# The Lacey Act Amendments of 2008: Curbing International Trafficking in Illegal Timber

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## I. Introduction

Illegal logging destroys forests, watersheds, and habitats and negatively impacts biodiversity, agriculture, fisheries, and global climate change. The scope of illegal logging worldwide is enormous. The World Bank estimated in 2006 that timber harvested illegally on public lands worldwide results in lost assets and revenue in excess of $10 billion dollars annually in developing countries. *See* STRENGTHENING FOREST LAW ENFORCEMENT AND GOVERNANCE, Report No. 36638-GLB (2006). That money represents funds that could otherwise be used by governments in developing countries to meet the basic needs of their people, better manage their forests and other natural resources, and reduce their international debt. In some locations, the money goes instead to fund armed conflict. In addition to the obvious ecological damages associated with illegal logging and the harm done to forest-dependent people, both the trade in lower-priced illegal timber and the products made from it hurt American wood products companies that operate legally.

Consequently, the United States government has launched a variety of efforts to combat illegal logging and associated trade and to promote trade in legally and sustainably harvested timber and wood products. The United States entered into separate Memoranda of Understanding (MOU) with the governments of Indonesia and China to combat illegal logging and associated trade. Attorneys from the Environment and Natural Resources Division (ENRD) of the Department of Justice (DOJ) participate in the interagency working groups that meet with their foreign counterparts under those MOUs. The United States similarly works with Peru, Liberia, Russia, and other countries on illegal logging issues. Surprisingly, the effort that has resulted in perhaps the most far reaching impact is a seemingly modest change in U.S. laws.

Beginning in 2003, an inter-agency group began meeting at the Council on Environmental Quality to put flesh on the bones of President George W. Bush's Initiative Against Illegal Logging. At times the government representatives were joined by representatives of the interested private industries and by representatives of environmental non-governmental organizations (NGOs). Each federal agency represented in the discussions was asked what it could contribute to the effort. The DOJ representatives repeatedly pointed out that the Department had little to contribute in the way of enforcement until changes were made in U.S. laws. Until such changes took place, a person could clear cut a protected

national park in the heart of a foreign country's rainforest, import the resulting timber into the United States while openly admitting the illegal source, and violate no U.S. law.

Thanks to the joint efforts of government officials, private industries, and environmental NGOs, the necessary changes were made to U.S. law, effective May 22, 2008. Some of the changes have proven to be complicated to implement and prosecutions have been slow in coming. Nevertheless, the new law that amends the century-old Lacey Act, 16 U.S.C. §§ 3371–3378, represents one of the most significant pieces of environmental legislation enacted since the 1970s and is changing the way the international timber and wood products industry conducts business.

## II. The Lacey Act as amended

### A. Provisions added by the Lacey Act Amendments of 2008

The Lacey Act has been the most powerful tool in the arsenal of the prosecutor of fish and wildlife crimes for over a century. However, when it came to crimes involving plants, the statute defined "plant" to exclude the majority of known species. The Lacey Act, until it was amended, applied only to plants that were indigenous to the United States *and* listed under the Endangered Species Act of 1973 (ESA), 16 U.S.C. §§ 1531–1544; on one of the Appendices to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); or on a state's protected species list. Almost all tropical timber, and the majority of other plants, were not covered by the Lacey Act prohibitions. For those that were covered, prohibitions were more limited than for fish and wildlife. For example, trafficking in plants that had been taken in violation of an underlying foreign—as opposed to state or federal—law was not prohibited as it was for fish and wildlife. All that has now changed.

The Lacey Act was amended to cover a much broader range of plants and plant products. These changes became effective on May 22, 2008 as part of the Food, Conservation, and Energy Act of 2008 (Section 8204, Prevention of Illegal Logging Practices). A redlined copy of the Act identifying the provisions added by the Amendments may be found on line at http://www.aphis.usda.gov/plant_health/lacey_act/index.shtml.

As amended, the Lacey Act has three primary new components relevant to combating international trafficking in plants, especially illegal timber and products made from illegal timber. First, the Amendments changed the definition of the term "plant" to expand the application of the Lacey Act. "Plant" is now defined broadly to mean "[a]ny wild member of the plant kingdom, including roots, seeds, parts, or products thereof, and including trees from either natural or planted forest stands." 16 U.S.C. § 3371(f) (2010). While this definition is both broad and clear, significant exceptions to the definition of "plant" remain and thus constitute important caveats of which prosecutors must be aware. *See id.* § 3371(f)(2). Three general categories of plants remain exempt from the definition of the term "plant" and thus from the provisions of the Act: (1) common cultivars, except trees, and common food crops (including roots, seeds, parts, or products thereof); (2) scientific specimens of plant genetic material (including roots, seeds, germplasm, parts, or products thereof) that are to be used only for laboratory or field research; and (3) plants that are to remain planted or to be planted or replanted (for example, live plants as in the nursery trade). *Id.* However, plants in the last two categories—scientific specimens and "planted" plants—are *not* exempt if they are listed in an appendix to CITES, as an endangered or threatened species under the ESA, or pursuant to a state law providing for the conservation of a species that is indigenous to the state and is threatened with extinction. *Id.* § 3371(f)(3).

The amended Lacey Act requires the Secretary of Agriculture and the Secretary of the Interior, after consultation with appropriate agencies, to jointly promulgate regulations to define the terms

"common food crop" and "common cultivar" that are used in the exemptions. 16 U.S.C. § 3376 (2010). Proposed regulations were published on August 4, 2010, but final regulations have not yet been issued. 75 Fed. Reg. 46859 (Aug. 4, 2010) (to be codified at 7 C.F.R. ch. 3). The proposed regulations are drafted to effectively exclude from this exemption plants listed in an appendix to CITES, under the ESA, or in a similar state list. The rationale behind this exclusion is that any plant considered threatened or endangered cannot be common.

