

October 10, 2008

Cindy Smith, Administrator  
Animal and Plant Health Inspection Service  
U.S. Department of Agriculture  
1400 Independence Avenue, SW  
Washington D.C. 20250

The Honorable W. Ralph Basham  
Commissioner  
U.S. Customs and Border Protection  
U.S. Department of Homeland Security  
1300 Pennsylvania Avenue, NW  
Washington, D.C. 20229

Ronald J. Tenpas, Assistant Attorney General  
Environment and Natural Resources Division  
U.S. Department of Justice  
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Washington D.C. 20530

H. Dale Hall, Director  
U.S. Fish and Wildlife Service  
U.S. Department of the Interior  
1849 C Street, NW  
Washington, D.C. 20240

Dear Ms. Smith, Mr. Basham, Mr. Tenpas and Mr. Hall:

We believe that amendments to the Lacey Act (16 U.S.C. 3371) in section 8204 of the Food, Conservation and Energy Act of 2008 (FCEA) can play a critical role in preventing the environmental degradation and social disruption caused by illegal logging and the illegal taking of other wild plants. Illegal logging contributes to loss of biodiversity, watershed damage and increased sedimentation, and climate change. In the communities where illegal logging takes place, the forest is often the only local economic resource. Illegal logging decimates, often irrevocably, that resource. In the same way, the illegal taking of other plant species has serious environmental and economic consequences.

Section 8204 of FCEA amends the Lacey Act with the aim of preventing the trade of illegally harvested plants and plant products without disrupting legitimate commerce. Since passage of the FCEA, we have heard several concerns and questions regarding the implementation of section 8204. This letter is intended to address some of those concerns and questions by reviewing the authorities that section 8204 delegates to the implementing agencies and by providing further guidance on Congressional intent with respect to the new provisions of the Lacey Act

Section 8204 of the FCEA clearly provides the implementing agencies with adequate discretion to implement the new requirements in a commonsense practical manner. Specifically, the amended section 7 of the Lacey Act states that “[t]he Secretary [of Agriculture], after consultation with the Secretary of the Treasury, is authorized to issue such regulations...as may be necessary to carry out the provisions of section[] 3(f)...” Additionally, section 3(f)(6) of the Lacey Act, as amended, states:

Not later than 180 days after the date on which the Secretary completes the review under paragraph (4), the Secretary may promulgate regulations

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— (A) to limit the applicability of any requirement imposed by paragraph (2) to specific plant products; (B) to make any other necessary modification to any requirement imposed by paragraph (2), as determined by the Secretary based on the review; and (C) to limit the scope of the exclusion provided by paragraph (3), if the limitations in scope are warranted as a result of the review.

Congress also explicitly delegated the definition of “common cultivar” and “common food crop,” to the relevant agencies. Section 7(c) of the Lacey Act, as amended by section 8204 of the FCEA, states “[t]he Secretary of Agriculture and the Secretary of the Interior, after consultation with the appropriate agencies, shall jointly promulgate regulations to define the terms used in section 2(f)(2)(A) for the purposes of enforcement under this Act.” The Federal Register notice published on October 8, 2008 failed to provide definitions for these terms. We urge you to initiate the notice and comment process pertaining to these definitions as soon as possible.

The modifications to the Lacey Act provided by section 8204 require an importer of plant and plant products to file an import declaration that contains the scientific name of the plant imported, the country of origin and a description of value and quantity. A critical reason for including the declaration requirement in the law is to provide relevant government agencies, including law enforcement agencies, and, through appropriate mechanisms, environmental and other interest groups, with useable data for the purposes of identifying products of potentially illegally harvested plants. We believe an electronic information collection system is essential to achieving this goal. We further recognize that paperless entry processing is critical to the smooth operation of supply chains, ensuring the timely and cost-efficient delivery of merchandise.

U.S. Customs and Border Protection has identified a legacy U.S. Fish & Wildlife system that can be retooled to permit the electronic filing of Lacey amendment declarations, but has indicated that this system will not be ready for use until April 1, 2009. We concur with the *Federal Register* notice that enforcement of the declaration requirement should be delayed until electronic filing is available, but no sooner than April 1, 2009, and we strongly believe that the implementing agencies have the authority to do so. We urge you to allow, on a voluntary basis, the filing of paper declarations between December 15, 2008, and the date that electronic filing is available.<sup>1</sup> Voluntary filing will allow importers to acclimate to the new requirements while also using this period to educate importers, retailers and others who will be affected by the requirements of section 8204 of the FCEA.

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<sup>1</sup> If you determine that the electronic filing system will not be available on April 1, 2009, we expect you to notify us of this at the earliest possible time.

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Subsequent to passage of the FCEA, the Administration indicated the need for a phased-in approach to the plant declaration requirement in section 8204 of the FCEA. We support a phased-in approach. The Administration used a phased-in approach to implement successfully the International Plant Protection Convention requirements for solid wood packing material. For purposes of the declaration requirement, we believe a similar phased-in approach would be appropriate. Once the system for electronically filing import declarations is ready for use, but no sooner than April 1, 2009, the declaration requirement should be phased in. This would greatly reduce the burden on implementing agencies and maximize the accuracy and value of the declarations submitted by importers. Phased-in enforcement would also provide the importer community with time to set up the business processes necessary to obtain the required declaration information.

