

**QUESTIONS BY THE HONORABLE JOHN FLEMING
CHAIRMAN, SUBCOMMITTEE ON FISHERIES,
WILDLIFE, OCEANS AND INSULAR AFFAIRS
FOR THE RECORD**

Questions for Mr. Marcus Asner
Responses submitted June 21, 2013

(1). On Page 1 of your testimony, you state that “the 2008 Amendments prevent illegal plants and plant products from flooding the U. S. market”. How does it accomplish that goal and where is the evidence that the Amendments have stopped illegal logging?

The Lacey Act works by incentivizing companies to monitor their own supply chains and to eliminate risky suppliers so they can better ensure that their products are legal and that their suppliers are legitimate. As companies eliminate risky suppliers, fewer illegal goods enter the U.S. market. This in turn protects U.S. interests and decreases illegal logging by reducing the demand for illegal goods. The 2008 Amendments also help level the playing field, making sure that responsible American companies that care about the legitimacy of their wood supply are not undercut by companies who cheat, cut corners, or are indifferent about the legality of their supply. While difficult to quantify, and the 2008 Amendments are still relatively new, the available statistics show that illegal logging has decreased since the 2008 Amendments. I refer the Chairman to Jameson French’s testimony for those statistics.

I have seen the impacts of the 2008 Amendments to the Lacey Act in my own practice. Major U.S. companies are taking a closer look at their supply chains as a result of the 2008 Amendments. I have helped major companies with their efforts to comply with the Lacey Act, including companies involved in the paper industry, publishing, and cosmetics. Responsible U.S. companies are taking a fresh look at their supply chains and are taking various measures to ensure that their suppliers are legal and that they have appropriate compliance programs in place. Steve McCreary’s company Collings Guitars provides a good example. In his testimony on May 16, 2013, Mr. McCreary reported that his company has taken a close look at its supply chain and removed untrustworthy suppliers. As he explained: “At Collings Guitars, we think we are in a better corporate position because of the 2008 amendments. We always thought we exercised due care in our procurement, but Lacey has led us to review our vendor compliance program, drop some suppliers, and continue to deal with those who we believe share our integrity and commitment to legal and responsible procurement.”¹ That is precisely what the Lacey Act Amendments are designed to do. As more companies work to ensure the legality of their supply chains, there will be less illegal wood and wood products in the market, which will help protect the health and viability of our wood supply.

¹ *Oversight Hearing on “The 2008 Lacey Act Amendments”*: Hearing Before the Subcomm. on Fisheries, Wildlife, Oceans and Insular Affairs, 113th Cong. (2013) (Statement of Steve McCreary, on behalf of Nat’l Ass’n of Music Merchants at 2), available at <http://naturalresources.house.gov/uploadedfiles/mccrearytestimony05-16-13.pdf>.

The enforcement actions taken against Gibson Guitar also show the Lacey Act is working. In the Criminal Enforcement Agreement (“CEA”), Gibson accepted responsibility for its actions² and admitted that it “should have taken a more active role and exercised additional due diligence.”³ The wood that had been imported illegally from Madagascar was forfeited and Gibson’s illegal importation of Madagascar wood was halted. In addition, pursuant to the CEA, Gibson implemented a compliance program to help ensure legal sourcing practices within the company. The Gibson compliance program is a useful model that other companies within the industry have been using to create their own Lacey Act compliance programs. Thus, the Gibson Guitar enforcement action has had a significant impact, both on the company specifically and on the wood and wood product industries more generally. With additional resources, the agencies charged with implementing and enforcing the Act would be able to have an even bigger impact, thereby helping companies who are trying to do the right thing in their efforts to compete with rogue companies who otherwise would cheat or be indifferent about the legality of their supply.

(2). On Page 2, you mention that the “Lacey Act prosecutions have been used to disrupt large-scale criminal organizations”. Could you cite an example of a large scale criminal organization that has been stopped because of the 2008 Amendments?