The second major new component of the Lacey Act is that it now makes it unlawful to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any plant, with certain exceptions, taken in violation of any federal, state, tribal, or foreign law that protects plants. *Id.* § 3372(a)(2). Thus, the Act prohibits a person from bringing into the United States any plant or plant product taken in violation of a foreign law that protects plants or that regulates a variety of plant-related offenses. *Id.* § 3372(a). The foreign laws that serve as the underlying predicate must be plant-related laws. For example, a labor law violation by a timber harvester would not qualify as a predicate offense. Specifically, the Lacey Act enforcement provisions apply to any plant taken, possessed, transported, or sold in violation of any foreign law that protects plants or that regulates the following: (1) the theft of plants; (2) the taking of plants from a park, forest reserve, or other officially protected area; or (3) the taking of plants without required authorization. *Id.* § 3372(a)(2)(B). The Lacey Act also applies to plants that are taken, possessed, transported or sold: (1) without the payment of appropriate royalties, taxes, or stumpage fees; or (2) in violation of any limitation under any state or foreign law governing the export or transshipment of plants. *Id.* In addition, the Lacey Act includes enforcement provisions if a person makes or submits any false record of any plant or plant product that is imported into the United States. *Id.* § 3372(d).

The third major new component created by the Lacey Act Amendments is the addition of a new import declaration requirement for plants and plant products. *See id.* § 3372(f). The amendments make it unlawful, as of December 15, 2008, to import certain plants or plant products without an import declaration. The declaration must include, among other things, the scientific name of the plant being imported or the plant used to make a product being imported, the value of the importation, the quantity of the plant or plant product, and the name of the country where the plant was harvested in. Prosecutors should be aware that enforcement of this declaration requirement is being phased in pursuant to an inter-agency agreement. *See infra* Part III.

The Lacey Act Amendments require the Secretary of Agriculture to review, no later than two years after enactment, implementation of the declaration requirement as well as the effect of an exclusion from this requirement for packaging material provided for in § 3372(f)(3). *Id.* § 3372(f)(4). The review must provide public notice and an opportunity for comment on the review. *Id.* This review is currently being undertaken and public comment has been sought. 76 Fed. Reg. 10874 (Feb. 28, 2011). Section 3372(f)(5) provides that not later than 180 days after the Secretary completes the review, he shall submit a report to Congress containing specified information related to implementation of the declaration requirements. Pursuant to that requirement, the Department of Agriculture's Animals and Plant Health Inspection Service (APHIS) is preparing a draft of the report to Congress describing implementation of the amended Lacey Act's declaration requirement for the period December 15, 2008 to June 30, 2010. Any public comments received by APHIS will inform this statutorily-required report to Congress.

### B. Penalties for violations of the Lacey Act

The penalties for Lacey Act violations were largely unchanged by the 2008 amendments except that penalties for violations of the new declaration requirement were specified. Violations of the Lacey Act may be addressed in three basic ways: (1) through forfeiture of the goods in question; (2) through the imposition of civil administrative monetary penalties; and/or (3) through the imposition of criminal penalties. *See* 16 U.S.C. §§ 3373, 3374 (2010).

**Forfeiture.** The most common enforcement action under the Lacey Act remains forfeiture of the illegal fish, wildlife, or plant. While civil and criminal enforcement actions for penalties under the Lacey Act require the government to prove some level of knowledge or scienter regarding the underlying illegality of the plants or plant products, forfeiture proceedings have no such requirement. The Lacey Act's civil forfeiture provision provides for forfeiture on a strict liability basis. It states:

> All fish or wildlife or plants imported, exported, transported, sold, received, acquired, or purchased contrary to the provisions of section 3372 of this title (other than section 3372(b) of this title), or any regulation issued pursuant thereto, shall be subject to forfeiture to the United States *notwithstanding any culpability requirements* for civil penalty assessment or criminal prosecution included in section 3373 of this title.

*Id.* § 3374 (2010) (emphasis added).

Civil forfeiture on a strict liability basis has been a longstanding feature of the Lacey Act and dates from 1981. Many federal courts have confirmed that the Lacey Act's civil forfeiture provisions are imposed on a strict liability basis. *See, e.g.*, *United States v. 144,774 pounds of Blue King Crab*, 410 F.3d 1131, 1133-34 (9th Cir. 2005); *United States v. One Afghan Urial Ovis Orientalis Blandfordi Fully Mounted Sheep*, 964 F.2d 474, 476 (5th Cir. 1992) (per curiam); *Conservation Force v. Salazar*, 677 F. Supp. 2d 1203 (N.D. Cal. 2009); *United States v. 1866.75 Board Feet and 11 Doors and Casings*, 587 F. Supp. 2d 740 (E.D. Va. 2008); *United States v. 2,507 Live Canary Winged Parakeets*, 689 F. Supp. 1106, 1117 (S.D. Fla. 1988). Thus, to forfeit imported plants or plant products, the government must show by a preponderance of evidence only that the plant or plant product was imported without a required declaration or taken in violation of a foreign law that protects plants or that regulates a variety of plant-related offenses. The product is then subject to civil forfeiture regardless of whether the person that subsequently dealt with that item had the requisite state of mind to be convicted of a criminal or civil Lacey Act offense.

The amendments to the Lacey Act include a reference to the Civil Asset Forfeiture Reform Act (CAFRA), 16 U.S.C. § 3374(d), providing that "[c]ivil forfeitures under this section shall be governed by the provisions of chapter 46 of Title 18 [United States Code]." This cross-reference to CAFRA in the Lacey Act amendments does not purport to modify CAFRA or alter the interplay between CAFRA and forfeitures under the Lacey Act. Since it was enacted in 2000, CAFRA has set forth the procedures that apply in all civil forfeitures under federal law unless the particular forfeiture statute is specifically exempted in 18 U.S.C. § 983(i)(2).

