

March 6, 2009

Filed Electronically

Kevin Shea
Acting Administrator Animal and Plant Health Inspection Service
U.S. Department of Agriculture
Administration Building
1400 Independence Avenue, SW
Washington, DC 20250

**Re: Notice of Request for Extension of Approval of an Information Collection;
Lacey Act Declaration Requirement; Plants and Plant Products – Docket
No. APHIS-2008-0136**

Dear Mr. Shea:

I am writing on behalf of the National Marine Manufacturers Association (NMMA) to comment on the Animal Plant Health Inspection Service's (APHIS) notice and request for comments on its intention to request an extension of approval of an information collection required by the Lacey Act for the importation of certain plants and plant products.¹

The 2008 Farm Bill (The Food, Conservation, and Energy Act of 2008) amended the Lacey Act. Therefore, as of May 22, 2008, the Lacey Act makes it unlawful to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any plant taken, possessed, transported or sold in violation of the laws of the United States, a State, an Indian tribe, or any foreign law that protects plants. The Act also now makes it unlawful after Dec. 15, 2008 to import certain plants and plant products without an import declaration. The Lacey Act's mandatory declaration provision requires a description of a plant or plant product including trees (but excluding common cultivars or food crops) be submitted as a condition of importation. See Section 8204 of the 2008 Farm Bill.

APHIS is seeking Office of Management and Budget (OMB) approval to collect this information. APHIS has received emergency approval from OMB that allowed it to make the

¹ *Notice of Request for Extension of Approval of an Information Collection; Lacey Act Declaration Requirement; Plants and Plant Products*, 74 Fed. Reg. 259 (Jan. 5, 2009); Food Conservation and Energy Act of 2008, Pub. L. 110-246, § 8204, 122 Stat. 2052 (2008). The Lacey Act combats trafficking in "illegal" wildlife, fish and plants. The 2008 amendments expand its protection to a broader range of plants and plant products.

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existing form available to importers and brokers. APHIS asks in this notice for approval for this extensive information collection for 3 years. In its analysis, APHIS has estimated that the public reporting burden for this collection will average 1.5 hours per response. NMMA urges APHIS to re-evaluate this estimate as it substantially undercounts the difficulty in making the reports required by this form.

The information required in the Plant and Plant Product Declaration Form is not information that is readily available to most importers. The typical importer of either a finished manufactured product or an input to be included in a product to be manufactured in the United States does not have first hand knowledge of the information requested in this form, specifically the Plant Scientific Name (including Genus and Species) and the County of Harvest. In order to obtain this information, an importer will have to make numerous requests to their entire supply chain. In the case of composite products like a finished boat or marine quality plywood there will be multiple species and countries of harvest. Quite simply, the more complex the product -- the more difficulty there will be in ascertaining this information.

Most importantly, APHIS is requiring that the importer submitting this information certify under threat of perjury that the information submitted is correct. The submitter would rarely, if ever, have first hand knowledge of this information. Thus, APHIS is imposing an enormous due diligence requirement and dramatically increasing the hours and staff needed to comply with this information request. NMMA members report to us that they have already had to make multiple inquiries of their suppliers throughout the supply chain in order to obtain the reportable information. When you factor in all the components of the supply chain who must respond to the importer's inquiries in order to complete one declaration form, the information collection burden should be ten-fold of the APHIS estimate. In all cases, it is difficult to determine if the request was understood by these foreign entities and is accurate. The accuracy of information is especially suspect in the Plant Scientific Name category.

APHIS could significantly reduce the information collection burden on importers required to submit the Plant Declaration Form if it recognized that importers will only be able to give information to the best of their ability and refrain from requiring the importer to certify under threat of perjury for an inaccurate report. Indeed, the Lacey Act expects that an importer will not have perfect information and allows for an importer, if the plant species or county of harvest is unknown, to instead list possible species or countries that the plant *may* have been taken from. See Section 8204(f)(2)(A) & (B) of The 2008 Farm Bill; Pub. L. 110-246; 122 Stat. 2054 (2008) (the declaration shall "contain the name of each species of plant that may have been used to produce the plant product ..[and] .. contain the name of each country from which the plant may have been taken...") Yet, APHIS has not given any indication of this flexibility in the Plant Declaration Form and instead included the perjury notice giving the impression that extreme due diligence must be expended to be absolutely certain of the information provided to APHIS.

