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DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 356

[Docket No. APHIS-2007-0086]

RIN 0579-AD50

Forfeiture Procedures Under the Endangered Species Act and the Lacey Act Amendments

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: The Animal and Plant Health Inspection Service is one of the agencies that administers the provisions of the Endangered Species Act of 1973, as amended (ESA), and the Lacey Act Amendments of 1981, as amended, that pertain to plants. We are proposing to update our regulations that set forth our forfeiture procedures with regard to plants or plant products seized under the authority of the ESA and the Lacey Act. The proposed changes would make our regulations conform to the requirements of the Civil Asset Forfeiture Reform Act of 2000, increase the monetary threshold of those cases proceeding through judicial forfeiture, provide for the assessment of storage costs of seized property, and make the regulations easier to understand.

DATES: We will consider all comments that we receive on or before [Insert date 60 days after date of publication in the Federal Register].

ADDRESSES: You may submit comments by either of the following methods:

- Federal eRulemaking Portal: Federal eRulemaking Portal: Go to <http://www.regulations.gov/#!documentDetail;D=APHIS-2007-0086-0001>.

- Postal Mail/Commercial Delivery: Send your comment to Docket No. APHIS-2007-0086, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road Unit 118, Riverdale, MD 20737-1238.

Supporting documents and any comments we receive on this docket may be viewed at <http://www.regulations.gov/#!docketDetail;D=APHIS-2007-0086> or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799-7039 before coming.

FOR FURTHER INFORMATION CONTACT: Dr. John C. Veremis; National CITES Coordinator; PPQ, APHIS, 4700 River Road Unit 52, Riverdale, MD 20737; (301) 851-2347.

#### SUPPLEMENTARY INFORMATION:

##### Background

The Endangered Species Act (ESA) of 1973, as amended (16 U.S.C. 1531 et seq.), was passed to prevent the extinction of native and non-native animals and plants by providing measures to help alleviate the loss of species and their habitats. With certain exceptions, the ESA prohibits activities with these protected species unless authorized by a permit from the U.S. Department of the Interior's Fish and Wildlife Service. The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES, 27 U.S.T. 1087) is implemented in the United States through the ESA. CITES is a multinational agreement that entered into force on July 1, 1975, to prevent species of wild animals and plants from becoming endangered or extinct because of international trade. The CITES treaty is currently signed by 176 countries. It regulates international trade in specimens of wild animals and plants in order to protect against

over-exploitation. Regulations implementing CITES for both wildlife and plants have been promulgated by the Division of Management Authority located within the U.S. Department of Interior, Fish and Wildlife Service. These regulations are found at 50 CFR parts 13, 17, and 23. The Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture, as well as the Office of Law Enforcement of the U.S. Fish and Wildlife Service of the Department of Interior, enforces those regulations with regard to plant imports.

Species regulated under CITES are listed in one of three appendices to CITES. Species listed in Appendix I are subject to the most restrictions and species listed in Appendix III are subject to the fewest. Depending upon the appendix in which the species is listed, its trade is controlled through the issuance of various permits or certificates by the exporting and/or importing countries' management authorities. When a CITES-regulated species is imported into the United States, it must be accompanied by the required permit or certificate. If it is not, the commodity is subject to seizure by, and forfeiture to, the U.S. Government. APHIS, as part of its enforcement work, initiates, with the assistance of other agencies, seizures at U.S. ports of entry, of plants and plant products imported in violation of CITES. APHIS initiates approximately 100 seizures each year for CITES-regulated products imported without the proper CITES documentation. Wood, wood products, medicinal items, and live plants constitute the bulk of property that has been seized in the past. The seizures of these commodities are governed by the forfeiture regulations currently found in APHIS' regulations in 7 CFR part 356, which are the subject of this proposed rule.

The current procedures in part 356 also apply to seizures by APHIS authorized by the Lacey Act Amendments of 1981, as amended (16 U.S.C. 3371 et seq.) (Lacey Act). The Lacey Act is the United States' oldest wildlife protection statute. It was first enacted in 1900 and was

significantly amended in 1981. The Lacey Act combats trafficking in “illegal” wildlife, fish and plants. The Food, Conservation, and Energy Act of 2008, effective May 22, 2008, amended the Lacey Act by expanding its protection to a broader range of plants and plant products. The Lacey Act makes it unlawful to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce certain plants taken, possessed, transported or sold in violation of the laws of a U.S. State or any foreign law that protects plants. It also makes it unlawful to import, export, transport, sell, receive, acquire or purchase certain plants taken, possessed, transported or sold, in violation of the laws of the United States or an Indian tribe. The Lacey Act also makes it unlawful to make or submit any false record, account, or label for, or any false identification of, any plant that has been or is intended to be moved in interstate or foreign commerce. Additionally, certain plants and plant products must be accompanied at the time of importation with a declaration providing, in part, the scientific name of the plant and where the plant was harvested. The Lacey Act authorizes the seizure of plants and plant products that are traded contrary to the Lacey Act. The proposed forfeiture procedures described below would apply to these types of seizures when conducted by APHIS.