CAFRA provides a uniform innocent owner defense to civil forfeiture actions. However, § 983(d)(4) of CAFRA states, "Notwithstanding any provision of this subsection, no person may assert an ownership interest under this subsection in contraband or other property that it is illegal to possess." Under the Lacey Act, it is unlawful for any person to "import . . . sell, receive, acquire, or purchase in interstate or foreign commerce . . . any plant—taken, possessed, transported, or sold in violation of . . . any foreign law, that protects plants or that regulates" plants in several enumerated respects. 16 U.S.C. § 3372(a)(2) (2010). If the government can establish that a person received or acquired a plant or plant

product in violation of § 3372(a)(2), the plant or plant product is "property that . . . is illegal to possess" and, under 18 U.S.C. § 983(d)(4), its owner may not assert CAFRA's innocent owner defense. *See 144,774 pounds of Blue King Crab*, 410 F.3d at 1135-36; *Conservation Force v. Salazar*, 677 F. Supp. 2d 1203 (N.D. Cal. 2009); *United States v. 1866.75 Board Feet and 11 Doors and Casings*, 587 F. Supp. 2d 740 (E.D. Va. 2008). Thus, under these long-standing provisions, the government may institute civil forfeiture proceedings under the Lacey Act against an importer of illegally taken plants or plant products without proving scienter, notwithstanding the innocent owner defense available under CAFRA.

The Lacey Act does provide for possible remission or mitigation of strict liability forfeiture. *See* 16 U.S.C. § 3374(b) (2010). If property is forfeited administratively, U.S. Fish and Wildlife Service regulations provide that any person that has an interest in property subject to forfeiture under the Lacey Act may file a petition for remission of forfeiture with the Solicitor of the Department of the Interior. 50 C.F.R. § 12.24. If the Solicitor finds the existence of mitigating circumstances to justify remission or mitigation of the forfeiture or alleged forfeiture, the Solicitor may remit or mitigate the forfeiture on such terms and conditions as may be reasonable and just or he may order discontinuance of any proceeding. *Id.* § 12.24(f). If the property in question is worth more than $100,000 or if a claim is filed in an administrative forfeiture proceeding, a judicial forfeiture proceeding must be initiated. In a judicial forfeiture proceeding a request for remission or mitigation of the forfeiture may be filed with the U.S. Attorney and the request will be decided by the Department of Justice in accordance with 28 C.F.R. §§ 9.4 and 9.5. These procedures for remission help alleviate any potential harshness resulting from Lacey Act forfeitures.

**Civil penalties.** The Lacey Act allows for the imposition of civil administrative monetary penalties of up to $10,000 for violations of the basic anti-trafficking provision, § 3372(a), against a party who, in the exercise of due care, should have known of the illegal nature of the plant or wildlife in question. Penalties of up to $10,000 may also be imposed against any person that knowingly violates the false labeling provision of the Act, § 3372(d), or the declaration requirement. 16 U.S.C. § 3373(a) (2010).

**Criminal penalties.** Criminal penalties may also be imposed for either a felony or misdemeanor under the Lacey Act and often depend on the defendant's knowledge or state of mind when he committed the violations. *Id.* § 3373(d).

Misdemeanor penalties. In order to impose a misdemeanor criminal penalty for a violation of the Lacey Act's anti-trafficking provisions related to international plant/timber cases, the government must prove the following beyond a reasonable doubt:

- the defendant knowingly imported or otherwise trafficked in or attempted to import or traffick in the plant or plant product or merchandise, using the new definition of plant;
- the plant had been taken, possessed, transported, or sold in violation of an underlying law (discussed above); and
- the defendant, in the exercise of due care, should have known that the plant was taken, possessed, transported or sold in some illegal manner. *Id.* § 3373(d)(2). It is important to note that the government is not required to prove that the defendant knew about the Lacey Act or the precise underlying law or regulation violated when the plant was illegally taken, possessed, transported, or sold. *See, e.g.*, *United States v. Santillan*, 243 F.3d 1125 (9th Cir. 2001).

An individual defendant found guilty of a Lacey Act misdemeanor is subject to the Class A misdemeanor maximum penalty of one year in prison and a fine of up to $100,000 or twice the gross gain

or loss. 18 U.S.C. § 3571(b)(5), (d) (2011). An organizational defendant convicted of a Lacey Act misdemeanor is subject to a fine of up to $200,000 or twice the gross gain or loss. *Id.* § 3571(c)(5), (d).

Felony trafficking/import penalties. The defendant's mental state regarding the underlying illegality of the wildlife, fish, or plant at issue is most often what distinguishes felony trafficking violations from misdemeanors. In cases involving interstate trafficking rather than international import conduct, the distinction may also be based on the value of the plants at issue or the commercial nature of the conduct. In order to impose a felony criminal penalty for a violation of the anti-trafficking provisions related to plant/timber cases, the government must prove the following beyond a reasonable doubt:

- the defendant knowingly imported or otherwise trafficked in or attempted to import or traffick in the plant or plant product/merchandise within the new definition of plant;
- the plant had been taken, possessed, transported, or sold in violation of an underlying law (discussed above); and
- the defendant knew the plant was taken, possessed, transported, or sold in some illegal manner. 16 U.S.C. § 3373(d)(2) (2010). As in the case of misdemeanors, the government is not required to prove that the defendant knew about the Lacey Act or the precise underlying law or regulation violated when the plant was illegally taken, possessed, transported, or sold. *See, Santillan, supra.*
- In cases based on interstate transport, the plant had a value of more than $350 and the violation involved commercial conduct, such as the sale or purchase of the plant. *Id.* § 3371(d)(1).

An individual defendant found guilty of a Lacey Act felony is subject to the Class D felony maximum penalty of five years in prison and a fine of up to $250,000 or twice the gross gain or loss. *Id.* § 3571(b)(3), (d). An organizational defendant convicted of a Lacey Act felony is subject to a fine of up to $500,000 or twice the gross gain or loss. *Id.* § 3571(c)(3) and (d).

