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## **Aquaculture and the Lacey Act**

by

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# Aquaculture and the Lacey Act

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Aquaculture includes raising aquatic species for consumption, as well as for recreational or ornamental purposes. The practice has a long history, reflected in both ancient Chinese and Egyptian records indicating that carp and tilapia was raised over 4,000 years ago.

However, aquaculture in the United States has a much more limited history. It began in the mid 1800s when hatcheries were built to raise sportfish species. Attempts to commercialize aquaculture for food purposes did not begin until the 1950s, with the development of catfish farming in the Mississippi Delta region. From those beginnings it has become a nationwide industry, with yearly sales of \$1.5 billion, according to the 2007 Census of Agriculture.

Aquaculture is regulated at various levels of government. State and local authorities generally regulate activities and issue permits for zoning, building, land and water use. They also oversee waste discharge and aquaculture production practices and species.

States are influenced by their unique history and ecology. The agencies responsible for certain regulations are vary widely from state to state, and so do the resulting regulations. As a result, state aquaculture regulation is a bewildering combination of regulations with little or no consistency between geographic locations.

At the federal level, different agencies are responsible for distinct areas of aquaculture regulation. For example, the Food and Drug Administration (“FDA”) regulates the safety of the food supply, including aquacultural products. On the other hand, the Environmental Protection Agency (“EPA”) is responsible for environmental regulations. Other agencies are involved in different ways. They include the United States Department of Agriculture (“USDA”), the Army Corps of Engineers, the National Oceanic & Atmospheric Administration (“NOAA”), and the Fish and Wildlife Service (“FWS”). The FWS is responsible for enforcement of the Lacey Act, and is the agency most relevant to this factsheet.

## **History and Provisions of the Lacey Act**

One statute with the potential to dramatically affect aquaculture is the Lacey Act.<sup>1</sup> The Lacey Act is a federal statute passed to protect wildlife. It was originally intended to prevent the shipment of unlawfully killed game across state lines, the killing of birds for the feather trade and the introduction of harmful invasive species. The Act has been amended several times since it was passed. The 1981 changes were very significant, establishing the basis for what is now enforced.

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<sup>1</sup> 18 U.S.C. §§ 41-48; 16 U.S.C. §§ 3371-3378

The Lacey Act applies to all “wild” animals. It specifically includes fish and amphibians, even if those creatures have been “bred, hatched, or born in captivity.” The Act makes it unlawful to “import, export, transport, sell, receive, acquire or purchase” any fish or wildlife “taken, possessed, transported, or sold” in violation of laws or regulations that relate to fish or wildlife. The laws or regulations violated could be state, federal, tribal or foreign.

One way that the Lacey Act may be triggered is by the violation of a *federal* law or regulation.<sup>2</sup> If this happens, the offender can be prosecuted under the Lacey Act even if no interstate shipment takes place.<sup>3</sup> For example, the Endangered Species Act is a federal law that protects certain species. If someone “transport[s], sell[s], receive[s], acquire[s], or purchase[s]” a creature that has been “taken, possessed, transported, or sold” in violation of that law, the individual may be prosecuted under either the Endangered Species Act or the Lacey Act, even if they do not cross a state line.

However, the Lacey Act is also triggered when law involving fish or wildlife is violated by a product that has been part of interstate commerce. If it involves interstate commerce, it could be either a state or federal law that was violated.

Think about each state’s protected, prohibited, restricted or approved exotic or game species lists. The lists are established by the state department of natural resources, fish and game, environmental protection or agriculture, depending on which agency is given the authority to do so. The creatures on these lists can vary widely from one state to the next.

So, as an example consider Minnesota. As of this writing, it is illegal in that state to transport “prohibited invasive species” on a public road. Penalties for breaking the law are either a \$250 civil penalty or a misdemeanor offense. The penalty for the misdemeanor is up to 90 days in jail and/or a fine of \$1,000. As a result, Minnesota companies who transport one of these species to another part of the state may be prosecuted, but only under state law. A company based in another state who transports one of these species on a Minnesota road, however, may be prosecuted under the Lacey Act. This is important, especially considering the difference between state and Lacey Act penalties.

### **Lacey Act Penalties**

Lacey Act prosecutions fall into three categories, each carrying different penalties. Prosecutions can be for “felony” or “misdemeanor” trafficking violations of the Lacey Act, or for “false labeling.”

If an individual “knew” or “was generally aware of” the illegal nature of the wildlife **and** the value of the wildlife was over \$350, he may be prosecuted and convicted of a felony. If that happens, the maximum

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<sup>2</sup> A “law” is passed by Congress, while a “regulation” is a rule put into place by a federal agency, such as USDA or EPA.

<sup>3</sup> “Interstate shipment” is shipment between states. For example, “a truckload of lobsters was moved interstate between Maine and New York.”

penalty is up to 5 years in prison and/or a \$250,000 fine. The maximum fine is raised to \$500,000 in the case of an “organization,” including a business.

A misdemeanor is not as severe and carries lower penalties. Misdemeanor penalties are up to a year in prison and/or a \$100,000 fine (\$200,000 for organizations).