A case that takes down a large-scale criminal organization requires a significant investment of time and resources. It has only been five years since the passage of the 2008 Amendments, which is a relatively short time period in complex investigations, especially in the present environment in which government agencies lack adequate resources for enforcement. That said, the enforcement actions that have taken place are already stopping illegal activities. The Gibson Guitar case provides one example; as noted above, the enforcement actions taken against Gibson ended Gibson’s practice of importing of illegal wood from Madagascar, and Gibson now has implemented a compliance program that will help the company ensure that its wood is legal. This case may not have dismantled the type of “large-scale criminal organization” that the government has been able to address in other areas covered by the Lacey Act, but I believe that it is only a matter of time before we see such an action. At the hearing, Fish and Wildlife Service’s Deputy Director Stephen Guertin mentioned that there have been six investigations under the 2008 Amendments, three of which are ongoing. In time, one of these investigations could mature into a larger case, such as *Bengis* or *McNab*.

The *Bengis* case is a prime example of how the Lacey Act has worked to stop a large-scale criminal organization and how it will work under the 2008 Amendments. *Bengis* involved “a complex, trans-Atlantic criminal scheme to illegally import into the United States massive quantities of illegal South African rock lobster and Patagonian toothfish, and then to sell that fish in the United States for a significant profit.”⁴ The criminal organization was principally run through a company in New York, a fishing and fish-processing operation in South Africa, Hout Bay Fishing Industries, and a fish-processing and packing factory in Maine. On the U.S. side, the New York branch of the organization would “arrange for the importation of the illegal fish,

² Criminal Enforcement Agreement Between U.S. Dep’t of Justice and Gibson Guitar Corp. at 2 (July 27, 2012), available at <http://www.fws.gov/home/feature/2012/USvGibsonGuitarAgreement.pdf>.

³ *Id.* at App. A ¶ 15.

⁴ Government’s Memorandum of Law in Opposition to Defendants’ Joint Motion for a Departure from the Applicable Sentencing Guidelines Range at 7-8, *United States v. Bengis*, No. 1:03-cr-00308-LAK (S.D.N.Y. May 26, 2004), ECF No. 62.

the marketing, storage, sale and transportation of the fish after it arrived in the United States, and the collection of proceeds from the sale of the fish on the United States market,” and the Maine facility would process illegal imported rock lobster, in part by using “previously disadvantaged South African citizens without valid working permits.”⁵ The organization also constructed an elaborate, sophisticated system to conceal the proceeds of the criminal scheme and to avoid paying restitution to the victim, South Africa.⁶ In South Africa, as part of the scheme, the organization “routinely would harvest quantities of South Coast rock lobster and West Coast rock lobster far in excess of applicable quotas. In order to escape detection from South African authorities, the Bengis organization would seek to ‘stretch’ the applicable quotas by (among other things) offloading stolen lobster at night and under-reporting to South African authorities the actual amounts of fish harvested. They also would bribe South African fisheries inspectors to look the other way while off-loading over-harvested fish at Hout Bay’s facility in Cape Town. And, once the fish was ready for export, they would submit false documents to South African authorities to conceal their illegal activities.”⁷ The impacts of these activities on the environment and on the U.S. were significant. The stolen fish were less expensive, which adversely affected legitimate competitors’ businesses and customer relationships.⁸ Further, the scheme severely depleted the South Coast rock lobster population, adversely affecting other, legitimate fishermen and the supply available to the U.S.—the largest consumer of South African South Coast lobsters in the world.⁹ The Lacey Act prosecution put an end to this illegal scheme. Only after the defendants were stopped and Hout Bay was closed did the lobster supply begin to recover, although the long-term impacts are unknown.¹⁰

Another example of the Lacey Act putting an end to a large and destructive international criminal organization is the *McNab* case, which involved more than 40 illegal shipments of spiny lobster tails from Honduras, adding up to more than 1.6 million pounds of spiny lobster with a retail value of over \$17 million.¹¹ A jury found each of the four defendants in *McNab* guilty of one or more of the following: conspiracy, smuggling, money laundering, Lacey Act violations, and false labeling.¹² These illegal activities, which included the illegal harvesting of undersized lobsters and the destruction of lobster eggs, had a devastating impact on lobster populations in Honduras.¹³ This in turn affected the United States’ supplies as well; the offspring of lobster populations in areas like Honduras and Nicaragua are, given the current flows in the Gulf, the primary parental source for replenishing lobster stocks in the southeastern United States.¹⁴

⁵ *Id.* at 9.

