U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

JUL 20 2012

The Honorable Doc Hastings
Chairman
Committee on Natural Resources
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

The Department of Justice has reviewed H.R. 3210, the "Retailers and Entertainers Lacey Implementation and Enforcement Fairness Act," or the "RELIEF Act," as reported by the House Natural Resources Committee on June 7, 2012. We have a number of serious concerns with H.R. 3210. While the Department appreciates the concerns raised in the bill, a number of the proposed changes to the Lacey Act will significantly weaken the plant protection provisions of the Lacey Act and undercut the effort to level the playing field for law-abiding American businesses and to combat illegal logging.

As the bill's findings recognize, the 2008 Amendments to the Lacey Act (the "2008 Amendments") were intended to level the playing field for American businesses engaged in the responsible harvest, shipment, manufacture, and trade of plants and plant products whose prices had been undercut by a black market fueled by irresponsible and illegal taking of protected plants around the globe. *Findings, paragraph (2)*. Passage of the 2008 Amendments responded to widespread concerns about the environmental and economic impacts of illegal logging. Trafficking in illegally harvested wood is estimated to generate proceeds of approximately $10 billion to $15 billion annually worldwide, according to a 2012 report by the World Bank. Illegal logging also has serious negative impacts on biodiversity, indigenous peoples, and the global climate. The 2008 Amendments had broad bipartisan support within Congress, as well as broad support across the full spectrum of interested stakeholders, including the forest products industry, trade groups, nonprofits, and unions.

Implementation of the Lacey Act provisions added by the 2008 Amendments is still in its early stages. The Administration has undertaken extensive efforts within the United States and abroad to educate the regulated community on the requirements of the 2008 Amendments, and has taken a careful, phased approach to enforcement of the declaration requirement. No criminal cases have yet been filed and only one, uncontested, administrative forfeiture action has been completed, reflecting the caution being exercised by the enforcement community in dealing with new statutory prohibitions. Therefore, the Administration believes that consideration of possible changes to the Lacey Act should await further developments in the implementation and enforcement of the 2008 Amendments to the Lacey Act.

The Department has the following objections with respect to specific provisions of H.R. 3210.

Findings

The Department believes that paragraphs (3) and (5) of the Findings in H.R. 3210 relating to potential criminal liability of "a good-faith owner, purchaser, or retailer of a plant or plant product" or penalties for "merely owning or traveling with a vintage musical instrument, antique furniture, or another wood product" are incorrect and should be deleted. As officials of the Departments of Justice and the Interior stated in a September 19, 2011 letter to Chairman Fred Upton and other members of the House Committee on Energy and Commerce, "people who *unknowingly* possess a musical instrument or other object containing wood that was illegally taken, possessed, transported or sold in violation of law and who, in the exercise of due care, would not have known that it was illegal, do not have criminal exposure. The Federal Government focuses its enforcement efforts on those who are removing protected species from the wild and making a profit by trafficking in them."[1] (Emphasis in original).

Section 3(a)

Finding 8 (in section 2) of the bill states the drafters' belief that the declaration requirements for plant products imported or manufactured prior to May 22, 2008 are unreasonable since the sourcing of plant products was not previously required under the Lacey Act. Section 3(a) of H.R. 3210, in turn, would eliminate application of the Lacey Act to any plant that was imported into the United States before May 22, 2008, or to any finished plant or plant product the assembly and processing of which was completed before May 22, 2008. As drafted, section 3(a) eliminates the declaration requirement and the overall application of the Lacey Act for plant products imported or manufactured prior to May 22, 2008, even in situations in which the importer knows a plant product was manufactured from wood illegally harvested.

The proposed changes to the scope of Lacey Act coverage could make effective enforcement of key policies of the 2008 Amendments extremely difficult. Under the proposed provisions, an individual would be free to purchase wood after May 22, 2008, in situations in which the purchaser knew that the wood was illegally harvested from a clear cut of a national preserve in the Amazonian rainforest in 2007, yet there would be absolutely no U.S. action that could be taken to prevent the import or sale of that wood. Even for wood harvested or manufactured after May 22, 2008, the bill's provisions would impose heightened litigation burdens that could gut the enforcement remedies intended by the Act. In almost any case brought by the United States for importation of a plant product made out of illegally harvested wood, the defendant would be able to claim that the product was manufactured prior to May 22, 2008, and put the burden on the government to prove the contrary. Especially with respect to products manufactured overseas, the practical difficulties of

[1] Letter of Christopher J. Mansour, Director, Office of Congressional and Legislative Affairs, Office of the Secretary, U.S. Department of the Interior, and Ronald Weich, Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice to Chairman Fred Upton and Representatives Cliff Stearns, Marsha Blackburn, and Mary Bono Mack, House Committee on Energy and Commerce (Sept. 19, 2011).

gathering evidence and proving the details and timing of manufacture or harvesting could pose an insurmountable burden in many cases.