False labeling/failure to declare penalties. False labeling violations, described in 16 U.S.C. §§ 3372(d) and 3373(d)(3), and declaration requirement violations, described in §§ 3372(f) and 3373(d)(3), may also be misdemeanors or felonies subject to the same penalties described above. A false labeling violation requires the government to prove beyond a reasonable doubt that the defendant knowingly made or submitted a false record, account, or label for or identification of the plant/product that has been or is intended to be: (1) imported, exported, transported, sold, purchased, or received from any foreign country; or (2) transported in interstate or foreign commerce. *Id.* § 3372(d). A declaration violation requires the government to prove beyond a reasonable doubt that the defendant knowingly imported a plant (including products thereof) without, upon importation, filing a declaration accurately stating the scientific name of any plant contained in the importation, the country of harvest, the quantity of any such plant, and the value of the importation. *Id.* § 3372(f). All false labeling and declaration violations must be knowing. However, any such knowing violation is a Class A misdemeanor unless the offense involves: (1) the import or export of the plant or; (2) the sale or purchase, offer of sale or purchase, or commission of an act with intent to sell or purchase plants with a market value of more than $350. In such cases the violation is a Class D felony.

## III. Implementation

A federal government inter-agency group began meeting in the summer of 2008 to cooperatively address issues relating to implementation of the Lacey Act amendments (hereinafter "implementation group"). ENRD is an active participant in this group. The group was initially chaired by APHIS. APHIS maintains a Web site, available at http://www.aphis.usda.gov/plant_health/lacey_act/index.shtml, that provides information on the Lacey Act, relevant Federal Register notices, and guidance to industry. The implementation group also includes representatives of the U.S. Fish and Wildlife Service (USFWS), Customs and Border Patrol (CBP), Immigration and Customs Enforcement (ICE), the Office of the U.S. Trade Representative, the International Trade Commission, the U.S. Forest Service, the Council on Environmental Quality, the State Department, and, most recently, the Office of Management and Budget. The group's primary tasks have been: (1) to advise the Secretaries of Agriculture and the Interior on development of the statutorily-required definitions of common food crop and common cultivar; (2) to implement the import declaration requirement under the amendments; (3) to conduct the statutorily-required review and assist the Secretary of Agriculture with preparation of the required report to Congress regarding the implementation of the plant declaration requirement; and (4) to work on initial enforcement efforts. Implementation of the Lacey Act amendments has garnered close scrutiny from Congress and on several occasions the implementation group has participated in briefings and meetings for Hill staff interested in the progress of various implementation issues.

### A. Common food crop and common cultivar definitions

One of the first tasks addressed by the implementation group was promulgating the required definitions of "common food crop" and "common cultivar." For decades these terms have been used to describe exceptions to the Lacey Act but until now have not been defined. Limited case law regarding the definitions exists. The most significant involved a ruling that American ginseng was not a "plant" as defined by the pre-amended Lacey Act because it was a "common food crop." *See United States v. McCullough*, 891 F. Supp. 422, 425-27 (N.D. Ohio 1995). The court reached this conclusion despite, and without discussing, the fact that ginseng is listed on Appendix II of CITES as being threatened by trade. ENRD's position is that *McCullough* was wrongly decided and subsequent ginseng cases have been successfully prosecuted without this issue being raised. *See United States v. Ledford*, 2010 WL 4449091, at *1-3 (Slip Copy Nov. 1, 2010). The statutory requirement under 16 U.S.C. § 3376(c) to define the terms "common cultivar" and "common food crop" present an opportunity to clarify this issue.

Proposed definitions were published in the Federal Register on August 4, 2010. 75 Fed. Reg. 46859 (Aug. 4, 2010) (to be codified at 7 C.F.R. ch. 3). Each definition provides that species listed as endangered or threatened under the Endangered Species Act, listed in the CITES Appendices (for example, ginseng), or protected under state law, are excluded because they are not "common" for purposes of the Lacey Act.

The public comment period closed on November 29, 2010. APHIS is reviewing and summarizing the comments received and the implementation group is working on revisions. No comments were received that questioned the exclusion of listed species.

### B. Implementation of the plant declaration requirement

The plant declaration requirement is a keystone of the 2008 Amendments. Holding importers responsible for knowing the type of wood or other plant product they are importing and where it was harvested means that the supply chain becomes more transparent, thus deterring trade in illegally-sourced plants and plant products. The requirement also gathers basic information about the nature and quantity

of plant materials coming into the United States, allowing the efficient allocation of enforcement resources. However, the plant declaration requirement applies to millions of plants and plant products imported into the United States each year. Industries that never concerned themselves with tracking the provenance of their source materials are having to rethink their practices and ask questions they never before considered. Agencies that are not used to dealing with large volumes of import declarations must create a mechanism for receiving those declarations from importers in a manner that does not hinder legal trade. They must also answer the many questions they receive regarding information to include in the declaration.

**Phased enforcement of the declaration requirement.** Although the statute established a six month period after enactment before the declaration requirements became effective, it became clear to the implementation group that six months was not enough time to accomplish all that needed to be done. CBP needed to develop a system for declarations to be electronically filed; APHIS had to develop a paper declaration form and a system for collecting and compiling the declarations; and industry members needed time to adjust their practices to gather the information they would now need to provide in the import declarations. Therefore, the implementation group, including ENRD, agreed to a phased approach for enforcing the declaration requirement once it became effective. Interested stakeholders from trade groups and environmental NGOs have also supported this phased declaration enforcement approach. In October 2008 several members of Congress sent a letter to the Administrator of APHIS, the Commissioner of CBP, the Director of the USFWS, and the Assistant Attorney General for ENRD to support a phased approach to implementation of the declaration requirements.

