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December 8, 2008

Regulatory Analysis and Development, PPD
Animal and Plant Health Inspection Service
U.S. Department of Agriculture
Station 3A-03.8
4700 River Road Unit 118
Riverdale, Maryland 20737-1238

RE: APHIS-2008-0119

To Whom It May Concern:

On behalf of the International Association of Color Manufacturers (IACM), I am writing to submit comments regarding the implementation of the Lacey Act provisions in the Food, Conservation and Energy Act of 2008 (FCEA). The FCEA amended the Lacey Act to provide, among other things, that importers submit a declaration at the time of importation for certain plants and plant products. These declaration requirements become effective on December 15, 2008.

The members of the International Association of Color Manufacturers include color manufacturers, color users, color ingredient suppliers and others with an interest in and commitment to providing the public a substantial supply of safe coloring substances for use in food products. Many color ingredients originate from species such as carmine which are cultivated from plants such as cacti and, absent a clear definition of "common cultivars" and "common food products" could be unnecessarily subject to the declaration requirements of the Lacey Act amendments.

IACM is concerned that the information proposed to be collected would contribute little to the intended purpose of the legislation -- to prevent illegal logging and associated trade of other wild plants which face the threat of illegal harvesting. In our view, the amendments are overreaching and will have a very significant, albeit perhaps unintended, impact on the use of plants not threatened by illegal harvesting but used extensively as the basis of ingredients for color formulations. IACM is also concerned that the proposed implementation plan, in its current form, would be nearly impossible to comply with and would impose unnecessary burdens on the color industry.

Trade Barrier Concerns

The declarations for imports to be regulated under the new Lacey Act Amendments 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. For plant products (as opposed to plants), if the plant species from which they are made varies and are unknown, importers will have to declare the name of each species that may have been used to produce the product. Similarly, if a plant product is made of plant species commonly harvested in more than one country and the country is unknown, the importer will be required to declare the name of each country from which the plant MAY have been harvested. This means that each and every importer of plant materials will have to keep track of each species that may have been used to produce a color or color ingredient as well as the name of each country of origin. What happens if the color manufacturer is not aware of each country of origin and fails to declare it when submitting the required information? Will those color manufacturers be subject to civil or criminal penalties or forfeiture of the plant or plant product in question? In our view the near impossibility of compliance and the imprecision of the definitions could constitute a non-tariff trade barrier. We doubt seriously that Congress meant to subject commercial color products to this type of scrutiny.

IACM supports the two year review of the implementation of the Lacey Act Amendments and encourages APHIS and the Administration to do everything possible to prevent unnecessary trade barriers.

Limited Exemptions

Under the Lacey Act, as amended, “plant” means: “any wild member of the plant kingdom, including roots, seeds, parts or product thereof, and including trees from either natural or planted forest stands.” There are three categorical exemptions:

- (1) Common cultivars, except trees, and common food crops (including roots, seeds, parts or products thereof);
- (2) Scientific specimens of plant genetic material (including roots, seeds, germplasm, parts or products thereof) that are to be used only for laboratory or field research;
- (3) Plants that are to remain planted or to be planted or replanted.

We note in the notice and request for comments that the U.S. Department of Agriculture (USDA) and Department of the Interior (DOI) have been given authority under the Lacey Act to define the terms “common cultivar” and “common food crop.” We look forward to the opportunity to comment on that rulemaking, but believe it important to give the Department our views in advance of that proposed rule and suggest the following:

Establish a Narrow and Clearly Defined Scope of Products

First and foremost, APHIS should establish a narrow and clearly defined scope of products subject to the new import declaration and enforcement provisions of the Lacey Act. Specific exemptions should exist for all products and goods intended for human or animal consumption and all products regulated by the U.S. Food and Drug Administration (FDA) regardless of tariff code.

The term “common cultivars” and “common food products” should include, to name a few, carmine, saffron, heliotrope, mulberry, sunflower, carotene, sandalwood and pomegranate that are processed into colors for use in foods. We believe that any plants, roots, seeds, parts and plant products such as these that grow wild as well as commercially and have commercial value should be exempt from the declaration requirements of the Lacey Act amendments.

Establish a Database of Laws and Regulations Governing Plants and Plant Material

The scope of the amendments to the Lacey Act make it unlawful to “import, export, transport, sell, receive, acquire, purchase, in interstate or foreign commerce or possess any plant taken in violation of another country’s laws.” Ensuring compliance with all of these laws and regulations is very important to IACM members. We would therefore urge APHIS, in accordance with the recommendation in the Congressional guidance letter, to establish a website with a comprehensive database of all the various laws subject to enforcement under the Lacey Act within one year of the initial enforcement phase-in period slated to begin April 1, 2009. This website should also contain a list of all genus and specie names for plants, a reference of available tools for tracking wood and assessing the risk of an illegally sourced product. Consideration should also be given to delaying the implementation of the Lacey Act until such a website is made available to the affected public.

Enforcement Concerns

The Federal Register notice indicates that APHIS will make a paper declaration form available for voluntary submission and that no agencies with Lacey Act enforcement authority will bring prosecutions or forfeiture actions for failing to complete the forms before the electronic system for data collection is available April 1, 2009 or thereafter. However, any person who submits a form containing false information may be prosecuted. How will the agencies with Lacey Act enforcement authority address declarations of products such as “common cultivars” until APHIS and DOI have finalized the rulemaking to define that term? Would those shipments with a declaration form that is deemed to be non-compliant be subject to forfeiture and/or the importer subject to penalties?

The International Association of Color Manufacturers appreciates the opportunity to comment on these new requirements and we look forward to further clarification on the definition of “common cultivars” and “common food crops” and other questions posed herein. We would also be happy to provide any further information the Department of Agriculture and APHIS might require in an effort to resolve some of the concerns raised herein.

Sincerely,

Ellen Gardner
Executive Director