

# Enforcing the amended Lacey Act — A Primer

## Players and Process

Fish and Wildlife Service (FWS), with its standing expertise investigating wildlife import and smuggling cases, and the Animal Plant Health Inspection Service (APHIS), with its agricultural expertise and responsibility for plant imports, play important roles in investigating illegal timber import cases, with support from Immigration and Customs Enforcement (ICE), and Customs and Border Protection (CBP).

If federal inspectors uncover or receive evidence of what appears to be methodical or ongoing criminal activity, this information can be referred for further investigation. If there is sufficient evidence to bring a criminal or civil case, the shipment can be seized. At this point, the case will be referred for prosecution to the Department of Justice, Environment and Natural Resources Division (ENRD) and/or the local U.S. Attorney's office (ENRD is typically involved in the larger criminal prosecutions and handles the high value forfeiture cases).

## Lacey Liability Basics

There are two elements to a Lacey Act case involving plants or plant products: 1) taking, possessing, transporting, or selling the plants or plant products in violation of a subset of State or foreign law that addresses illegal logging – the “trigger” – and 2) the act of importing, exporting, transporting, selling, receiving, acquiring, or purchasing that illegally obtained timber or related timber products. The level of knowledge / intent impacts an individual's potential liability. Intentionally submitting a false record for plants will

also trigger a civil or criminal violation of the Lacey Act, depending on the circumstances.

*Civil Penalties.* Fines up to \$10,000 can be imposed if there is strong evidence that the party knew, or in the exercise of due care should have known, that the timber was taken in violation of the law. “Due care” is a flexible concept that takes into account a company's experience as an importer and its capacity to monitor its supply chain. Reasonable measures to satisfy a “due care” standard could include internal tracking systems, sourcing policies, contract warranties, or third-party verification.

*Criminal Liability.* A person can be found guilty of a misdemeanor if it is proven beyond a reasonable doubt that the party, in the exercise of due care, should have known that the timber was taken etc. in violation of the law. A person can be found guilty of a felony if it is proven beyond a reasonable doubt that the party knew he was taking etc. the timber in violation of the law. Penalties are subject to the Criminal Fines Improvements Act of 1987 [P.L. 100-185, 18 USC 3623, 101 Stat. 1279].

*Forfeiture.* To ensure that illegal timber does not enter the stream of commerce, a shipment of timber can be forfeited if both elements of a Lacey Act case are satisfied by a preponderance of evidence, even if the individual has no knowledge/intent that the timber was taken etc. in violation of the law. Because of their limited resources and the time it takes to develop a case, FWS/CBP rarely pursue forfeiture cases without proof of criminal liability.

## Hypothetical Cases

Legal importation. Flooring, Inc. employs 45 people and imports and retails wood flooring. Its sales are primarily American oak and New Zealand pine. As the companies in these supply chains are reputable and the wood is not from high-risk regions, Flooring, Inc. (and in turn the U.S. government) has high confidence in the legality of these products. Flooring, Inc. has a line of “exotic species” that includes merbau harvested and manufactured in Indonesia. The Flooring, Inc. procurement rep. knows that a high percentage of harvest in Indonesia is done illegally and that merbau is a species of particular concern. Being a small company, Flooring, Inc. cannot regularly travel to Indonesia, so in order to be confident that its merbau has been legally sourced, it has established a long-standing relationship with a trusted Indonesian manufacturer and follows its internal guidelines to avoid purchasing illegal timber. Upon import, Flooring, Inc. accurately declares each shipment as X cubic meters of *Intsia spp.* (merbau) from Indonesia worth \$X.

Illegal importation. Flooring, Inc. has a relationship with a Chinese manufacturer and discovers that it is receiving merbau logs from Indonesia in violation of Indonesia's log export ban. Flooring, Inc. continues to order merbau flooring from this manufacturer because it is priced below the competition. At import, Flooring, Inc. declares all the needed information, but Customs has previously received specific information from a FWS Special Agent that this Chinese manufacturer regularly sources illegal merbau and has red-flagged such shipments in his database. The Special Agent opens a case and tracks Flooring, Inc.'s continued importation of merbau flooring produced from illegal wood over a six-month period. Once the Special Agent determines that Flooring, Inc. is aware of the illegalities in its merbau supply chain, FWS seizes a Flooring, Inc. shipment as evidence, and a case is brought under the Lacey Act.