In October 2008 APHIS published a Federal Register notice, 73 Fed. Reg. 58925 (Oct. 8, 2008), proposing this phased approach to enforcing the declaration requirement. The notice identified initial categories to start implementing the requirement. These categories are identified by Harmonized Tariff Schedule (HTS) chapter number. During Phase I parties could voluntarily file declarations but no enforcement would be undertaken for failure to file the declaration. (DOJ and the other federal agencies have consistently made clear that although enforcement for failure to file a declaration form would be phased in, the underlying substantive requirements of the amendments are fully enforceable.) Actual enforcement was to begin with Phase II on April 1, 2009 with goods in certain subchapters of HTS chapter 44 (wood and articles of wood) and chapter 6 (live plants, bulbs, etc.). Phase III was scheduled to begin on July 1, 2009 with goods in HTS chapters 47 (wood pulp), 48 (paper), 92 (musical instruments), 94 (furniture), as well as goods included in Phase II.

As a result of public comments and further discussion, APHIS published a second federal register notice, 74 Fed Reg. 5911 (Feb. 3, 2009), that revised the initial schedule. The categories of goods designated to be included in Phase II beginning on April 1, 2009 were narrowed and the commencement of Phase III was pushed back to October 1, 2009. A new Phase IV, to begin on April 1, 2010, was also established that would include goods in certain subchapters of HTS chapters 44, 48, and 94, in addition to goods in Phases II and III. Issues with respect to implementation of the declaration requirement for certain wood products covered by CBP's expedited release program further delayed the initiation, but Phase II ultimately began on May 1, 2009.

Meanwhile, the implementation group reviewed comments submitted by industry and environmental groups in response to the two Federal Register notices, discussed rationales for phasing in enforcement of the declaration requirement, and started to analyze the experience with Phase II of the enforcement phase-in process. Based on this work the implementation group developed a further revised schedule that was published on September 2, 2009. 74 Fed. Reg. 45415 (Sept. 2, 2009). The schedule did not add any new phases but it revised the products covered in Phases III and IV. The revision took into

account not only the complexity of the plant products at issue but also the risk, to the extent it was known, that products in certain tariff codes may be of illegal origin.

The September 2, 2009 schedule phased in new categories of products at six-month intervals. As each interval phased in these new categories, the declaration requirement became enforceable as to goods in those categories. The last six-month interval commenced on April 1, 2010. Each phase is additive such that all categories listed on the schedule are now being, and will continue to be, enforced. No further products have been added to the phased schedule since that time. However, the September 2009 notice did set forth a list of additional tariff categories that the implementation group was considering for subsequent phases to begin on or after September 1, 2010. Additional phases are anticipated.

**Issues identified during the phase-in to date.** So far, the experiences with implementing the plant declaration requirement and the public comments about the implementation have identified several highly technical issues that the implementation group continues to confront.

Identification of genus and species of plants being imported. Several persons commented that the requirement for importers to provide the scientific name (genus and species) of imported plants and plant products in Lacey Act declarations has been challenging. This commentary was a response to Federal Register notices published by APHIS that solicited comments on implementation of this declaration requirement. A key issue reported by some has been the difficulty in locating sources of information that provide scientific names for the commodities being declared. APHIS has been able to provide a list of Web sites that it considers reliable sources to research the scientific names of some plants, but no single authoritative and comprehensive resource is available to research all plant species that may be in trade.

For many goods requiring declarations, identifying the genus and species has not been problematic. This may be attributable to the size and sophistication of many of the importers filing declarations and to the government's phased approach to enforcement that began with relatively less complex products for which there are a relatively small number of species utilized. However, some types of products present unique challenges for those trying to verify genus and species information either by tracking the sourcing or conducting tests. For example, reused or recycled materials, the use of which should be encouraged, cannot typically be tracked back to the forest source. Methods of testing such complex products to determine the species of plants contained, while rapidly improving, are currently limited in availability and capability and are relatively costly.

In an effort to accommodate some of the current challenges that importers and regulators face with regard to the genus and species requirements of the declaration, APHIS took several preliminary steps. For example, it has identified several special declaration codes that may be used to identify genus and species when certain specific circumstances are met. These special declaration codes are compiled in a guidance document. The document is titled "Lacey Act Plant and Plant Product Declaration Special Use Codes" and is posted on APHIS's Lacey Act Web site. This document addresses issues raised in public comments and divides the issues into three categories: (1) the possible difficulties involved in identifying composite, recycled, reused, or reclaimed materials to the genus and/or species level; (2) the difficulty in identifying the genus and species for certain articles manufactured prior to the passage of the Lacey Act Amendments; and (3) the possible use of a shorthand designation for common trade groupings of species.

Composite, recycled, reused, or reclaimed materials. APHIS has provided guidance in the Special Declaration Codes document to importers regarding how to identify the genus and species of plant material used in composite wood products and recycled, reused, and reclaimed materials. APHIS explained in the guidance that, on October 1, 2009, it began to enforce the declaration requirements for goods in certain HTS chapters that include some goods composed in whole or in part of composite

materials, such as medium density fiberboard (MDF), particleboard, or paperboard, as well as products containing recycled, reused, or reclaimed materials. Importers have claimed that identification of the genus and species of such wood materials may be difficult. Therefore, APHIS explained that if importers are unable through the exercise of due care to determine the genus, species, and/or country of harvest of such materials, the importer may temporarily use certain special codes to identify that information on the declaration. For example, the genus of MDF should be identified as "Special" and the species should be identified as "MDF." For recycled material, however, the genus should be identified as "Special" and the species should be identified as "Recycled." Similar special codes were identified for particle board, paper/paperboard, reused material, and reclaimed material. By using the special code, the importer represents that it is not possible through the exercise of due care to determine the genus, species, and/or country of harvest of such materials. If a product is not composed entirely of composite, recycled, reused, or reclaimed materials, the importer must indicate the genus, species, and country of harvest for all other product components. This practice may be revisited as technologies and industrial practices evolve.

