

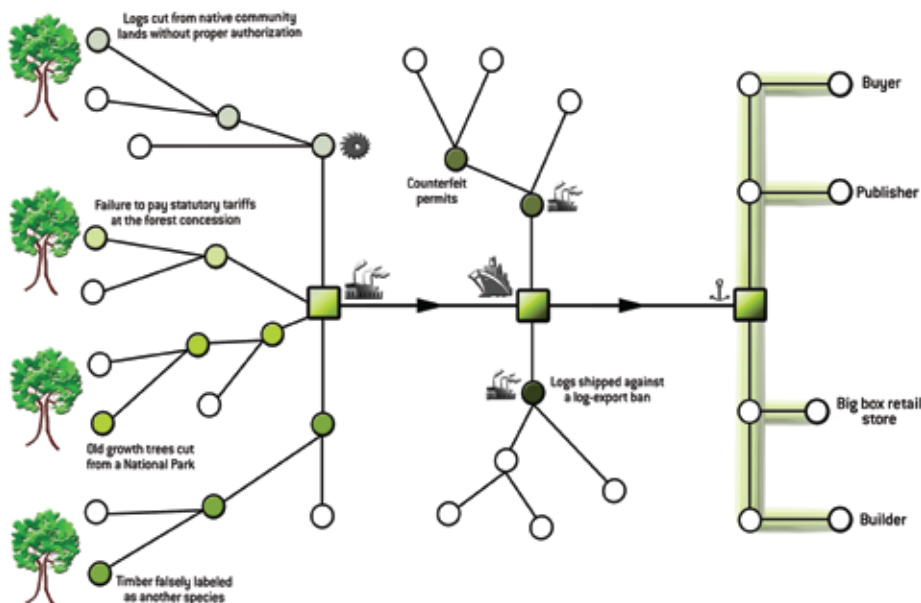


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SETTING THE STORY STRAIGHT THE U.S. LACEY ACT: SEPARATING MYTH FROM REALITY



In 2008 the United States amended its long-standing Lacey Act to prohibit commerce in illegally sourced plants, including wood products. The new law is a significant change for the forest products sector, creating a previously non-existent level of responsibility all along the supply chain. Abiding by the Lacey Act will require many companies in the U.S. and abroad to make changes to their business practices. Inevitably, new laws and requirements create some confusion and misconceptions. In this document we try to clarify some of the most frequent myths about what the Lacey Act actually says and what ‘compliance’ with this law entails.



A violation of the Lacey Act consists of two basic components. **First**, an *underlying violation of a foreign, state, or tribal law occurs*. The underlying violation does not have to be of a criminal statute, nor one actively enforced in the foreign country. It does, however, have to be a violation of a law or regulation related to protection or management of plants or derivative products. **Second**, once this underlying violation occurs, that good which is now “tainted” as an illegal good must go *somewhere* — it must be traded in the U.S. It is this second act of trade, whether export, transport, sale, purchase, or import, that triggers a violation of the Lacey Act.

MYTH: I now need a certificate of legality to import wood into the U.S.

REALITY: “Lacey compliance” is not defined by any one document, checkbox, due diligence system or due care check-list, and do not expect the U.S. government to provide that. In order to be fully “Lacey compliant” as per the statute, you need to eliminate illegal wood from your supply chain. In order to guard against liability, you need to practice due diligence — termed “due care” under the Lacey Act. How you can best do this will depend on your product, your current sourcing practices, and your business model. The private sector is better equipped than the government to define which best practices will ensure that companies are only sourcing legal timber, especially because these practices continue to evolve over time.

Still confused as how to practice “due care”? What are the leaders in your industry doing to

comply? What are the gold standard methods for ensuring legal supply chains? Look to trade associations for leadership.

MYTH: My supplier gave me a document/ phone call/stamp that says her/his product is Lacey compliant. Can I trust her/him? It is impossible to ascertain that the businessperson three links down the chain is trustworthy.