Finally, NMMA has explained to APHIS in comments that is critical that the agency provide for the confidentiality of the declaration information. See NMMA Comments to APHIS dated Dec. 8, 2008. APHIS should give importers adequate assurance that the information

provided in the Plant and Plant Product Declaration Form will be confidential and not be disclosed by the agency via a Freedom of Information Act (FOIA) request. NMMA urged APHIS to include in its regulations a class determination that the information submitted in the declaration form is considered confidential. The Agency is authorized to make a proactive class determination under FOIA Exemption 4.² FOIA Exemption 4 allows an agency to withhold "trade secrets and commercial or financial information obtained from a person and privileged or confidential." This is vitally important because the information included in the declaration could provide a competitor with information that could cause substantial harm to the competitive position of the submitter of the information.³ For example, a competitor may be able to gain information about the sales volume, costs and sourcing of a competitor. This is especially true when product niches include few competitors. In particular, since importers are providing this information to APHIS involuntarily it should be held confidentially by the agency.

Any public interest in this information could best be served by only releasing it in an appropriate aggregate format. Aggregate information (that does not identify an individual importer or identify products that would identify an individual importer) would not pose the same risk of substantial harm to the competitive position of the information submitter. If APHIS does not provide a categorical class determination of confidentiality, then it is imperative that the Plant Declaration form contain a section allowing a submitter to opt to have the information held confidential due to the submitter's determination that its release would cause substantial harm to its competitive position.

For the above reasons, NMMA asks that OMB not approve this information collection request until an accurate information collection burden estimate is calculated, the certification

² 5 U.S.C. 552(b)(4). APHIS is authorized by law to make categorical class determinations regarding the confidentiality of information under the Freedom of Information Act because individual determinations as to the confidentiality of the data submitted would adversely affect the agency's regulatory scheme and because the Supreme Court has recognized the ability of agencies to proceed by rulemaking rather than by individual adjudications unless Congress has otherwise specified. *See Fed. Power Comm'n*, 377 U.S. 33, 44, 84 S.Ct. 1105. (1964).

³ 4 U.S.C. § 552(b)(4); *See e.g. Center for Public Integrity v. FCC*, 505 F.Supp.2d 106, 112 (D.D.C. 2007)(holding that Exemption 4 will allow for withholding of information submitted involuntarily "upon a showing that disclosure is likely 'to cause substantial harm to the competitive position of the persons from whom the information was obtained.'")(citing *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). For an example of an agency providing a class determination see *NHTSA Confidential Business Information*, 72 Fed. Reg. 59,434 (Oct. 19, 2007)(codified at 49 CFR Part 512)(final rule providing for the confidentiality of certain information that manufacturers of motor vehicles and motor vehicle equipment must submit to NHTSA pursuant to the early warning reporting rule by establishing class determinations of certain categories of EWR information as confidential based on Exemption 4 of FOIA).

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under threat of perjury is removed and a section is added allowing the submitter to opt to have the information treated by the agency as confidential business information.

The National Marine Manufacturers Association (NMMA) is the leading national recreational marine trade association, with nearly 1,700 members involved in every aspect of the boating industry. NMMA members manufacture over 80 percent of recreational boats, engines, trailers, accessories and gear used by boaters and anglers in the United States. The U.S. boating industry is comprised mostly of small- and medium-sized businesses, and our products are primarily made in America by American workers. The U.S. exported more boats and engines (\$2.9 billion) in 2007 than were imported (\$2.5 billion) resulting in a trade surplus of \$391 million.

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NMMA appreciates the opportunity to provide comment to APHIS on the Lacey Act plant import provisions. Please contact me at 202-737-9766; csquires@nmma.org for any additional information or if you have any questions on this material.

Sincerely,



Cindy L. Squires, Esq.
Chief Counsel for Public Affairs and Director of Regulatory Affairs

CC: Ms. Shawne Carter McGibbon, Acting Chief Counsel for the U.S. Small Business Administration, Office of Advocacy