Items manufactured prior to May 22, 2008. In its Special Declaration Codes guidance, APHIS also addressed the importation of items manufactured prior to the Lacey Act amendments. APHIS recognized that for products manufactured in whole or in part prior to the amendments, the manufacturer may not have tracked the sources or species of its raw materials. It may thus be impossible to obtain that information after the fact. Therefore, if an importer of items manufactured before May 22, 2008 is unable through the exercise of due care to determine the genus, species, and/or country of harvest of the plant materials contained in that item, the importer may identify the genus as "Special" and the species as "PreAmendment." If a product is not manufactured entirely before May 22, 2008, the importer must indicate the genus, species, and country of harvest for all product components manufactured after that date. Over time this special code should be used less frequently.

Common trade groupings. Moreover, while not yet a significant problem, importers and regulators may face practical challenges in reporting the scientific name of plant material where the genus of the plant being used in the product is obvious but a large number of species within that genus may potentially have been used and are difficult to distinguish or identify. The law currently requires that if the species used to produce the product being imported is unknown, the declaration shall contain the name of each species that may have been used to produce the plant product. 16 U.S.C. § 3372(f)(2)(A) (2010). As plant products in more HTS codes are phased in for enforcement, situations will arise where importers may be required to list a large number of possible species on declarations, particularly where multiple genera of plants are used in making the product. Such a circumstance presents unique difficulties because the charge that brokers impose on importers for filing declarations is based on the number of lines of text. Importers may find that filing electronic declarations for such products is cost prohibitive and that it is less costly to simply file paper declarations. Furthermore, at present, the electronic declaration does not provide filers with an unlimited number of lines to report Lacey declaration data. As a result, identifying a large number of potential species used in a product may result in an increase in the number and complexity of paper declarations being filed. Because the current quantity of paper declarations presents a significant burden for APHIS, an increase in filing of paper declarations could be problematic.

APHIS has begun to address this issue by making a special use code available for one type of Common Trade Grouping, Spruce Pine Fir (SPF), and is inviting proposals for others. The Special Declaration Special Use Codes guidance explains the circumstances under which the SPF designation may be used. SPF is a common grade of lumber manufactured from varying proportions of spruce, pine, or fir species in Canada. SPF imports from Canada are a combination of several distinct species but identifying the particular species in any individual shipment would be difficult. In its Special Declaration

Codes guidance, APHIS lists fourteen species of spruce, pine, and fir commonly found in SPF lumber. When the list of possible species in a particular shipment of lumber includes all species in the approved list, the importer may identify the genus as "Special" and the species as "SPF" on the plant declaration form. APHIS has identified the plant genera and species that must potentially be included in the lumber to enable the importer to use the shorthand designation. Thus, the use of the designation is consistent with the statutory requirement in 16 U.S.C. § 3372(f)(2)(A) and fulfills the requirements of the Lacey Act regarding identification of the genus and species of plant being imported.

Provided that the special codes for composite, recycled, reused, or reclaimed materials or for the code for goods manufactured pre-amendment are properly used in a Lacey Act declaration that is otherwise in compliance with the requirements of the Act, APHIS will not punish the failure to provide genus, species, or country of harvest information required by the Act's amendments. Specifically, APHIS will not refer for prosecution or take any other enforcement action as to such a declaration filed while this guidance is in effect.

Issues relating to identification of country of harvest. APHIS has noted numerous issues with respect to the data provided by importers in the Country of Harvest portion of the PPQ 505 import declaration. The Lacey Act requires the industry to identify the country from which the plant or plant product was taken (harvested). However, customs documents have long required that the importer declare the "country of origin," a term of art that may refer to the country of manufacture rather than the country where the plant material in the product was grown or harvested. Thus, for example, a product can be "country of origin" (product of) China but "country of harvest" Indonesia. Some confusion appears to have been experienced regarding the difference between the Lacey Act's requirement of country of harvest and the customs requirement of country of origin. Some plant declarations may mistakenly contain the country of origin rather than the country of harvest.

APHIS has provided guidance and clarification on this topic by reaching out to trade groups with a series of presentations and providing instructional information on the Lacey Act Web site explaining that the country of harvest is the country where the original source material was grown and subsequently cut down, picked, or otherwise removed (for example, harvested). Nevertheless, some inconsistencies appear to remain of which prosecutors should be cognizant.

APHIS also noted in its guidance on Plant and Plant Product Special Use Codes that in many instances where an importer uses one of the Special Use Codes to identify the genus and species of plant material being imported, the importer will know the country of harvest of the plant material and, if so, that information must be provided on the declaration. If circumstances associated with the product in question are such that the country of harvest is unknown, the statute requires that each country from which the plant material may have been taken must be listed. 16 U.S.C. § 3372(f)(2)(B). However, if this list would include more than 10 countries, APHIS has indicated in its guidance that a Special Use Code of "**" (two asterisks) may be used.

## IV. Enforcement

While the prohibitions of the Lacey Act amendments have been in effect since May 22, 2008, enforcement actions have been slow to follow. Various factors contribute to this disparity, including the enforcement phase-in schedule for the declaration requirement, the typical complexity of the international investigations required to substantiate a substantive plant trafficking violation under the Lacey Act, and the scarcity of enforcement resources for these cases.

### A. Forfeiture cases

To date, public enforcement actions have been undertaken only under the forfeiture provisions of the Lacey Act. These provisions involve the seizure and forfeiture of plants (including products) that were improperly declared upon import or were taken, possessed, transported, or sold in violation of some underlying foreign law.

The first such forfeiture action was handled administratively by the Department of the Interior. In *United States v. Three Pallets of Tropical Hardwood*, Inv. No. 2009403072 (June 22, 2010), the Department of the Interior denied a petition for remission filed by an importer seeking the return of a shipment of three pallets of tropical hardwood imported into Tampa, Florida from Peru. The pallets had been seized after information was received from a Peruvian business owner that the shipment was being made with stolen and forged documents. The shipment, valued at just over $7,000, was declared under tariff code 4421 that covers finished wood products such as clothes hangers, blinds, toothpicks, clothespins, and canoe paddles. At the time, the declaration requirement was not being enforced for this tariff code. The shipment actually contained raw sawn wood that should have been declared under tariff code 4407. The declaration requirement was being enforced for this tariff code at the time of the importation. Prior imports of this kind by this importer had used the proper tariff code of 4407.

