

# **Complying with the Lacey Act: Issues for the Lumber Industry**

by Elizabeth Baldwin, President of Compliance Specialists

Everyone in the wood industry is talking “Lacey,” as the 2008 amendment to the one hundred year old Lacey Act is now commonly known. But how does it affect your business?

## **What is Lacey? (Three Basic Provisions)**

1) It is a United States federal offense to trade in illegal or “tainted” plants and plant based products; and the action that made the product illegal (“tainted” the product) does not have to occurred within the US. Included in the long list of ways to “taint” a product are actions such as harvesting it illegally, trading it without proper duties or other fees being paid, or smuggling/stealing it.

2) Importers need to declare both what species they are bringing in and where it came from.

3) Don’t lie to the government! (While this seems like common sense, the government has to specifically state that it’s wrong so they can prosecute you if you do it.)

The Lacey Act applies to everyone in the United States, from the individuals and companies doing business in wood to the final retail consumer—the law does not exclude anyone. Violations of the new law will be met with steep penalties if the government is able to prove that an individual or a corporation has knowingly traded in illegal material or has misreported an imported product. Ten years of imprisonment is a possible penalty and corporate fines can go as high as five hundred thousand dollars.

## **The Documentary Burden (Really only for Importers)**

The initial focus by most companies is on the documentary burden. Lacey affects everything containing plant-based materials—even the wood burl veneer on a car’s dashboard must be documented. The total number of items impacted is expected to exceed 90,000.

Every importer must file a detailed declaration for incoming agricultural products specifying species and country of origin no matter where the final product is produced. This includes material coming from Canada and Mexico—NAFTA does not eliminate any Lacey-related compliance requirements.

The international wood products trade often has a very complicated supply chain. An engineered floor might be made in China but contain a Meranti plywood core made in Malaysia and a top veneer of Red Oak originally from the United States. The declaration requires that the importer know the source countries and exact scientific species for each component, including material originating from the United States.

While difficult enough for a company importing a single type of solid decking, this will be a significant challenge to companies that import mixed species production, such as furniture or kitchen cabinet companies. Wood is traded under a commercial or trade name, but is rarely purely a single species of tree. A Meranti plywood core might require a declaration of over fifty species (out of over 250 possible). The top veneer might come from several countries and include dozens of species within the one genus. Developing a system to document and track the species is one of the challenges Lacey puts on companies.

In many cases, a freight forwarder or broker will file the declaration, but the company must provide the information for them. US Customs is trying to accept information electronically, but is still receiving the majority of declaration on paper. They have developed a rolling implementation schedule, requiring declarations for different HS Codes to start on different dates. These dates are subject to change as Customs' information collection system continues to be developed. An updated listing of items subject to declaration (listed by HS code) is available on the APHIS website at:

[http://www.aphis.usda.gov/plant\\_health/lacey\\_act/index.shtml](http://www.aphis.usda.gov/plant_health/lacey_act/index.shtml)

### **The Legality Burden (for absolutely EVERYONE!)**

The potential for legal liability falls on everyone in the chain. **On an absolute level**, Lacey allows for the confiscation of goods from anyone—even to the point of allowing the government to enter a home to pull up a living room floor, rip out the kitchen cabinets or seize Johnny's new bunk bed. Now, in the real world, that's just not going to happen, but that's the potential extent of liability. Anyone in the chain, from the importer to the retailer to the homeowner, and even the trucking companies technically share the risk for the legality of their wood in the product.

Most people define Lacey's start date as when their specific import declarations are required. This focus can be dangerous since the legality requirement already in effect: as of May 22, 2008, it is against US law to trade in any illegally harvested agricultural product. Every one of us is currently Lacey Liable.

While the greatest burdens and risks will be on the actual importers, distributors and retailers should also be asking some questions of their suppliers, if only to be able to respond to their customers' questions. In some markets, domestic producers are using Lacey as a scare tactic in their marketing to try to pull customers away from imported products.

It is important to note that the Lacey Act does not specifically require importers to document the legality of their material at time of entry and there is no specific burden of documentation or labeling for anyone further down the chain of custody. So technically there is no immediate legal obligation to compel a company to ensure the legality of their supply chain. However, forcing companies to trace a product's chain of legality is most definitely the intent and the expectation of the government and the government can prosecute based on a failure to do so if they determine that you've traded in "tainted" material.

Furthermore, in a Lacey violation case, ignorance will not be considered a sufficient defense. Even if a company or an individual had no idea that a product was "tainted," they can still face fines or confiscation if the government believes that they should have reasonably known.