REALITY: Know your supply chain and know your suppliers. Use suppliers you know and trust. Ask your suppliers if they know and trust their suppliers. Check with your colleagues in the industry and see who they trust (or who they *do not* trust). Establish long-term relationships rather than buying on spot markets. Make site visits if possible, do independent research on-line and through your business contacts, and *ask tough questions*.

MYTH: The best way to comply with the Lacey Act is to stop sourcing from any high-risk countries.

REALITY: There are examples of legal, responsible logging in every country. Yes, certain high-value species, and countries with historically bad track records, should get particularly targeted questions. But that means “do your homework,” not “don’t import from country X, Y or Z” — in fact, businesses with good practices in tough countries should be rewarded. The U.S. government will not be creating an official list of “high-risk” countries. No matter what country you source from, including the United States or Canada, you should know — and be able to substantiate

The Lacey Act is a fact-based, rather than a document-based statute. Documents are part of demonstrating due care and assessing legality, but they are not proof of legality. It is important to look behind the documents: EIA has seen and exposed many cases of forged papers, false certifications, and laundered wood crossing borders. Checking out and trusting your suppliers and the wood they are providing is as important, if not more important, than proper paperwork.

— as much as possible about the wood material’s origin.

MYTH: It is impossible to determine if my product is legal or not.

REALITY: It is critical that you know (and trust) your suppliers and simplify your supply chains. Understand what national laws are likely to be applicable based on your source locations. Make site visits, ask for translations if necessary, and use common sense. Some “red-flags” to look for include:

- Products priced significantly below the going market rate
- Cash-only payments
- Bribes
- Offers at a lower price for goods without paperwork
- Prices that do not include legal tariffs or duties
- Incorrect, inconsistent or imprecise product labeling
- Invalid or questionable permits or paperwork
- Inability or unwillingness to answer questions about the product’s origin
- Other unusual sales methods or practices



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MYTH: If my product is not listed on the *declaration* phase-in schedule (now, or in the future), I do not need to worry about the Lacey Act.

REALITY: The phase-in schedule only applies to the declaration requirement. The Plant and Plant Product Declaration Form is also known as PPQ 505. The underlying ban on illegal wood has been in effect since May 2008. If you are found to have traded illegal material, regardless of where your product falls on the phase-in schedule, you can be prosecuted and/or have your goods confiscated.

Need more information on the declaration form or the phase-in schedule? Visit http://www.aphis.usda.gov/plant_health/lacey_act/index.shtml to learn more.

The U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) is in charge of processing the paper declaration forms. Customs and Border Protection (CBP) accepts electronic declarations, which must be entered into the system via a broker¹. CBP will then provide the information to APHIS. Declaration information must be submitted by importers based on a *phased-in schedule which is subject to change*².

MYTH: Only individuals and companies in the U.S. are liable, so as an overseas operator I do not need to worry about anything.

REALITY: Numerous buyers and sellers around the world may be associated with a single source or product. The underlying violation which triggers a violation of the Lacey Act can occur at any step along the supply chain. If the U.S. importer is found to have illegal product that can be traced back to you, as an overseas operator, you, too, are implicated in the crime. There is precedent for indicting and prosecuting foreign individuals under the Lacey Act. In addition, legislators in the European Union, Australia, New Zealand, and Japan are in the process of designing timber trade legislation similar to the Lacey Act. It is likely that in order to access these markets in the future you will need to source legal wood.

MYTH: If I'm an overseas operator who does not sell directly to the U.S., I do not need to worry about this law.

REALITY: Supply chains can be long and complex. Many wood products exported into the U.S. from China, Vietnam, the European Union, Mexico, etc., are made with wood fiber imported from a third country. The Lacey Act applies equally to these products, even if your buyer sells your products onwards to the U.S. without your knowledge. If you or someone further back in your supply chain committed an underlying violation, such as failure to pay tariffs or falsifying documentation, then trading or selling that product in the U.S. could trigger a Lacey Act violation and you could be held liable.