The denial of the petition for remission noted the history of use of correct tariff codes and the importer's lack of diligence in handling the transaction, including his failure to request the required information on genus and species, his failure to contact the Peruvian government to determine if he was dealing with a legitimate company, and his failure to follow up on information that indicated that the shipment was questionable. This last failure includes the fact that the importer was asked to make payment directly to an individual rather than the exporting company because the company had gone out of business.

A second civil forfeiture action is being handled judicially and remains ongoing. The action involves wood materials seized from the premises of Gibson Guitars in Nashville, Tennessee. According to the affidavit of a USFWS Special Agent in support of that forfeiture, on September 28, 2009 Customs and Border Protection reported the import of a shipment of Madagascar ebony wood at the Port of Newark, New Jersey. Immigration and Customs Enforcement notified the USFWS Special Agent of the importation that consisted of 5,200 pieces of ebony, sawn sizes, and 2,133 pieces of sawn Madagascar black ebony, sawn sizes, with a total value of approximately $76,437.59. The shipment was exported by Nagel GMBH and Company KG (Nagel) of Hamburg, Germany to its U.S.-based affiliate, Hunter Trading Company (Hunter) of Westport, Connecticut for its customer, Gibson Guitars of Nashville. CBP notified Hunter that the required Lacey Act declaration had not been submitted upon importation and an employee of Hunter subsequently submitted a declaration for 1,664 cubic meters of ebony, sawn sizes, and 700 cubic meters of Madagascar black ebony, declaring the country of harvest for both as Madagascar.

Since at least April of 2000, the Republic of Madagascar has had various laws that restrict the harvest and export of ebony wood. In 2006 a Madagascar Interministerial Order was entered that required all existing, legally harvested stocks of ebony wood to be declared to the relevant office of the Madagascar Ministry of Environment, Water and Forests. Any ebony not declared under that order is subject to seizure by Malagasy authorities. According to the search warrant affidavit in the public record, investigators have been unable to discover any authorizations for exports of unfinished, semi-worked, or sawn ebony to Nagel from Madagascar since at least September 2006. The Special Agent also examined 2008 inventory records of existing stocks of Madagascar ebony maintained by the Madagascar Ministry

of Environment, Water and Forests and was unable to find any stock of Madagascar ebony wood recorded for Nagel's supplier.

The Defendant Property in this forfeiture proceeding is identified as ebony that originated in Madagascar. The USFWS Special Agent averred in an affidavit in the public record that he believed the Defendant Property was exported from Madagascar and imported into the United States in violation of 16 U.S.C. § 3372(a), prohibiting the import of a plant product taken, possessed, transported, or sold in violation of an underlying foreign law and imported without the filing of a Lacey Act declaration and was therefore subject to forfeiture under the Lacey Act. It was also alleged that the Defendant Property is subject to forfeiture for being involved in a violation of 18 U.S.C. § 545, that is, the fraudulent or knowing importation into the United States of any merchandise contrary to law or the receipt, concealment, purchase, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law. Gibson Guitars has filed a claim in this forfeiture proceeding and moved to dismiss the forfeiture complaint. Briefing in the case continues.

### B. False labeling cases

The simplest criminal cases to bring under the Lacey Act, whether involving plants or animals, are false records cases. False labeling cases require only that someone knowingly made or submitted a false record, account, or label for, or false identification of, animals or plants that have been or are intended to be placed in interstate or foreign commerce. 16 U.S.C. §§ 3372(d), 3373 (2010). The falsity need not be material or even submitted to a federal authority. *See United States v. Fountain*, 277 F.3d 714 (5th Cir. 2001). Declaration violations require simply that someone knowingly failed to file a required declaration or knowingly filed a declaration containing false or incomplete information.

Typically such prosecutions are based on actions within United States jurisdiction and are premised wholly on violations of federal laws. Based on experience with wildlife declarations over decades, it is expected that such false records cases would be made most frequently in conjunction with plant declarations falsified to hide questionable or outright illegal sources of timber, either by falsifying the country of harvest (for example, the export of a particular species may be prohibited from one country but not from another) or the genus and species (for example, where the species is protected).

The phase-in schedule for enforcement of the plant declaration requirement and the mechanics related to the implementation of the requirement to date have effectively minimized opportunities for such prosecutions. Some of the categories of plant products most reported to involve illegally-sourced plants are not yet phased in for enforcement of the declaration requirement. In addition, while the declarations being filed to date are largely filed electronically, a significant subset are filed by mailing a hard copy to APHIS. Because of the existence of this hard copy filing option, Customs agents at the ports cannot assume that the lack of an electronic declaration for a particular product being imported means that the shipment lacks such a declaration. Real-time information on the existence of a paper declaration is not consistently available due to lack of personnel to handle such inquiries. As with all types of imports and import documentation, limited personnel in the ports means that shipments are often not checked for a declaration or if a declaration is filed, its accuracy is not verified at the port. While solutions are being developed for some of these issues, these challenges present hurdles that criminal investigations and prosecutions based on false records or labeling must overcome.

### C. Trafficking cases

Trafficking cases are exponentially more complex than false records cases, particularly when they involve, in some measure, underlying violations of foreign laws related to the harvest, possession, transport, or sale of the plants or plant products. Thus, for example, a criminal investigation and prosecution of an international timber case, similar to previous fisheries or wildlife cases, may involve obtaining foreign records, foreign government witnesses to testify regarding their laws, coordination with foreign law enforcement authorities, mutual legal assistance treaty requests or letters rogatory, and witnesses located outside the United States. It is not even enough to prove that the plant material in question was illegally sourced in the foreign country. In order to prove a criminal trafficking case, it is also necessary to be able to prove that the defendant knew or, in the exercise of due care, should have known that the plant product in question contained plant material that had been taken, possessed, transported, or sold in some manner illegally.