Another statute bearing on our forfeiture regulations is the Civil Asset Forfeiture Reform Act of 2000 (CAFRA, 18 U.S.C. 983). CAFRA was enacted to provide a more just and uniform procedure for Federal civil forfeitures. Among other things, CAFRA enacted time requirements spanning from the point of seizure to the effective date of forfeiture. CAFRA also eliminated the requirement that a property owner post a bond in order to be able to file a claim.

Because our forfeiture regulations in part 356 predate CAFRA, we are proposing to revise those regulations to bring them into conformity with CAFRA requirements. In addition, we are proposing to amend the requirements for determining the value of seized property, to

increase the monetary threshold of those cases proceeding through judicial forfeiture, to provide for the assessment of storage costs of seized property, and to make the regulations easier to understand. A section-by-section analysis of the proposed changes follows.

### Definitions

The existing regulations in part 356 do not include a section in which key terms used in the regulatory text are defined. In proposed § 356.1, we would define the applicable terms used in the regulatory text of the proposed regulations. These proposed definitions would be in accordance with the way the terms are defined in our existing regulations.

We would define the person and the program responsible for enforcing the proposed rule, namely the Administrator and Plant Protection and Quarantine. Specifically, we would define Administrator as the Administrator, Animal and Plant Health Inspection Service, U. S. Department of Agriculture, or any other person authorized to act for the Administrator. This proposed definition is consistent with the definition of Administrator that we employ elsewhere in the regulations. We would define Plant Protection and Quarantine (PPQ) as the Plant Protection and Quarantine program of the Animal and Plant Health Inspection Service, U.S. Department of Agriculture, or any agency delegated to act in its place.

We would define the property that could be seized under the proposed rule. Property would be defined as any plant, plant product, equipment or means of transportation seized under the authority of the ESA or the Lacey Act.

We would define the two types of forfeiture actions that could occur under the proposed regulations. We would define administrative forfeiture as a forfeiture action initiated by the Administrator. A judicial forfeiture would be defined as a forfeiture action initiated in a U.S. District Court.

We would define the components of notices of proposed forfeiture and notices of seizure. Specifically, we would define notice of proposed forfeiture as a document alerting someone with an ownership interest in property valued at less than \$15,000 of PPQ's initiation of an administrative forfeiture action. Notice of seizure would be defined as a document alerting an owner that PPQ has taken custody of certain property. The notice would set forth when and where the property was seized, a description of the property, the reason for seizure, and the determined value of the property.

We would define the three written requests that may be filed to request the return of seized property, to request that the forfeiture cease or be mitigated, and to effectuate relinquishment of property. Claim would be defined as a written request to the Administrator for the return of property that is the subject of an administrative forfeiture action. The definition would further state that submittal of a claim in an administrative forfeiture action mandates that the matter proceed through judicial forfeiture. A petition for remission or mitigation of forfeiture would be defined as a written request to the Administrator that the proposed forfeiture not be completed, or in the alternative, be mitigated. Waiver of title would be defined as the divestiture of an owner's right, title, and interest in the property to the United States. If a waiver is signed, the United States becomes the owner of the property and the signatory is relinquishing all right, title and interest in the property. Signing a waiver of title would eliminate the need for administrative or judicial forfeiture proceedings, since, upon signature, the property would become that of the United States.

#### Scope of the Regulations

Proposed § 356.2 would outline the scope of the regulations. Specifically, the section would state that the regulations set forth the procedures relating to the forfeiture of any property

that is seized by APHIS under the authority of the ESA and the Lacey Act by the Administrator and that is in PPQ's active or constructive custody. This proposed section is consistent with the corresponding section in the existing regulations.

#### Determination of Property Value

Current § 356.2, which pertains to appraisal of seized property, states that if the property may be lawfully sold in the United States, its value shall be determined by ascertaining the price at which the property or similar property in the ordinary course of trade is freely offered for sale at the time of appraisal, and at a principal market as close as possible to the place of appraisal. The section further states that if the property may not lawfully be sold in the United States, the value thereof shall be determined by other reasonable means.

