

BEFORE THE
U.S. DEPARTMENT OF AGRICULTURE
ANIMAL AND PLANT HEALTH INSPECTION SERVICE

DOCKET NO. APHIS-2008-0119
IMPLEMENTATION OF REVISED LACEY ACT PROVISIONS

COMMENTS OF NASSTRAC, INC. AND
THE HEALTH AND PERSONAL CARE LOGISTICS CONFERENCE, INC.

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Dated: December 8, 2008

These comments on Lacey Act implementation rules are submitted by NASS-TRAC, Inc. and The Health & Personal Care Logistics Conference, Inc. (“H&PCLC”), in response to the Notice and Request for Comments published October 8, 2008 by the Animal and Plant Health Inspection Service (“APHIS”) of USDA.

NASSTRAC and H&PCLC are incorporated membership associations that have, for more than 50 years, represented the interests of their members before Congress, governmental departments and agencies, and federal and state courts with respect to freight transportation and logistics.

NASSTRAC members produce and distribute freight of many different kinds and use the services of carriers of all modes – highway, ocean, air and rail – as well as intermediaries and other service providers. H&PCLC members also work with all of these types of service providers, but membership in H&PCLC is limited to manufacturers of pharmaceuticals, medicines and health and personal care products. Most of the major pharmaceutical companies are members of H&PCLC in their capacity as shippers of freight, i.e., as customers of ocean and other carriers.

In today’s globalized economy, many members of NASSTRAC and H&PCLC (collectively the “Shipper Conferences”) are large-scale importers of goods. As such, they have a direct interest in this proceeding.

Virtually without exception, the new requirements proposed in the APHIS notice appear well-intentioned and may have some benefits, but it does not follow that they should be adopted as proposed. The cumulative effect of a long series of initiatives mandated by Congress and implemented or expanded by executive branch agencies, of which

the Lacey Act amendments are just one example, is to impose significant costs and burdens on the businesses that make up the U.S. economy.

The adverse impacts are not limited to new payments and expenses importers incur. Delays, whether at border crossings or elsewhere inside or outside the U.S., also disrupt supply chains that have been designed to deliver goods “just-in-time.” For many years, businesses have devoted extensive and successful efforts to reducing inventory, minimizing unnecessary costs for inventory acquisition, transportation and storage. Warehouses have been downsized or eliminated and the resulting efficiencies have benefited companies, their customers, and the environment.

These gains are reversed when imports are delayed or their processing through Customs is no longer predictable. The costs and difficulties of adding inventory as “safety stock” may far outweigh the expense of the data gathering and reporting that are the immediate and obvious results of compliance with Lacey Act amendments.

The proposal by APHIS to implement the recent Lacey Act amendments on a phased-in basis is welcome, as far as it goes. However, the Shipper Conferences join other groups like the National Retail Federation in urging APHIS to extend the phase-in periods from three months to six months. Government agencies and importers need time to adapt to the new requirements, and good faith compliance will also clearly necessitate extensive coordination with foreign vendors.

In addition, the list of commodities covered in these phases should be modified, in order to delay implementation where the risk of violations is lower. Under this approach, the first six-month phase would cover logs, timber, lumber and solid wood flooring. The second six-month phase would include bent wood furniture, plywood and engineered

flooring, and wood pulp. Paper products would be shifted from the second three-month phase to the third six-month phase. Products containing only trace amounts of plant material, including footwear and cosmetics and personal care products, should be exempted.

More needs to be done. The amendments, read broadly, are too broad, and will severely impair international trade between the U.S. and other countries, or else reduce such trade relations, as U.S. companies turn to U.S. sources to avoid border delays, liability exposure and compliance burdens. In today's economic environment, neither of these outcomes is desirable.

Of course, federal agencies have their own duty to comply with the federal laws. However, APHIS has some discretion, under the Lacey Act amendments and under general case law on interpretation and implementation of statutes by agencies, to read and apply the Lacey Act amendments in a productive rather than destructive way, doing more good than harm.