Misdemeanor prosecution may occur in two situations. The first is if the defendant takes, possesses, transports or sells wildlife “without exercising due care.” “Due care” means “that degree of care which a reasonably prudent person would exercise under the same or similar circumstances.” As a result, it is applied differently to people with differing amounts of knowledge and responsibility.<sup>4</sup> Generally, due care requires the judge to consider whether the defendant applied as much thought, planning and prevention as would a normally reasonable person in the same situation. It’s important to remember that the amount of “due care” a person must show changes depending on their knowledge and responsibility level. In other words, a producer transporting products across state lines will probably be held to a higher standard of care than a child transporting his pet goldfish during a cross-country move.

The second way in which a misdemeanor may be prosecuted under the Lacey Act is if the defendant knew about the illegal nature but the value of the wildlife was less than \$350. It’s important to note, however that prosecutors may “aggregate,” or combine, violations. Combining violations increases the value of the wildlife, potentially elevating the charge from misdemeanor to felony status.

The final Lacey Act offense is false labeling. If the products have a market value of less than \$350, false labeling is a 1 year/\$100,000 misdemeanor, but if the value is greater than \$350, the offender may be charged with another 5 year/\$250,000 felony.

### **Federal Enforcement of the Lacey Act**

Enforcement of the Lacey Act may happen in two possible situations. The first occurs when a federal law is violated, even if no interstate commerce takes place. This situation is described in the Endangered Species Act example given above. Secondly, it is triggered when a state law concerning fish or wildlife is violated by a product that has been part of interstate commerce. This is described in the Minnesota example, also given above.

How does this affect aquaculture? Imagine that a single fish (or even fish egg)- legal to possess in Wisconsin- is inadvertently loaded with a 2,000 pound truckload of other fish that is sold to a Minnesota buyer. That species is on the Minnesota prohibited list. Once the truck crosses the state line, it is stopped by the Minnesota DNR, searched, and the prohibited fish is found.

Both the Wisconsin seller and the Minnesota buyer may be prosecuted under the Lacey Act. What would have been a maximum penalty of 90 days and/or \$1,000 from the state of Minnesota has now

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<sup>4</sup> Senate Report 97-123.

turned into a potential year in federal prison and up to \$100,000 in fines. Additionally, the seller may be charged with false labeling (for failing to include the prohibited fish in the list of the shipment's contents). The false labeling offense may add up to another 5 years and/or \$250,000 to the sentence.

### **Minimizing Risk**

The risks associated with the Lacey Act can, of course, be minimized by only shipping products in-state. However, this is not a reasonable or feasible option for many aquacultural producers. For producers involved in interstate shipment, the only advice that may be helpful is to double-check and document every step taken to ensure that regulated species are not transported. At some point, your freedom and livelihood might depend on convincing a judge or jury that you exercised due care in trying to prevent it. Aquacultural producers can access the Injurious Species List, as authorized by the Lacey Act, at [www.fws.gov/fisheries/ans/ANSInjurious.cfm](http://www.fws.gov/fisheries/ans/ANSInjurious.cfm). The National Agricultural Library is assembling a nationwide compilation of information describing species regulated by the states. Find it at [www.invasivespeciesinfo.gov/laws/statelaws.shtml](http://www.invasivespeciesinfo.gov/laws/statelaws.shtml). The compilation is a work in progress, so aquacultural producers should still check with the Aquaculture Coordinator in both the destination state and their home state for regulated species information. Visit [www.nasac.net](http://www.nasac.net) for Coordinator contact information.

For more information on many legal aspects involved in aquaculture operations, please visit the National Agricultural Law Center's "Aquaculture" reading room, located at [www.nationalaglawcenter.org/readingrooms/aquaculture](http://www.nationalaglawcenter.org/readingrooms/aquaculture).



### Lacey Act Examples

Consider three producers. Producer A’s business is located in Arkansas, B’s is in Alabama and C’s is in Wisconsin, as shown on the map. They all engage in interstate shipping of their products while also receiving products from other companies that were shipped interstate. The interstate commerce triggers Lacey Act enforcement.

<p><u>Question:</u> Producer A sells an unlabeled load of diploid black carp to Producer B. Diploid black carp may be possessed in Arkansas. However, it is on the federal invasive species list, so it may not be transported across state lines.</p>	<p><u>Possible Charges:</u> Against A: Trafficking Against B: Trafficking</p>
<p><u>Question:</u> Producer A sells a load of catfish to Producer B, but it is labeled “whitefish”</p>	<p><u>Possible Charges:</u> Against A: False Labeling Against B: None</p>
<p><u>Question:</u> Producer A sells a load labeled “catfish” to Producer B, and a diploid black carp is included in the shipment.</p>	<p><u>Possible Charges:</u> Against A: False Labeling &amp; Trafficking Against B: Trafficking</p>
<p><u>Question:</u> Producer A sells a load labeled “catfish” to Trucker in AR. A diploid black carp is included in the shipment. Trucker drives the shipment to AL, and sells it to Producer B.</p>	<p><u>Possible Charges:</u> Against A: False Labeling Against B: Trafficking Against Trucker: Trafficking</p>
<p><u>Question:</u> Producer A sells a load correctly labeled “fishfish” to Producer C. Possession of “fishfish” is legal in AR and WI, but illegal in IL, where Trucker is pulled over.</p>	<p><u>Possible Charges:</u> No Lacey Act violation, as long as the load was correctly labeled.</p> <p>Trafficking provisions do not apply to interstate shipment if the shipment is traveling to a state where the fish or wildlife may be legally possessed.</p>