⁶ See Memorandum of Law in Further Support of the Government’s Application for Writ Under 28 U.S.C. § 1651(a) and in Support of the Government’s Motion for Order to Show Cause, *United States v. Bengis*, No. 1:03-cr-00308-LAK, (S.D.N.Y. Apr. 22, 2013), ECF No. 232.

⁷ 5/26/2004 Memorandum, *supra* note 4 at 10-11; *United States v. Bengis*, 631 F.3d 33, 35, 40 (2d Cir. 2011).

⁸ 5/26/2004 Memorandum, *supra* note 4 at 15.

⁹ *Id.* at 15-16.

¹⁰ *Id.* at 16-17.

¹¹ NOAA, *McNab to Continue Serving Federal Prison Sentence for Lobster Smuggling*, NOAA 2004-R119 (Mar. 22, 2004), available at <http://www.publicaffairs.noaa.gov/releases2004/mar04/noaa04-r119.html>.

¹² *United States v. McNab*, 331 F.3d 1228, 1235 n.10 (11th Cir. 2003).

¹³ NOAA, *supra* note 11.

¹⁴ *Id.*

Florida's lobster harvests dramatically declined in part because of the illegal harvest of small lobsters and female egg-bearing lobsters in the source fisheries off Central America.¹⁵

International environmental crime has impacts beyond depleting important natural resources. As I noted in my written testimony, the Director of National Intelligence's *Statement for the Record on the 2012 Worldwide Threat Assessment of the US Intelligence Community* states that "[t]ransnational organized crime (TOC) networks erode good governance, cripple the rule of law through corruption, hinder economic competitiveness, steal vast amounts of money, and traffic millions of people around the globe TOC threatens U.S. national interests in a number of ways,"¹⁶ one of which is through environmental crime: "Illicit trade in wildlife, timber, and marine resources constitutes a multi-billion dollar industry annually, endangers the environment, and threatens to disrupt the rule of law in important countries around the world. These criminal activities are often part of larger illicit trade networks linking disparate actors—from government and military personnel to members of insurgent groups and transnational organized crime organizations." The World Bank similarly has reported that "[i]llegal logging also has detrimental economic impacts. It stifles economic development and distorts the marketplace, discouraging legitimate forest enterprises from making socially and environmentally responsible investments in forestry and undermining attempts to achieve successful and sustainable management of forest resources worldwide. Finally, the extensive corruption associated with illegal logging weakens broader structures of governance and the rule of law."¹⁷ As evidenced by *Bengis* and *McNab*, there is great potential for the Lacey Act to help put an end to criminal organizations and in turn reduce threats to the U.S. In the meantime, the increased attention to supply chains encouraged by the Lacey Act will decrease the demand for illegal goods and the use of illegal suppliers, which in turn will decrease the proceeds available to criminal networks.

(3). Since April 1, 2009, the Animal and Plant Health Inspection Service has received 1.9 million declaration forms. They are not routinely shared with other government agencies, less than 1 percent is reviewed by APHIS and not a single one has triggered an investigation. Based on these facts, explain how these plant and plant product declarations have helped "in the investigation and prosecution of criminal organizations"?

The declaration forms required by the 2008 Amendments to the Lacey Act serve several important purposes, two of which are particularly relevant to this question: compliance and enforcement.

The declaration requirement encourages compliance with the Act and forces companies to examine their supply chains. Completing the declaration form requires gathering information about the supply chain, which helps highlight potential illegal activity. According to the May 16, 2013 testimony of Rebecca Bech, Deputy Administrator of the Plant Protection and Quarantine Program within USDA's Animal and Plant Health Inspection Service (APHIS), while the agency is understaffed and has insufficient resources, the majority of declarations filed are still reviewed

¹⁵ *Id.*

¹⁶ *Statement for the Record on the Worldwide Threat Assessment of the US Intelligence Community, Before the S. Select Comm. On Intelligence*, 113th Cong. 5-6 (2013) (statement of James R. Clapper, Director of National Intelligence), available at <http://www.intelligence.senate.gov/130312/clapper.pdf>.