While we recognize the *Federal Register* notice published on October 8, 2008 outlines a phased-in implementation of the declaration requirement, we believe the agencies should consider further limiting the products covered by the phase-in. The phase-in schedule should be developed taking into consideration risk and an importer's ability to accurately identify a plant or plant product and the country of origin of the plant or plant product, as required by the declaration. To provide clear and predictable guidance, the Administration should phase-in the declaration requirement using Harmonized Tariff Schedule (HTS) classifications and each phase should be six months in length. Examples of the types of products that should be included in the first phase include logs and timber, sawn wood, lumber, and solid wood flooring. Examples of products that should be included in the second phase include bent wood furniture, cribs, wooden picture frames, plywood, engineered flooring and wood pulp. Examples of the types of products that should be included in subsequent phases include certain paper products, wooden blinds, billiard cues and musical instruments.

The *Federal Register* notice describes the first two phases of this process. The notice then indicates that a phase-in schedule for additional products will be announced in the future. However, based on the above criteria, some products should be exempted from the import declaration requirement during the first two years that the law is in force. Examples of products in this category should include beverages (HTS chapters 21 and 22); cosmetics and personal care products (HTS chapters 33 and 34); footwear, textiles and apparel (HTS chapters 50 through 64); and rubber or cork products. As part of the review that the legislation contemplates (*See* Sec. 3(f)(4) of the Lacey Act, as amended by section 8204 of the FCEA), we would expect the Administration to use its rulemaking authority to expand or limit the applicability of the declaration requirement on plants and plant products, as necessary.

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We urge the appropriate implementing agencies, as needed, to state their intent to tie enforcement of the declaration requirement to the declaration phase-in schedule. Importers need the assurance that they will not be subject to civil enforcement or prosecution for complying with the phased-in electronic declaration process prior to the date that U.S. Customs and Border Protection implements the declaration requirement for a particular product. Written notification from the relevant enforcement agencies is essential to provide such assurance.

Section 3(f)(1) of the Lacey Act, as amended by section 8204 of the FCEA, is intended to require a declaration only for the item that provides the basis for the HTS classification and is presented for import. Section 3(f)(3) of the Lacey Act, as amended, is intended to exclude from the declaration requirement any packaging materials that support (either physically or by providing information), protect or carry the imported item and that are properly classified with the imported item. Only where the packaging material itself is the item being imported is it potentially subject to the declaration requirement. HTS General Rule of Interpretation 5(b) makes a similar interpretation of packaging, although the Lacey Act provision also excludes from the declaration requirement packaging that is "reusable." The agencies therefore should interpret the term "packaging materials" to include, *inter alia*, tags, labels, manuals, warranty cards, wrap, boxes, cardboard or paper inserts, bottle corks, and pallets.

The declaration requirement in section 3(f)(1) of the Lacey Act, as amended by section 8204 of the FCEA, is intended for formal, consumption entries. It is not intended to cover other entries such as informal entries, personal importations, mail (unless subject to formal entry), transportation and exportation (T&E) entries, in transit (IT) movements, carnet importations, and foreign trade zone (FTZ) and warehouse entries, except in the case of FTZs and warehouse entries when required by U.S. Customs and Border Protection for specific products when the agency is notified by appropriate enforcement agencies that compelling evidence exists that links those products to Lacey Act violations within FTZs or bonded warehouses.

We strongly urge the Administration to, within one year, budget for, establish, and maintain on a U.S. government website a comprehensive and continuously updated database of genus and species and common/trade name information for plants; a continuously updated compilation of foreign laws related to taking, possessing, transporting or selling plants; and a reference of available tools for tracking wood and assessing and addressing risk of illegal sourcing within a wood supply chain. The purpose of this website is to provide information that those involved in wood product trade may find helpful in implementing section 8204. Please note, however, that this website would be for guidance only, and would not be intended to replace the exercise of due care necessarily undertaken by those involved in the wood product trade to comply

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with the Lacey Act, as amended. Obviously, the website must caution the user that it may not be comprehensive, and care must be taken that the information on the website does not become obsolete.

Additionally, adequate implementation of the new import declaration requirements and prohibitions will require new funds for the implementing agencies, which will be necessary, for instance, to design a streamlined electronic declaration database system and to hire declaration analysts, inspectors and investigators. We request that the agencies budget accordingly for FY 2010 and subsequent years as required.

When properly implemented, section 8204 of the FCEA can significantly curb trade in illegally harvested plants and plant products without disrupting legitimate commerce. We hope that this letter is helpful and we look forward to working with you to ensure that the legislation is implemented in a way that reflects Congress' intent.

Sincerely,

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Earl Blumenauer  
United States House of Representatives

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Ron Wyden  
United States Senate

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Nick Rahall  
Chairman, House Committee on  
Natural Resources

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Tom Harkin  
Chairman, Senate Committee on  
Agriculture

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Charles B. Rangel  
Chairman, House Committee on  
Ways and Means

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Max Baucus  
Chairman, Senate Committee on  
Finance