MYTH: It must be pretty difficult to "steal" a tree; illegal logging can't be that pervasive.

REALITY: Illegal logging occurs in all regions of the world. It is typically defined as extraction and associated trade of trees in contravention of any state, foreign, or tribal law. Examples of illegal logging include timber theft; logging in a national park or protected area; failure to pay concession fees, taxes, or tariffs on a shipment; or cutting trees without proper authorization from relevant authorities. At least 10% of annual wood imports to the U.S. are estimated to be of illegal origin³. Illegal logging rates and practices vary dramatically by exporting country and species; as much as 80% of some countries' wood products are estimated to be illegally harvested.



Whether or not the trees are legally harvested, under the Lacey Act it is also unlawful to make or submit any false record, account, or label for, or any false identification of, any plant. What does that mean? Labels, invoices or other statements that intentionally misrepresent a wood product — for example, falsely claim that a product is "third-party certified" or comes from a lower-risk country constitute a violation of the law.

MYTH: Determining the scientific name (genus and species) of my wood products is unfeasible, and it does not matter anyway.

REALITY: Scientific names are the only way to obtain accurate information about wood trade streams, because of the bewildering variety of commercial or country-specific names that a single species may have — and conversely, because many distinct species may all be called the same thing. A buyer who does not know the scientific name of the wood product s/he is purchasing cannot always be sure s/he is not violating the Convention on International Trade in Endangered Species (CITES) or other laws that protect endangered species. Likewise, without the use of a unified naming system, the Lacey Act declarations are less useful as a source of information about the impacts of U.S. imports on ecosystems and economies around the world.

If you need help looking up the scientific name of your wood product, visit <http://www2.fpl.fs.fed.us/CommNames2000.html> operated by the U.S. Forest Service. Efforts to develop user friendly databases are ongoing.

MYTH: Practicing "due care" consists of obtaining a ton of documentation.

REALITY: Due care is not, ultimately, about documents at all, although in practice it would be prudent for businesses to keep records that demonstrate their best efforts to ascertain the legality of their wood products. Due care itself is a flexible concept that continues to develop over time within the U.S. legal system, where court decisions define it as "that degree of care which a reasonably prudent person would exercise under the same or similar circumstances." What exactly that degree of care should be varies, depending on factors such as the sector, the size of the company, and how risky the product itself might be.

For example, a small eucalyptus lumber import business might not need to conduct site visits for all its overseas trading partners, but a musical instrument manufacturer importing expensive hardwoods from a tropical country with a history of illegal logging would be wise to exercise strong due care measures no matter how small the company



is. Due care “is applied differently to different categories of persons with varying degrees of knowledge and responsibility.” To use a wildlife trade example, zoo curators, as professionals, are expected to apply their knowledge to each purchase of wildlife. If they know that a reptile is Australian and that Australia does not allow export of that reptile without special permits, failure to check for those permits would constitute a lack of due care. On the other hand, the airline company which shipped the reptile might not have the expertise to know that Australia does not normally allow that particular reptile to be exported. However, if an airline is notified of the problem and still transships the reptile, then it would probably fail to pass the due care test.

Some examples of demonstrating due care include:

- Keep complete records of your efforts
- Develop a company compliance plan
- Document how you follow your compliance plan in business transactions
- Train employees — they are your agents
- Visit suppliers
- Ask questions based on any specific concerns in the source material’s region
- Develop and follow industry standards
- Ask your overseas supplier for genus/species information
- Confirm validity of scientific names
- Check botanical resources (e.g. GRIN Taxonomy⁴)
- Confirm geographic distribution
- Check with Foreign Ministries of Agriculture
- Confirm that source companies operate legally (licensed/certified)
- Request pertinent plant protection laws from a government official in the country of harvest
- Contact APHIS: Lacey.Act.Declaration@aphis.usda.gov

MYTH: I’m already green — I only source certified wood, so I should be exempt or in compliance already and I do not need to worry about the Lacey Act.