¹⁷ The World Bank, *Justice for Forests: Improving Criminal Justice Efforts to Combat Illegal Logging* at 2 (2012), available at http://siteresources.worldbank.org/EXTFINANCIALSECTOR/Resources/Illegal_Logging.pdf.

for completeness and compliance with the Act.¹⁸ While the declaration requirement may be new in the wood and wood products industries, it is not a foreign concept. The Convention on International Trade in Endangered Species requires import and export permits for species listed on certain appendices under the convention. There are customs and food labeling requirements for commercial food imports, which request similar information. The Commission for the Conservation of Antarctic Marine Living Resources (“CCAMLR”) imposes an even more onerous reporting requirement called a “*Dissostichus* catch document” scheme for toothfish (*Dissostichus eleginoides* and *Dissostichus mawsoni*), including fish commonly marketed as “Chilean seabass,” because illegal fishing is threatening to seriously deplete toothfish populations.¹⁹

Critics may seek to dismiss the declaration filing requirement as a mere technical requirement. I think they are wrong. The declaration requirement is crucial to a regulatory scheme designed to combat illegal logging. It provides an incentive for legal behavior and a mechanism for law enforcement officials to identify and stop illegal activity. In that regard, the declaration requirement is similar to requirements utilized in a wide range of legal regimes, particularly when the purpose is to protect the environment. One example is the Clean Water Act, which requires that dischargers apply for a permit to discharge pollutants into the waters of the United States.²⁰ These permitting requirements help regulators ensure that water bodies are adequately protected from excessive pollution. Similarly, the Honduran processing requirements violated in *McNab* were designed to help fisheries managers ensure that the lobsters were not being overharvested to the detriment of the species, the legitimate fishermen relying on the harvest for their livelihood, and the consumers of the lobsters. Where a resource is accessible by a number of individuals and subject to degradation, reporting mechanisms such as the declaration requirement are often the best way to prevent degradation and devastation.

In addition to encouraging compliance with the Lacey Act, declarations make it “possible to flag for further review or investigation specific shipments as to which questions arise based on information provided in the declarations filed for those shipments.”²¹ In short, they serve to target efforts and thus maximize the efficiency of the limited enforcement resources currently available. According to Mr. Guertin’s hearing testimony, there have been six investigations under the 2008 Amendments to the Lacey Act, all of which have involved the declarations. In addition, “[e]nforcement agencies can use information on declarations to target their limited enforcement resources on imports with a higher likelihood of illegality.”²² Once an investigation

¹⁸ According to the Report to Congress on implementation of the Lacey Act submitted to Congress after the hearing, APHIS has received approximately 1.4 million import declarations since 2009. While the vast majority of declarations filed are electronic, many (more than 17%) are still being filed in paper form, and “APHIS has been limited in its ability to manage paper declarations due to the lack of appropriated resources.” Animal and Plant Health Inspection Service (APHIS) and U.S. Department of Agriculture (USDA), *Report to Congress Senate Committee on Agriculture, Nutrition, and Forestry, Senate Committee on Environment and Public Works, House Committee on Agriculture, and the House Committee on Natural Resources With Respect To Implementation of the 2008 Amendments to the Lacey Act* at 10 (May 2013), available at <http://iwpawood.org/associations/8276/files/Lacey%20Report%20to%20Congress%205.30.13.pdf>.

¹⁹ CCAMLR, Conservation Measure 10-05 (2012), Catch Documentation Scheme for *Dissostichus* spp., available at http://www.ccamlr.org/sites/drupal.ccamlr.org/files//10-05_0.pdf.

²⁰ 33 U.S.C. § 1342.

²¹ APHIS Report, *supra* note 18. at 23.

²² *Id.*

turns into an enforcement action, declaration forms can provide important evidence that links problematic imports and suppliers. Indeed, similar importation forms filed in the *Bengis* case played a central role in that investigation and prosecution.

The declarations' role in encouraging compliance and in the investigation and prosecution of environmental crime would be undermined if the declaration system were changed to an "on demand" system. Such a system would not provide the same incentives for compliance and therefore would render the declaration requirement less effective at deterring illegal activity. Further, shifting to an "on demand" system makes no sense either as a law enforcement matter or as a business matter. To be blunt: if law enforcement agents had to jump through the hoop of requesting a declaration form from a rogue company engaged in importing illegal wood, they in effect would have to tip off the company that it was under investigation, which in turn would give the bad actors a chance to destroy evidence, otherwise cover up the illegal activity or flee before they are arrested. As a business matter, an "on demand" system would still require 98% of the effort by the company because it still would have to gather all of the information necessary to complete the form so that it could be produced on demand. Avoiding pressing a button to file a document that has already been completed is hardly a huge benefit to businesses, but it is a huge detriment to the law enforcement efforts that help provide those businesses with a level playing field.