As APHIS observes in its Notice, there are exemptions for "common cultivars" and "common food crops," and APHIS and the Department of the Interior are working on a joint notice of proposed rulemaking concerning how these terms are to be defined. The Shipper Conferences urge that such a proceeding be initiated sooner rather than later, and that these exceptions be defined broadly. At a minimum, these exemptions should cover all commodities reasonably includable which (1) do not involve cutting down trees,¹ and (2) only involve harvesting of trees planted for the specific production purpose, e.g., tree farm trees.

¹ As the Notice observes, there is another exemption for plants that are to remain planted or are to be replanted.

In addition, the exemption for scientific specimens of plant genetic material to be used for laboratory or field research should be interpreted broadly. Such an approach is particularly important for The Health & Personal Care Logistics Conference, whose members manufacture drugs, medicines and personal care products.

Moreover, overlapping regulation should be avoided. Even if there are ways of harmonizing multiple regulatory requirements, overlapping regulation adds to delays, costs and complexity. In particular, there should be an exemption (possibly under the “common cultivar” category) for imports subject to FDA regulation under the Bioterrorism Act. Other good candidates for exemption are products regulated under the Food, Drug & Cosmetic Act, and products regulated by the EPA under the Toxic Substances Control Act or the Federal Insecticide, Fungicide & Rodenticide Act.

Consideration should also be given to recognition of industry and third party certification regimes that include responsible sourcing and compliance with laws and regulations. For example, the Forest Stewardship Council and the Sustainable Forestry Initiative involve rigorous certification requirements.

Packaging is not subject to the declaration requirement (except where the shipment itself consists of packaging, e.g., a container load of corrugated cardboard boxes). However, there is more to packaging than just outer boxes. Packaging can and should be defined to include paper display backing, price tags and hang tags, owners manuals and instruction sheets, etc. Alternatively, the declaration requirement should apply only to the extent that the product corresponding to the HTS chapter consists of or contains plant or tree products. Plant products in associated tags, stickers, owners manuals etc., which

do not correspond to the HTS listing, should not be covered. Similarly, the valuation requirement should apply to the entire import, not components thereof.

Importers need help from APHIS in the form of databases of plant names, to facilitate electronic filing, and of foreign laws that foreign vendors must observe. Innocent purchasers should not be exposed to forfeiture of goods, and the import declaration requirement should not be treated as a requirement for allowing entry to the import. Instead, it should be treated as part of the post-entry process. There should be an exemption for carnet importations, i.e. goods which enter the U.S. temporarily and duty-free under a carnet certificate because they are to be exported.

There should also be a de minimus or small quantity exception, as provided for in the Hazardous Materials Transportation Regulations. In both contexts, it makes no sense to impose the same burdens, costs and delays on small volumes and on container loads. Where plant or wood products make up only a small portion by weight, volume or value of the import, no declaration requirement under the Lacey Act amendments should apply.

Finally, APHIS should consider a lesson learned by DHS, TSA and other governmental agencies charged with protecting the U.S. against threats more serious than illegally logged trees. In pursuing detection of and denying entry to weapons or explosives or other materials that might be used by terrorists, security officials try to focus most closely on routings, shipment characteristics and other indicators that are more rather than less likely to be problematic. This is called “shrinking the haystack.”

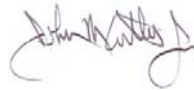
Even fundamental national security interests must be pursued with limited resources. It therefore makes sense to use enforcement resources wisely, to maximize their efficiency. Rather than opening every container, carton, drum, tank and box that crosses

a U.S. border, governmental authorities recognize that routine shipments from established vendors in friendly foreign countries to established customers in this country may warrant different treatment from non-routine shipments originating in countries known to be hostile or known to have difficulties with legal compliance and transparency.

In the Lacey Act context, if most illegally-logged products come from a relatively short list of geographic sources and rarely come from Canada or EU members, it is not a good use of enforcement resources to ignore these facts, and treat all imports the same.

As stated in an October 10, 2008 letter to APHIS and other agencies by Congressional sponsors of the Lacey Act amendments, including Senator Ron Wyden and Representative Earl Blumenauer, the Lacey Act amendments are to be implemented in a “commonsense practical manner,” and “without disrupting legitimate commerce.” The Shipper Conferences support this approach.

Respectfully submitted,



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