Despite the challenges, investigations are ongoing and prosecutions are anticipated. Assembling these cases takes considerable time and is obviously a complex and challenging task but bringing such cases remains important to combat this type of illegal activity.

## V. Practice tips

Cases such as those outlined above are currently few and far between. Agent resources are scarce for several reasons. APHIS no longer has criminal investigators in its ranks, other than the Department of Agriculture Inspector General's Office; the USFWS has fewer than 200 criminal investigators nationwide whose first priority is fish and wildlife cases; and ICE has other priorities, including terrorism and immigration. Moreover, each such case is resource intensive. However, the USFWS is allocating resources to this area because fish and wildlife often depend on healthy forests for their existence. Recently, the U.S. Forest Service has also begun to allocate agent resources to these cases.

Any AUSA who is referred a case arising under the Lacey Act Amendments of 2008 may want to initially assess the case by asking the following questions:

- Is the wood or plant product covered by the Lacey Act and not exempt as a common food crop or cultivar, scientific specimen, or planted plant?
- What is the species of the wood or plant product in question?
- How can the wood or plant product be identified beyond a reasonable doubt as being that species?
- What is the status of the species under the ESA, CITES, and any state or foreign laws?
- Where, when, and how was the product sourced?
- How was the product exported and traded?
- If imported, how was the product declared?
- Is this type of product currently on the enforcement schedule for the Lacey Act declaration and, if so, was a declaration filed? If so, was the filing in electronic or paper form and what does the declaration(s) show?
- Given the species and the sourcing information, what underlying laws apply that would render the wood or plant product "taken, possessed, transported or sold" in violation of an underlying law as described by the Lacey Act?

- How can those underlying laws be substantiated? Will the issuing authority testify? Were those laws promulgated in a valid manner?
- What is the standard of care for trading in this wood or plant product?
- What admissible evidence is available that any target of the investigation knew or should have known in the exercise of due care that the wood or plant product was "taken, possessed, transported or sold" in some illegal manner?
- What admissible evidence is available that any target of the investigation knew a declaration was required or any false record was in fact false?
- What documents exist that relate to the trade in or import of the wood or plant product, including invoices, shipping records, purchase orders, contracts, photographs, concession permits, phytosanitary certificates, import filings, storage records, etc.? How much of that paper trail does the agent now have and does any of it reflect any false labeling?
- What is the fair market retail value of the wood?
- What is an initial sentencing guideline estimate? *See* U.S. SENTENCING GUIDELINES MANUAL § 2Q2.1 (2011).

Any agent working on such a case should be prepared to answer these questions as well.

Significant resources are available through the Environmental Crimes Section to assist AUSAs facing such first impression cases. These resources range from model pleadings and basic advice and guidance to contacts for particular issues, such as the latest information on scientific capacities for species identification, proof of particular underlying foreign laws, and obtaining trade and customs data. Initial inquiries may be directed to Elinor Colbourn, Assistant Chief, ECS at 202-305-0205.

## VI. Conclusion

Trade in illegally logged timber and wood products made from illegal timber robs national governments of needed revenues, impoverishes and destabilizes communities dependent on local forests, undercuts the price of legally harvested forest products, finances regional conflict, undermines the rule of law, acts as a disincentive to sustainable forest management, and results in widespread deforestation, thereby contributing to global climate change. Illegal logging also has profound negative consequences for fish, wildlife, and people that are dependent on forest resources.

The passage of the Lacey Act Amendments catapulted the United States into a global leadership role in the ongoing multilateral effort to combat illegal logging and associated trade. Since the enactment of the Amendments, other nations are now considering laws that are similar to the Lacey Act amendments to help stem this damaging international trade. Consequently, the need for enforcement actions under the Lacey Act in response to such widespread illegal logging and harmful deforestation is enormous. To those profiting from illegal logging, successful prosecutions under the Lacey Act will send a message that the United States will no longer tolerate a "business as usual" mentality that looks the other way as illegally harvested timber and wood products made from such timber flow through the supply chain and enter the United States. By prosecuting Lacey Act cases, federal prosecutors will play an important role in the efforts to combat illegal logging and deforestation and to address the myriad environmental and social harms that result from such environmental crimes.❖

## ABOUT THE AUTHORS

❑**Elinor Colbourn** is currently the Assistant Chief primarily responsible for supervising federal plant and animal criminal prosecutions in the Environmental Crimes Section. She has been prosecuting federal plant and animal crimes for the Department of Justice for fifteen years and has represented ENRD on the President's Initiative Against Illegal Logging. Ms. Colbourn is a member of the implementation working group for the Lacey Act Amendments and is the author or co-author of several articles, including *Shocked, Crushed and Poisoned: Criminal Enforcement In Non-Hunting Cases Under the Migratory Bird Treaties* (coauthor), 77 DENV. L. REV. 359 (2000) and *Natural Resource Restoration: The Interface Between the Endangered Species Act and CERCLA's Natural Resource Damage Provisions*, (coauthor) 24 ENVIRONMENTAL LAW 717 (1994).

❑**Thomas W. Swegle** is Senior Counsel in ENRD's Law and Policy Section. Mr. Swegle coordinates ENRD's international training and outreach program and has conducted training for judges in Mexico and Central America on adjudicating environmental enforcement cases. He has also represented the Department and spoken in U.S. enforcement efforts to combat illegal logging at numerous international and domestic conferences and meetings. Mr. Swegle also served as a Trial Attorney and Senior Attorney in ENRD's Environmental Enforcement Section and as an Attorney Advisor in EPA's Office of General Counsel (OGC), where he worked on rulemaking and enforcement under the Clean Air Act.✠