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by

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March, 2010

www.NationalAgLawCenter.org

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Aquaculture includes the cultivation of aquatic species for human consumption as well as for recreational or ornamental purposes. The practice has a long history, tracing back through ancient Chinese records indicating that carp was raised more than 4,000 years ago and hieroglyphics in the tombs of the Pharaohs describing tilapia farming in ancient Egypt. However, fish culture in the U.S. has a much more limited history, beginning in the mid 1800s when federal and state hatcheries were built to raise sportfish species to stock public and private waters. Attempts to commercialize aquaculture for food purposes did not begin until the 1950s, with channel catfish farming in the Mississippi Delta region. From those small beginnings it has become an extensive industry, bringing in yearly nationwide revenue of \$1.5 billion, according to the 2007 Census of Agriculture.

The practice of aquaculture is regulated at various levels of government, with state and local authorities generally regulating activities and issuing permits dealing with zoning, building, land and water use, waste discharge, and aquaculture production practices and species. Not surprisingly, each state's division of regulatory responsibility and authority among their agencies or offices, as well as the resulting regulations themselves, are all very different. They have each been influenced by unique state socioeconomic histories and the ecological differences between states. As a result, state aquaculture regulation is a bewildering mosaic of species regulations, with little to no consistency between geographic locations.

At the federal level, agencies responsible for different areas of regulation include the FDA, USDA, EPA, Fish and Wildlife Service ("FWS"), Army Corps of Engineers and National Oceanic & Atmospheric Administration ("NOAA").

History and Provisions of the Lacey Act

One major statute with the potential to severely affect aquaculture is the Lacey Act, 18 U.S.C. §§ 41-48, a federal statute passed in 1900 to protect wildlife. It was originally intended to combat hunting to supply commercial markets, the interstate shipment of unlawfully killed game, the killing of birds for the feather trade and the introduction of harmful invasive species. The Lacey Act applies to all "wild" animals, specifically including fish and amphibians, even when those animals have been "bred, hatched, or born in captivity." It is 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 (state, federal or foreign) that are fish or wildlife related. In 2008, plants were added to the scope of the Act.

One of the ways in which the Lacey Act can be triggered is by the violation of a federal regulation. If this happens, the offender can be prosecuted under the Lacey Act even if no interstate shipment takes place. For example, the Endangered Species Act is a federal statute that protects certain species. If an individual "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, that person 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 a state or federal law regarding fish or wildlife is violated by a product that has been part of interstate commerce. Each state has its own protected, prohibited, restricted or approved exotic or game species lists, established by a state department of natural resources, fish and game, environmental protection or agriculture, and the creatures on the list can vary widely from one state to the next. For an example in this situation, consider Minnesota. As of this writing, in Minnesota it is illegal to transport “prohibited invasive species” on a public road, and violation subjects the offender to a \$250 civil penalty or a misdemeanor (up to 90 days and/or \$1,000). As a result, a company based in Minnesota who transports one of these species to another part of the state may only be prosecuted under the 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 disparity between the state and Lacey Act penalties.

Lacey Act Penalties

Penalties for violating the Lacey Act are severe. 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 under the Act’s felony provisions. If that happens, the penalty is up to 5 years in prison and/or a \$250,000 fine (\$500,000 in the case of an “organization,” including a business).

Misdemeanor prosecution may occur in two situations. The first is if the defendant takes/possesses/transport/sells the prohibited 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 different categories of persons with varying degrees of knowledge and responsibility” (Senate Report 97-123). Generally, due care requires the judge to ask him or herself if the defendant, when trying to follow the law, applied as much thought, planning and prevention as would a normal, reasonable person in their situation. It’s important to remember that, as stated above, the amount of “due care” a person must show changes depending on their knowledge and responsibility level. As a result, an aquacultural producer transporting their products across state lines will probably be held to a higher standard of care than a child who is 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 for charging purposes. Combining the violations can increase the value of the wildlife, and potentially elevate the offense from misdemeanor to felony status. Misdemeanor penalties are up to a year in prison and/or \$100,000 fine (\$200,000 for organizations).

Further, false labeling of wildlife transported in interstate commerce is also criminalized, regardless of intent. 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

Federal enforcement of the Lacey Act is triggered in two situations. First, it is triggered when federal law is violated, even if no interstate commerce takes place. For example, if an individual possesses a creature that is illegal to possess under federal law, the Lacey Act may be enforced. Secondly, it is triggered when a state law regarding fish or wildlife is violated by a product that has been part of interstate commerce. Each state has its own protected, prohibited, restricted or approved exotic or game species lists, established by a state department of natural resources, fish and game, environmental protection or agriculture, and the creatures on the list can vary widely from one state to the next. For an example in this situation, consider Minnesota. In Minnesota it is illegal to transport “prohibited invasive species” on a public road, and violation subjects the offender to a \$250 civil penalty or a misdemeanor (up to 90 days and/or \$1,000). As a result, a company based in Minnesota who transports one of these species to another part of the state may be prosecuted under the state law. A company based in another state who transports one of these species on a Minnesota road may be prosecuted under the Lacey Act.

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 lb truckload of other fish that had been sold to an aquaculture producer in Minnesota. This single fish 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, and what would have been a maximum penalty of 90 days and/or \$1,000 from the state of Minnesota has now turned into a potential year in federal prison and up to a \$100,000 fine. Moreover, the seller may also be charged with false labeling (for failing to include the prohibited fish in the list of the shipment’s contents), adding 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 producers. For those producers involved in interstate shipment of aquacultural products, the only advice that may be helpful is to check, double-check and document every step taken to ensure that regulated species are not transported, because your freedom and livelihood might depend on convincing a judge or jury that you exercised due care in trying to prevent it. Aquaculturists can access the Injurious Species List, as authorized by the Lacey Act, by visiting <http://www.fws.gov/fisheries/ans/ANSInjurious.cfm>. The National Agricultural Library is working on a nationwide compilation of information describing species that are regulated by the states, and it is located at <http://www.invasivespeciesinfo.gov/laws/statelaws.shtml>. This compilation is still a work in progress, so aquacultural producers should still check with the Aquaculture Coordinator in the destination state or their state for regulated species information. Visit <http://www.nasac.net/> for Coordinator contact information.

For more information on the legal aspects involved in aquaculture operations, please visit the National Agricultural Law Center’s “Aquaculture” reading room, located at <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. That interstate commerce is the trigger to the Lacey Act.

Example 1

Question: 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.

Charges

Against A: Trafficking

Against B: Trafficking

Example 2

Question: Producer A sells a load of catfish to Producer B, but it is labeled "whitefish"

Charges

Against A: False Labeling

Against B: None

Example 3

Question: Producer A sells a load labeled "catfish" to Producer B, and a black carp is included in the shipment.

Charges

Against A: False Labeling & Trafficking

Against B: Trafficking

Example 4

Question: Producer A sells a load labeled "catfish" to Trucker in AR. A black carp is included in the shipment. Trucker drives the shipment to AL, and sells it to Producer B.

Charges

Against A: False Labeling

Against B: Trafficking

Against Trucker: Trafficking

Example 5

Question: Producer A sells a load labeled "fishfish" to Producer C. Possession of "fishfish" is legal in AR and WI, but illegal in IL, where Trucker is pulled over.

Charges: No Lacey Act violation, as long as the load was correctly labeled. Trafficking provisions do not apply to interstate shipment if the shipment is en route to a state in which the fish or wildlife or plant may be legally possessed.