We understand that section 3(a) may have been added to address concerns regarding certain limited categories of plant products imported prior to May 22, 2008, such as specialty woods used by artisanal musical instrument manufacturers, or products such as wooden musical instruments and similar products manufactured prior to May 22, 2008 that are brought out of and back into the United States by traveling musicians or ordinary citizens. We believe that these situations would be best addressed through administrative rulemaking that could create de minimis or other tailored exclusions from Lacey Act coverage or the declaration requirement where warranted.

Section 3(b)

Section 3(b)(2) of H.R. 3210 significantly limits the declaration requirement for importers of wood products and other products derived from trees, since importers of such products would not have to provide any of the statutorily-required information unless the product is solid wood. Specifically, it would eliminate the requirement to report the scientific name, value, quantity, and country of harvest for such products. This information significantly aids law enforcement officials in identifying the importation of potentially illegal wood products. Eliminating this information would undercut the effectiveness of the declaration as an enforcement tool for the majority of wood products imported into the United States, and would prevent the government from gathering useful information about the country of harvest and species of wood being imported where the product is not solid wood.

The Department of Agriculture Animal and Plant Health Inspection Service (APHIS) and other relevant federal agencies have worked diligently to solicit and consider the comments of industry and other members of the public as they implement the declaration requirement enacted by Congress in 2008. For example, APHIS and other relevant federal agencies have carefully implemented a phased schedule for enforcement of the declaration requirement and created special use designations for composites and other wood products. APHIS has also published an advance notice of proposed rulemaking to solicit public comment on possible de minimis and other exclusions from the declaration requirement to address difficulties in complying with the declaration requirement that may be faced by importers of composite wood products and other products.

While the Administration has concerns with Section 3(b)(2) as currently drafted, we believe that the more appropriate approach would be to allow the technical agencies to engage in rulemaking to place appropriate limits on the requirement to provide certain types of information, such as the genus and species of plant material being imported, for certain categories of plant products where the agencies determine that providing such information is currently technically difficult. Such an approach is consistent with that proposed in the June 23, 2010 "Second Consensus Statement of Importers, Non-Governmental Organizations, and Domestic Producers on Lacey Act Clarifications" organized by the Retail Industry Leaders Association and signed by a broad array of 57 industry and environmental organizations. The Second Consensus Statement noted, for example, that while identifying the genus and species of plants incorporated into composite wood products is currently difficult, technical advances in identifying this information may in the future make providing such information easier. We believe that such technical issues are best addressed by agencies engaging in notice and comment

rulemaking so that they can take into account input from the regulated community and other members of the public.

The Administration would be willing to discuss with you other issues that have been brought to your attention regarding implementation of the declaration requirement.

Section 3(c)

The Administration recommends deleting section 3(c) of H.R. 3210 because it would have an impact far beyond the stated intent of the bill, and would undercut enforcement of the Lacey Act.

Section 3(c) of H.R. 3210 would allow an "innocent owner" defense against forfeitures of property that is illegal to possess under violations of the Lacey Act. This defense would apply not just to individuals or retailers, but also to forfeitures against companies engaged in the commercial importation of the illegal material. Specifically, this provision would exempt plants and plant products imported into the United States from those items deemed "contraband or otherwise illegal to possess" under the Lacey Act, and thus potentially prevent such items from being forfeited. This provision is problematic for both legal and policy reasons.

