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DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 357

[Docket No. APHIS-2009-0018]

RIN 0579-AD11

Lacey Act Implementation Plan; Definitions for Exempt and Regulated Articles

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Affirmation of interim final rule.

SUMMARY: We are adopting as a final rule, without change, an interim final rule that established definitions for the terms common cultivar and common food crop and several related terms. The 2008 amendments to the Lacey Act expanded its protections to a broader range of plant species; extended its reach to encompass products, including timber, that derive from illegally harvested plants; and required that importers submit a declaration at the time of importation for certain plants and plant products. Common cultivars and common food crops are among the categorical exclusions to the provisions of the Act. The Act does not define the terms common cultivar and common food crop but instead gives authority to the U.S. Department of Agriculture and the U.S. Department of the Interior to define these terms by regulation. The interim final rule specifically requested comment on definitions of two related terms: commercial scale and tree. This document responds to comments we received on those definitions.

DATES: Effective on [insert date of publication in the Federal Register], we are adopting as a final rule the interim final rule published at 78 FR 40940-40945 on July 9, 2013.

FOR FURTHER INFORMATION CONTACT: Ms. Parul Patel, Senior Agriculturalist, Imports, Regulations, and Manuals, PPQ, APHIS, 4700 River Road Unit 60, Riverdale, MD 20737-1231; 301-851-2351.

#### SUPPLEMENTARY INFORMATION:

##### Background

The Lacey Act (16 U.S.C. 3371 et seq.), first enacted in 1900 and significantly amended in 1981, is the United States' oldest wildlife protection statute. The Act combats trafficking in "illegal" wildlife, fish, and plants. The Food, Conservation, and Energy Act of 2008, effective May 22, 2008, amended the Lacey Act by expanding its protections to a broader range of plants and plant products (Section 8204, Prevention of Illegal Logging Practices). As amended, the Lacey Act now makes it unlawful to, among other things, import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any plant, with some limited exceptions, taken, possessed, transported or sold in violation of any Federal, State, tribal, or foreign law that protects plants or that regulates the theft of plants; the taking of plants from a park, forest reserve, or other officially protected area; the taking of plants from an officially designated area; or the taking of plants without, or contrary to, required authorization.

The statute excludes from the definition of the term "plant" the following categories: (i) Common cultivars, except trees, and common food crops; (ii) scientific specimens for laboratory or field research (unless they are listed in an appendix to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES, 27 UST 1087; TIAS 8249); as an endangered or threatened species under the Endangered Species Act of 1973 (16 U.S.C. 1531 et

seq.); or pursuant to any State law that provides for the conservation of species that are indigenous to the State and are threatened with extinction); and (iii) plants that are to remain planted or to be planted or replanted (unless they are listed in an appendix to CITES; as an endangered or threatened species under the Endangered Species Act of 1973; or pursuant to any State law that provides for the conservation of species that are indigenous to the State and are threatened with extinction). The Lacey Act also now makes it unlawful to make or submit any false record, account, or label for, or any false identification of, any plant covered by the Act.

In addition, Section 3 of the Lacey Act, as amended, makes it unlawful, beginning December 15, 2008, to import plants and plant products without an import declaration. The declaration must contain, among other things, the scientific name of the plant, value of the importation, quantity of the plant, and name of the country from which the plant was harvested. Currently, enforcement of the declaration requirement is being phased in, as described in two notices we published in the Federal Register<sup>1</sup> (74 FR 5911-5913 and 74 FR 45415–45418, Docket No. APHIS-2008-0119).

On August 4, 2010, we published in the Federal Register (75 FR 46859-46861, Docket No. APHIS-2009-0018) a proposal<sup>2</sup> to establish a new part in the plant-related provisions of title 7, chapter III of the Code of Federal Regulations (CFR), containing definitions for the terms common cultivar and common food crop. Common cultivars and common food crops are among the categorical exclusions to the provisions of the Act. The Act does not define the terms

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<sup>1</sup> To view these notices and the comments we received, go to <http://www.regulations.gov/#!docketDetail;D=APHIS-2008-0119>.

<sup>2</sup> To view the proposed rule and the comments we received, go to <http://www.regulations.gov/#!docketDetail;D=APHIS-2009-0018>.

common cultivar and common food crop but instead gives authority to the U. S. Department of Agriculture and the U.S. Department of the Interior (DOI) to define these terms by regulation.

Comments on the proposed rule were required to be received on or before November 29, 2010. The comments we received on the proposed rule included concerns about two additional terms used in the regulations. Specifically, some commenters asked that we define the term commercial scale to clarify that the definitions apply to specialty products grown commercially on a smaller scale. One commenter also asked that we define the word tree as it is used in the regulations. The commenter noted that there is no globally accepted botanical definition for tree and stated that adding a definition to the regulations would help clarify which products require a declaration.

We agreed with the commenters that adding definitions of these terms would improve clarity. Therefore, in an interim final rule<sup>3</sup> published in the Federal Register on July 9, 2013 (78 FR 40940-40945, Docket No. APHIS-2009-0018), we proposed to define commercial scale as “production, in individual products or markets, that is typical of commercial activity, regardless of the production methods or amount of production of a particular facility, or the purpose of an individual shipment” and tree as “a woody perennial plant that has a well-defined stem or stems and a continuous cambium, and that exhibits true secondary growth.”