The good news is that the US government bears the burden of proof. For criminal charges, they must demonstrate beyond a reasonable doubt that you knowingly committed the crime or knowingly traded in "tainted" material. To assess civil penalties, they must show, again beyond a reasonable doubt, that you failed in your professional due diligence and truly should have known that a product was "tainted."

The greatest challenge is that under Lacey, material can become "tainted" even if the law being broken is not an American one. The illegal action can occur at any point in the chain. From that point further, the wood is considered "tainted," and thus it would be considered a violation of the Lacey Act to import it or sell it within the US. This means that importers must ensure not only that their immediate purchase is legal but also attempt to trace the origin of the material back to its original point of harvest, confirming that each step along the way was made in full accordance with local and international laws.

Many people assume that FSC certification protects them. It does not. While being certified or carrying/purchasing a certified product (be it by FSC, SFI, PEFC, MTCC or by any other internationally recognized program) does not specifically protect companies from prosecution under Lacey, it does help show that a company is doing its due diligence. Although it will certainly be considered a sign of good faith, the US government does not accept any third party verification regarding the legality (or illegality) of material.

Finally, it should be noted that foreign companies and individuals can also be prosecuted under Lacey and in some previous Lacey cases (for fish and

wildlife, not wood), foreign nationals have been arrested during a visit to the United States and subsequently tried and jailed.

### **Lacey and US Woods**

Trade in US woods is also covered by Lacey. For example, if the government can prove that a log was taken from the wrong side of a property line, that would be a Lacey violation and the US company would be liable for any applicable penalties. Furthermore, all American domestic woods need to be declared upon their re-entry into the US. If a foreign company utilizes American Red Oak or Walnut for a floor, Pecan for a kitchen cabinet or SPF for plywood production, etc., those species will be subject to Lacey declaration requirements when the final product is imported into the US. So while much less likely to be targeted for investigation, a certain level of due diligence should be done regarding the American supply chain as well.

Many American manufacturers are anticipating an increase in their domestic market share as both downstream producers and retail customers shift from imported species to the 'safer' domestic hardwoods. Certainly there is likely to be a change in that area, but US companies should not neglect their opportunity to utilize the Lacey Act to increase their export opportunities as well.

US companies should be offering their overseas customers who intend to export a finished product back to the United States documentation to show that their production has an extremely low risk of being considered 'tainted.' Such documentation can include the FSC's own assessment of American hardwoods as "low risk," or copies of reports by AHEC or the AHMI and other local industry organizations. Local universities often have studies (Purdue has an excellent one on Indiana timber) that can be quoted. Companies with good documentation packages should become preferred suppliers to nervous overseas buyers.

### **The Future of Lacey (around the world)**

Lacey's goal is to protect the world's forests by encouraging a more detailed questioning of supply chains and to provide a means of enforcement against egregious offenders. So whether you choose to take action because it's the right thing to do, or because you are afraid of potential prosecution, you will be following the spirit of the Law, perhaps even more so than the letter.

Finally, the international demand for legality documentation is here to stay, and it's not just for the USA. Japan began requiring some forms of legality statements over five years ago, the United Kingdom is debating the issue, and even the state of Illinois recently considered passing a law against the trade of illegal timber within the state. Furthermore, the European Union is currently developing legislation similar to the Lacey Act which will cover international trade

with all of the countries in the Euro-zone. (There is rumor that this legislation may potentially require the submission of legality documentation at the point of entry, which Lacey currently does not require).

So the work you do today, if you trade in other countries, may help you far beyond just complying with the Lacey Act. The documentary conditions created by Lacey Act may well become the default condition for the international trade of wood products.

### **About the Author and To Learn More**

**Elizabeth Baldwin** has more than twenty years of international wood sourcing experience. She has visited over a thousand mills in nearly fifty countries producing any possible type of wood product of all sizes and qualities. She is painfully familiar with the documentation requirements for FSC, CARB, LEED and other programs.

Japanese trained, she is a well-recognized consultant in many aspects of international trade, including quality control systems and wood production management. In addition to speaking passable American, she can confuse people in both Spanish and Japanese.

**“Complying with the Lacey Act: A Real-World Guide”** is available at [www.LaceyActResources.com](http://www.LaceyActResources.com). Revised in the Spring of 2010, the book provides practical instructions to help you to organize and manage your species information and legality documentation, and coordinate your internal and external communications.

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