The Civil Asset Forfeiture Reform Act (CAFRA), 18 U.S.C. Chapter 46, provides that the innocent owner defense applies to all civil forfeiture statutes, including those, like the Lacey Act, that contain no innocent owner provision of their own, *see* 18 U.S.C. section 983(i)(1). The Lacey Act is not included in the list of civil forfeiture statutes that are exempted, *see* 18 U.S.C. section 983(i)(2). However, the innocent owner provision is limited by 18 U.S.C.§ 983(d)(4), which provides that no person may assert an ownership interest in contraband or other property that is illegal to possess. Multiple courts have confirmed that no valid, bona fide ownership interest can exist for property that is contraband or otherwise illegal to possess. *See United States v. 144,774 Pounds of Blue King Crab*, 410 F.3d 1131, 1135 (9th Cir. 2005); *see also Conservation Force v. Salazar*, 677 F. Supp. 2d 1203, 1207 (N.D. Cal. 2009). Proposed section 3(c) of H.R. 3210 would therefore be inconsistent with statutory and case law prohibiting possessors of illegal material from qualifying as "owners" for purposes of the "innocent owner" defense.

This provision is also problematic from a policy standpoint. The lack of an innocent owner defense renders plant and wildlife forfeiture provisions, at least pursuant to the Lacey Act and the Endangered Species Act, strict liability provisions. As courts have noted, the strict liability nature of these forfeitures fulfills a key policy purpose:

> [T]he application of strict liability in wildlife forfeitures is necessary to effect Congressional intent. To permit an importer to recover the property because he or she lacks culpability would lend support to the continued commercial traffic of the forbidden wildlife. Additionally, a foreseeable consequence would be to discourage diligent inquiry by the importer, allowing him or her to plead ignorance in the face of an import violation.

United States v. One Handbag of Crocodilus Species, 856 F. Supp. 128, 134 (E.D.N.Y. 1994) (quoting *United States v. 1,000 Raw Skins of Caiman Crocodilus Yacare*, 1991 WL 41774, at *4 (E.D.N.Y. Mar. 14, 1991). Exempting certain plants and plant products from strict liability forfeiture, and effectively immunizing the possession of contraband would significantly undermine the effectiveness and purpose of the Lacey Act.

If proposed section 3(c) of H.R. 3210 is enacted, companies engaged in the importation of the illegal material would have little incentive to exercise due care (the culpability standard for a misdemeanor Lacey Act violation) in buying imported wood or other plant products since the government could only seize and forfeit such contraband when investigators could prove that the Lacey Act violation was knowingly committed. Limiting forfeitures to only those who knowingly violate the law would provide an incentive for importers to be ignorant or claim ignorance of the contents of their shipments and undermine the Administration's efforts to combat the trafficking of protected wildlife and plants and the importation of injurious non-native species.

The Administration believes the proposed section 3(c) of H.R. 3210 is unnecessary given that protections already exist in the law to assist those whose goods may be subject to forfeiture. For example, the Lacey Act provides for possible remission or mitigation of such forfeiture. *See* 16 U.S.C. § 3374(b). U.S. Fish and Wildlife Service regulations provide that any person who has an interest in property administratively forfeited 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. The Solicitor may remit or mitigate the forfeiture if she finds that mitigating circumstances justify such action and may impose such terms and conditions as may be reasonable and just or may order discontinuance of any proceeding. 50 C.F.R. § 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; the Department of Justice will decide such a request in accordance with 28 C.F.R. §§ 9.4 and 9.5. These procedures for remission help to alleviate any potential harshness resulting from Lacey Act forfeitures. Current law also provides the Fish and Wildlife Service's Office of Law Enforcement and the Department of Justice the flexibility to take into consideration mitigating and aggravating circumstances when deciding whether to file formal charges, issue a violation notice, or simply seize a shipment.

We would be willing to discuss with you any concerns that have been raised with the current process. However, the Administration opposes section 3(c) and its modification of the provisions of the Civil Asset Forfeiture Relief Act to add an innocent owner defense to forfeitures under the Lacey Act.

Finally, we also note an inconsistency in applicability and scope of the provisions added by the bill intended to create an innocent owner defense. Section 3(c)(3) adds two subparts to 16 U.S.C. Sec. 3374(d). Subpart (2) states that "[s]ubsection (d)(4) of such chapter, and the second sentence of subsection (a)(1)(F) of such section, shall not apply to plants or plant products." This new subpart (2) indicates an intent by the bill's authors to limit the applicability of the new innocent owner provision to cases involving plants or plant products. However, subpart (3)