Finally, the declaration requirement serves to protect innocent companies that are complying with the Lacey Act. The declarations help companies identify and remedy potential issues, and in an enforcement action would help establish that the companies are exercising due care.

(4). Mr. Asner, you use the example of a stolen baseball. However, in the case of forfeited wood and wood products, the original owner doesn't get the timber back but it is sold by the Fish and Wildlife Service and cleansed in international commerce. It is simply wrong to treat a piece of furniture the same way as stolen art work or an autographed baseball which are "illegal to possess". What is wrong with allowing folks an opportunity to have their case heard before an Administrative Law Judge and seek the return of products which they obtained through the exercise of "due care". Isn't the burden on the plaintiff to prove their case?

It is important to recognize the distinction between forfeiture and restitution, as well as how these two concepts support property rights and victims' rights. The law imposes upon the Department of Justice an affirmative obligation to identify the victims of crimes and to return stolen property to its rightful owner.²³ Restitution is mandatory in most federal crimes affecting property.²⁴ Where goods are forfeited to the government and restitution is ordered, the Department of Justice can return the forfeited goods to the rightful owner under its "Restoration Policy."²⁵ The same framework applies to the illegal goods at issue under the Lacey Act. The Civil Asset Forfeiture Reform Act (CAFRA) provides the legal framework for civil forfeiture, and restitution may be used to compensate the victims of this environmental crime where the

²³ See 18 U.S.C. § 3771(a), (c); §§ 3663, 3663A.

²⁴ 18 U.S.C. § 3663A.

²⁵ See *Bengis*, 631 F.3d at 41.

rightful owner can reasonably be identified.²⁶ Indeed, as Preet Bharara, the United States Attorney for the Southern District of New York, explained recently:

[T]hose who violate the environmental laws of another country by illegally taking fish, wildlife, or plants and then import these items into the U.S. will be required to pay back the victims of their offenses. This Office remains committed to ensuring, no matter how long it takes, that those who would damage another country's environment and seek to profit in the U.S. market will have to remedy their violations of law and repay those foreign governments.²⁷

Indeed, on June 14, 2013, Judge Lewis Kaplan of the U.S. District Court for the Southern District of New York ordered the defendants in the *Bengis* matter to pay restitution of approximately \$29.5 million for the lobsters they illegally poached from South African waters and shipped to the United States.²⁸

Victims of environmental crimes should be protected, and this includes people who had their trees stolen. I believe that the forfeiture provisions under CAFRA provide an adequate means of protecting those victims. As I mentioned in my testimony, if any change is contemplated, I think the Lacey Act could be strengthened by enacting a rebuttable presumption that wood or wood products from a particular country are owned by that country for purposes of the return of stolen property or restitution in the event that an individual victim owner cannot reasonably be identified. It also could be strengthened by explicitly expanding the list of crimes covered by the federal restitution statutes,²⁹ so that they explicitly would cover the Lacey Act. As I mentioned before, that fix would help facilitate the return stolen articles to their rightful owner in cases where the evidence establishes a substantive Lacey Act violation, but fails to support a charge under a Title 18 crime (for example, where the defendant acted alone and therefore did not violate the federal conspiracy statute, 18 U.S.C. § 371).

I disagree with the suggestion that furniture should be treated differently from a piece of stolen art or an autographed baseball. Stolen wood is illegal to possess under the law, just like stolen art or memorabilia, or stolen fish or wildlife.³⁰ There is simply no reason to create a special exception here. Regardless of what the object is, the illegal wood rightfully belongs to and was illegally taken from someone or some state. The forfeiture procedures provided by CAFRA and adopted by the Lacey Act are similar to those used under various laws.³¹ Permitting people to

²⁶ See, e.g., Memorandum Opinion, *United States v. Bengis*, No. 1:03-cr-00308-LAK (S.D.N.Y. Jun. 14, 2013), ECF No. 250 (awarding restitution to South Africa only for illegally harvested lobster imported into the United States or intended for shipment to the United States); *United States v. Bengis*, 631 F.3d 33 (2d Cir. 2011); *United States v. Borden*, 10 F.3d 1058 (4th Cir. 1993) (trafficker of illegal mussels ordered to pay \$100,000 restitution)..