REALITY: Third-party sustainable forestry certification under schemes such as FSC (Forest Stewardship Council), or legality verification schemes, are good ways to demonstrate *due care*. Be aware which of your products are certified and which are not. If one product in your line contains “certified” wood this does not mean that your entire line of products is certified. Certifications are not required by law, nor are they a get-out-of-jail-free card, but they will help demonstrate to both the government and your customers that you have taken some of the steps necessary to eliminate illegal wood from your supply chain for the particular item that is certified. You must still submit appropriate import declaration information to APHIS or CBP for products that appear on the phase-in schedule.

MYTH: All third-party legality verification systems are the same in terms of due care.

REALITY: The Lacey Act is fact-based and not document-based; due care is about ensuring that a supply chain is traceable and not which verification system was used. Some certification and verification systems have more robust standards than others; comparisons and evaluations of these systems can be found on-line. You should have confidence in your third party verifier, and should ask them questions about their standards and practices. The burden of proof is on the U.S. Government.

MYTH: The Lacey Act is unenforceable.

REALITY: U.S. government employees from the Department of Homeland Security’s Customs and Border Patrol (CBP), the Fish and Wildlife Service’s Office of Law Enforcement (OLE), the Department of Justice (DOJ) and the Department of Agriculture’s Animal Plant Health Inspection Service (APHIS) are on the job, with support from related agencies. Trained officers are stationed in ports and warehouses inspecting timber shipments, while investigators are looking into cases of illegal trade. Environmental watchdog organizations routinely gather and make public information on the illegal timber trade. The first timber-related Lacey Act enforcement action occurred in November 2009.

MYTH: CITES (The Convention on International Trade in Endangered Species) and the Lacey Act are essentially the same thing.

REALITY: CITES species — such as mahogany, ramin, or cedar — require a CITES permit to import because of their threatened or endangered status. CITES is meant to protect at-risk species from being over harvested. However, less than 0.03% of wood entering the U.S. annually falls under CITES⁵. The Lacey Act plant provisions are critical for combating the broader illegal logging problem, and importers of CITES plants must also follow all Lacey Act protocol. EIA has found numerous cases of illegally harvested wood products that were not protected under CITES. For example, if a species listed as endangered or illegal to export under Indonesian law is brought into the U.S., an underlying violation to the Lacey Act has occurred — regardless of whether the species is protected by CITES. In addition, the Lacey Act makes false declaration or falsification of any documents illegal, so if fraudulent or incorrect CITES permits are submitted, traders can be prosecuted under Lacey. Proper compliance with the Lacey Act could help to prevent more species from being listed on CITES in the future.

Have more myths we can help to clarify? Visit our website, www.eia-global.org/lacey and visit the APHIS website http://www.aphis.usda.gov/plant_health/lacey_act/index.shtml. If you still can’t find what you’re looking for, please email: anne@eia-international.org.

(ENDNOTES)

1. At time of publication, January 2010.
2. For updates to the Lacey Act and the phase-in schedule, visit the APHIS website at http://www.aphis.usda.gov/plant_health/lacey_act/index.shtml.
3. For this and other facts on illegal logging, read EIA’s report, “No Questions Asked.” Available at www.eia-global.org/lacey.
4. The Germplasm Resources Information Network operated by USDA. Available at <http://www.ars-grin.gov/cgi-bin/npgs/html/index.pl>
5. For this and other facts on illegal logging, read EIA’s report, “No Questions Asked.” Available at www.eia-global.org/lacey.

For more information visit:
www.eia-global.org/lacey

This document is for informational purposes only. Persons seeking legal advice on compliance with the Lacey Act statute should consult with a legal professional.
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