We invited public comment on these two definitions. Comments on the interim final rule were required to be received on or before August 8, 2013. We received two comments by that date. The comments were from an organization of State plant pest regulatory agencies and a retailer selling home furnishings.

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<sup>3</sup> To view the interim final rule and the comments we received, go to <http://www.regulations.gov/#!docketDetail;D=APHIS-2009-0018>.

One commenter supported the additional definitions as proposed. The other commenter stated that the definitions of common cultivar, common food crop, and tree do not provide enough clarity for importers to determine whether certain products are subject to provisions of the Act, but did not address the specific wording of the definitions. The commenter also asked whether certain products, including rattan, palm leaves, and willow and osier branches, were considered common cultivars and if they would be included on the list of common cultivars.

Willows and osiers are trees and therefore cannot be excepted from the declaration requirement. We note that several species of palms, including African oil palm (Elaeis guineensis), carnauba palm (Copernicia spp.), and palms in the genera Astrocaryum, Bactris, and Euterpe are included on the list of common cultivars and common food crops that are excepted from the declaration requirement. Rattan and other palms are not currently excepted from the declaration requirement but may be evaluated as common food crops or common cultivars if a member of the public submits a request as described below.

As we explained in the interim final rule, the list of common cultivars and common food crops is intended to be illustrative, not exhaustive. The list is available on the Animal and Plant Health Inspection Service (APHIS) Web site at [http://www.aphis.usda.gov/plant\\_health/lacey\\_act/index.shtml](http://www.aphis.usda.gov/plant_health/lacey_act/index.shtml). The public may also send inquiries about specific taxa or commodities and requests to add taxa or commodities to the list, or remove them from the list, by writing to The Lacey Act, ATT: Common Cultivar/Common Food Crop, c/o U.S. Department of Agriculture, Box 10, 4700 River Road, Riverdale, MD 20737 or by email to [lacey.act.declaration@aphis.usda.gov](mailto:lacey.act.declaration@aphis.usda.gov) and including the following information:

- Scientific name of the plant (genus, species);
- Common or trade names;

- Annual trade volume (e.g., cubic meters) or weight (e.g., metric tons/kilograms) of the commodity; and
- Any other information that will help us make a determination, such as countries or regions where grown, estimated number of acres or hectares in commercial production, and so on.

Decisions about which products will be included on the list will be made jointly by APHIS and the DOI's Fish and Wildlife Service. We will inform our stakeholders when the list is updated via email and other electronic media. We will also note updates of the list on APHIS' Lacey Act Web site mentioned above.

Therefore, for the reasons given in the interim final rule and in this document, we are adopting the interim final rule as a final rule without change.

This action also affirms the information contained in the interim final rule concerning Executive Orders 12866 and 13563 and the Regulatory Flexibility Act, Executive Orders 12988 and 13175.

#### Paperwork Reduction Act

Section 3 of the Lacey Act makes it unlawful to import certain plants and plant products without an import declaration, which must contain, among other things, the scientific name of the plant, value of the importation, quantity of the plant, and name of the country in which the plant was harvested. In addition, there is a supplemental form that must be completed if additional space is needed to declare additional plants and plant products. Also, records of the import declaration and supplemental form must be retained for at least 5 years. These collection activities have been approved by the Office of Management and Budget (OMB) under OMB control number 0579-0349. We published a notice in the Federal Register on August 21, 2014

(79 FR 49491-49492, Docket No. APHIS-2014-0073) seeking an extension of the approval for this information collection.

Common cultivars and common food crops are among the categorical exclusions to the provisions of the Act. In the July 2013 interim final rule, we advised the public that inquiries about specific taxa or commodities and requests to add taxa or commodities to the list, or remove them from the list, be sent in writing to APHIS, including information as to the scientific name of the plant (genus, species), common or trade names, annual trade volume (e.g., cubic meters) or weight (e.g., metric tons/kilograms) of the commodity, and any other information that will help us make a determination, such as countries or regions where grown, estimated number of acres or hectares in commercial production, and so on.

We inadvertently did not obtain OMB approval for this information collection activity. Therefore, in accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.), we published a notice in the Federal Register on October 15, 2014 (79 FR 61846-61847, Docket No. APHIS-2014-0082), announcing our intention to initiate this information collection and to solicit comments. We have asked OMB to approve our use of this information collection for 3 years. When OMB notifies us of its decision, we will publish a document in the Federal Register providing notice of the assigned OMB control number, and we will combine this collection with OMB control number 0579-0349 once it is approved by OMB.

E-Government Act Compliance

The Animal and Plant Health Inspection Service is committed to compliance with the E-Government Act to promote the use of the Internet and other information technologies, to provide increased opportunities for citizen access to Government information and services, and for other purposes. For information pertinent to E-Government Act compliance related to this

rule, please contact Ms. Kimberly Hardy, APHIS' Information Collection Coordinator, at (301) 851-2727.

List of Subjects in 7 CFR Part 357

Endangered and threatened species, Plants (Agriculture).

**PART 357--CONTROL OF ILLEGALLY TAKEN PLANTS**

Accordingly, we are adopting as a final rule, without change, the interim final rule that amended 7 CFR part 357 and that was published at 78 FR 40940-40945 on July 9, 2013.

Done in Washington, DC, this 15<sup>th</sup> day of January 2016.

Gary Woodward,

Deputy Under Secretary for Marketing and Regulatory Programs.

[FR Doc. 2016-01399 Filed: 1/22/2016 8:45 am; Publication Date: 1/25/2016]