underlying foreign law can be interpreted by U.S. Courts**

SOME POTENTIALLY RELEVANT U.S. STATUTES

- ALL PLANTS

- Customs Laws:

- Class E felonies: 18 U.S.C. 541 (entry of falsely classified goods) – 2 years, \$250,000/\$500,000; 542 (entry of goods by means of false statement) – 2 years, \$250,000/\$500,000; 545 (importation contrary to law) - 5 years, \$250,000/\$500,000

- False statements, 18 U.S.C. 1001 – Class D felony (5 years, \$250,000/\$500,000, or twice the gross gain or loss)

- Conspiracy, 18 U.S.C. 371 - Class D felony (5 years, \$250,000/\$500,000, or twice the gross gain or loss)

- Money Laundering, 18 U.S.C. 1956, 1957 – Class C felonies (20 years \$500,000; 10 years, \$250,000 respectively)

- Plant Protection Act, 7 U.S.C. 7734 - Class A misdemeanor (1 year, \$100,000 or twice the gross gain or loss)

- Lacey Act, 16 U.S.C. 3372, 3373

- Class D felony (5 years, \$250,000, or twice the gross gain or loss)
 - Class A misdemeanor (reasonably should have known) (1 year, \$100,000, or twice the gross gain or loss)

- CITES/ESA LISTED PLANTS

- Endangered Species Act, 16 U.S.C. 1538, 1540

- Class A misdemeanor (1 year, \$100,000/\$200,000, or twice the gross gain or loss)
 - Class B misdemeanor (6 months, \$25,000/\$25,000, or twice the gross gain or loss)

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- **These are only some of the major statutes likely to be implicated in a timber trade case; particular fact patterns may bring to play additional statutes such as those related to obstruction of justice.

All United States statutes can be found at <http://www.access.gpo.gov/uscode>

All United States regulations can be found at <http://www.gpoaccess.gov/cfr/index.html>

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Information on the Internet

www.aphis.usda.gov/plant_health/lacey_act

www.cbp.gov

To look up genus/species, go to:

<http://plants.usda.gov/classification.html>