added by the bill is not limited to plants and plant products; it states that "[t]his section is the sole authority for civil seizure or forfeiture actions alleging, or predicated upon, a violation of section 3." While we object to this new "innocent owner" section of the bill in its entirety for the legal and policy reasons already stated, we would not want the bill to proceed with this inconsistency between the new subparts (2) and (3) added by section 3(c) of the bill. If the innocent owner provisions remain in the bill, we suggest that subpart (3) added by section 3(c)(3) should be amended to read, "(3) This section is the sole authority for civil seizure or forfeiture actions alleging, or predicated upon, a violation of section 3 with respect to plants or plant products." Alternatively, and preferably, if these provisions remain in the bill, we suggest that they be limited to plants imported prior to May 22, 2008, and any finished plant or plant processing the assembly and processing of which was completed before May 22, 2008. That language would be consistent with the statement at the outset of H.R. 3210 ("to limit the application of the Act with respect to plants and plant products that were imported before the effective date of amendments to that Act enacted in 2008") and section 3(a) of the bill, which adds a new section 9 to the Lacey Act in order to limit the applicability of the Act to plants imported or manufactured before May 22, 2008.

Section 4

Section 4 would strike the words "foreign law" as used in three places in the Lacey Act and replace them with "foreign law that is directed at the protection, conservation, and management of plants." While we do not object to this revision, we suggest a slight revision to the proposed amendments to improve their clarity. We believe that the term "directed at" in the language proposed by the bill is vague and subject to differing interpretations. We instead suggest that that phrase be replaced with "a purpose of which is the protection, conservation, or management of plants or the ecosystems of which they are part." We also believe that the word "and" in the phrase "protection, conservation, and management of plants" should be replaced with "or." A foreign law that meets any of those qualifications should suffice for Lacey Act applicability. As laws prohibiting the harvesting of plants are frequently aimed at ecosystem protection, we recommend amending the language to address that. Finally, we believe the inserted text in paragraph (2)(B)(iii) of 16 U.S.C. § 3372(a) would be clearer if located later in the provision.

Therefore, we suggest that 16 U.S.C. §§ 3372(a)(2)(B)(ii) and (iii) and 16 U.S.C. §§ 3372(a)(3)(B)(ii) and (iii) be modified to read as follows:

> "(ii) taken, possessed, transported, or sold without the payment of appropriate royalties, taxes, or stumpage fees required for the plant by any law or regulation of any State or any foreign law a purpose of which is the protection, conservation, or management of plants or the ecosystems of which they are part;"
>
> "(iii) taken, possessed, transported, or sold in violation of any limitation under any law or regulation of any State, or under any foreign law, governing the export or transshipment of plants a purpose of which is the protection, conservation, or management of plants or the ecosystems of which they are part;"

The Administration recommends deleting the language of section 4(b) of H.R. 3210 because the reference to "foreign law" in 16 USC 3373(a)(1) is not limited to foreign laws applying to plants, but applies to foreign laws related to fish and wildlife, as well. Foreign law for these purposes is already defined elsewhere in the Act and including it here will conflate two definitions in a potentially confusing manner.

Section 5

Paragraph 2(A) of Section 5 reassigns the responsibility for submitting a report to Congress on implementation of the declaration requirement from APHIS to the U.S. Fish and Wildlife Service. Since APHIS has been the lead agency in developing and implementing a declaration system for plants and is in the process of preparing such a report, the Administration objects to this change.

Section 2(D) of Section 5 would require the Fish and Wildlife Service to conduct an evaluation of the feasibility of creating and maintaining a publicly accessible database of laws of foreign countries from which plants are exported. Conducting such a study and creating and maintaining such a database would involve the use of appropriated funds to provide a unique and "free" service primarily of benefit to companies engaged in the international trade in plants and plant products. No such service has ever been provided to, or deemed necessary for, fish or wildlife importers covered by the Lacey Act for several decades. The companies engaged in the international trade in plants and plant products, as with the companies engaged in the trade in fish and wildlife products, are in a superior position to efficiently and cost-effectively determine the relevant foreign laws applicable to their commercial operations.

Thank you for providing us with the opportunity to submit these views on H.R. 3210. The Office of Management and Budget has advised us that there is no objection to the submission of this letter from the perspective of the Administration's program. Please contact us if you have any questions regarding the information provided in this letter.

Sincerely,

Judith C. Appelbaum
Acting Assistant Attorney General

cc: The Honorable Edward J. Markey
Ranking Member