²⁷ United States Attorney's Office, Southern District of New York, *Officers of Fishing and Seafood Corporations Ordered to Pay Nearly \$22.5 Million to South Africa for Illegally Harvesting Rock Lobster and Smuggling It into the United States*, June 14, 2013, available at <http://www.justice.gov/usao/nys/pressreleases/June13/BengisArnoldetalRestitutionPR.php?print=1>.

²⁸ *Id.*; Memorandum Opinion, *supra* note 27.

²⁹ 18 U.S.C. §§ 3663, 3663A.

³⁰ *United States v. 144,744 Pounds of Blue King Crab*, 410 F.3d 1131 (9th Cir. 2005) (holding that goods seized under the Lacey Act are contraband or otherwise illegal to possess).

³¹ 18 U.S.C. § 2323 provides that property is subject to forfeiture were the making or trafficking of it is prohibited under, among other provisions, § 2318 (trafficking in counterfeit labels, illicit labels, or counterfeit

keep illegal wood or wood products would remove the deterrent effect of the Lacey Act and perpetuate the demand for illegal goods in the market.

Finally, I agree with the Chairman's suggestion that folks should have "an opportunity to have their case heard before an Administrative Law Judge and seek the return of products which they obtained through the exercise of due care." In cases where a rightful owner cannot be identified, for example, a truly innocent possessor should be able to argue that she should get to keep the wood. Luckily, that is already the law. CAFRA explicitly contemplates a process under which a person may file a claim for the return of seized property. After the seizure, the government must provide notice to the person from whom the property was seized. That person may do one of two things: (1) file a claim in court contesting forfeiture; or (2) submit a petition straight to the agency that seized the property.³² The second option is a well-established system, commonly referred to as "remission." The federal departments charged with enforcing the Lacey Act, including the Department of the Interior, the Department of Agriculture, the National Oceanic and Atmospheric Administration, and the Department of Justice, all have regulations permitting people to file a petition for remission, seeking the return of goods that otherwise would be illegal to possess under the Lacey Act.³³ The petitioner sets forth the reasons why the goods should be returned and the agency determines whether, in light of the particular circumstances, mitigation is warranted or the goods should be returned.³⁴ In fact, that is what happened in Gibson. As noted, Gibson conceded that Madagascar wood was illegal and that wood was forfeited. However, because the Indian law was ambiguous with respect to whether the Indian wood Gibson had imported was legally exported "finished" wood or illegally exported "unfinished" wood, the government allowed Gibson to file an unopposed petition for remission to seek the return of that wood.³⁵ Gibson filed the remission petition and that Indian wood was in fact returned.³⁶

Thank you again for the opportunity to share my views on this important subject. Please do not hesitate to contact me if any additional questions arise.

documentation or packaging), § 2319 (criminal infringement of a copyright), § 2319A (unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), § 2319B (unauthorized recording of Motion pictures in a Motion picture exhibition facility) or § 2320 (trafficking in counterfeit goods or services); *see also* 18 U.S.C. § 545 (providing that merchandise smuggled into the U.S. contrary to law is subject to forfeiture).

³² *See* 18 U.S.C. § 983(a).

³³ *See* 50 C.F.R. § 12.24 (FWS, Department of Interior); 7 C.F.R. § 356.7 (Department of Agriculture); 15 C.F.R. § 904.506 (NOAA); 28 C.F.R. § 9.4 (DOJ).

³⁴ *See, e.g.*, 50 C.F.R. § 12.24(e).

³⁵ Gibson CEA, *supra* note 2 at 3.

³⁶ *See* Gibson USA - Electric Guitars, <http://www.gibson.com/press/usa/> (last visited Jun. 20, 2013) (advertising the sale of "Government Series" guitars made from wood reclaimed from FWS in the remissions process); Musician's Friend, Gibson Les Paul Government Series Electric Guitar, <http://www.musiciansfriend.com/guitars/gibson-les-paul-government-series-electric-guitar> (last visited Jun. 20, 2013) (describing the commemorative Les Paul guitars and noting that "[i]nterspersed among the general production run of the Government Series, the confiscated and returned components will be 'golden tickets' of a sort, rendering these particular guitars instantly collectible.").