Under this proposed rule, § 356.3 would provide for the manner in which the Administrator determines the value of seized property. To simplify and streamline our procedures, we are proposing that the value would be the amount shown on the import's associated invoice. We understand that by using this amount, we would likely undervalue the seized commodity. We have taken this factor into account in determining when a forfeiture should proceed administratively versus judicially. Judicial forfeiture would apply to property of greater value, i.e., \$15,000 or higher. In the uncommon event that an invoice is unavailable, or if the invoice is determined by the Administrator not to represent a reasonable value, the value of the property would be determined by ascertaining the price at which similar property is offered for sale at or as near as possible to the time and place of seizure.

#### Notice upon Seizure; Distribution of Forms

Proposed § 356.4 concerns the notice of seizure and the distribution of forms upon seizure. Some of the requirements contained in this section are incorporated from the existing

regulations, but we are also proposing amendments to conform to current practice or to comply with CAFRA.

Proposed paragraph (a) states the purpose of a notice of seizure, when it is to be completed, and the elements to be included. A notice of seizure would be completed by PPQ when the property is seized and would alert the property owner of the seizure. The notice would include information on when and where the property was seized, a description of the property, the reason for seizure, and the property's value. These provisions are incorporated from the existing regulations.

Proposed paragraph (b) provides that the notice be posted at the port office of the seizing agency for 35 calendar days. The existing regulations also provide for public posting of the notice; however, we are proposing to increase the duration of the posting from 21 to 35 days. If the property is valued at less than \$15,000, administrative forfeiture proceedings would be commenced, and a notice of proposed forfeiture would be posted with the notice of seizure. Under the existing regulations, administrative forfeiture applies to property valued at under \$10,000. Property valued at \$10,000 or more is subject to judicial forfeiture. We are proposing to raise the threshold for judicial forfeiture to \$15,000 in order to account for inflation and to allow for the most cost-effective use of the U.S. Attorney's resources in pursuing judicial forfeiture cases. We welcome comment on raising the threshold for judicial forfeiture up to \$500,000.

Proposed paragraph (c) provides that if the owner of the property is present when property is seized for forfeiture, the owner would be given a copy of the notice of seizure; a form providing for a waiver of title; a form providing for the petition for remission or mitigation of forfeiture; and, if the property is valued at less than \$15,000, a copy of the notice of proposed

forfeiture and a form providing for the filing of a claim. This proposed paragraph would codify in the regulations procedures that are already being employed in the field.

In the alternative, if the owner of the property is not present, proposed paragraph (d) would provide that all applicable notices and forms be sent by certified or registered mail, return receipt requested, to the owner and to any other persons having an interest in the property. The forms would be mailed not more than 60 calendar days after the date of seizure. The proposed 60-day notice of seizure is incorporated from CAFRA.

#### Waiver of Title

Proposed § 356.5 provides for a waiver of title. Under the existing regulations, such a waiver, referred to as a waiver of forfeiture, occurs when an owner voluntarily decides not to challenge the forfeiture of his or her property and instead to divest the property to the United States. The owner must sign a statement indicating that he or she is waiving his or her rights to any procedures relating to the forfeiture. Under this proposed rule, we would continue to allow for the waiver of forfeiture proceedings. We would use the term waiver of title, however, which we view as more precise than waiver of forfeiture. Provided that the value of the property does not exceed \$500,000, in which case judicial forfeiture would be required, the owner of the seized property may waive his or her title to the property by submitting a waiver of title form to the port office of the seizing agency or to the Administrator. Once the form has been submitted, all right, title, and interest in the property would be forfeited to the United States, thus eliminating the need for any further action by the Administrator with regard to the forfeiture.

#### Judicial Forfeiture; Property Valued at \$15,000 or Greater

Proposed § 356.6 would elevate the current monetary threshold for a case to be referred to a U.S. Attorney's Office for institution of judicial forfeiture in U.S. District Court. Currently,

property having a retail value over \$10,000 will proceed through judicial forfeiture. We propose that the value be increased to \$15,000, as discussed above, in order to account for inflation and to allow for the most efficient use of the U.S. Attorney's resources. Also, as discussed earlier, appraisement of the value of the property would be based upon the readily accessible invoice price, which presumably would be below retail value. We anticipate that more cases will fall below the \$15,000 threshold and, consequently, be forfeited administratively. We welcome comment on raising the threshold for judicial forfeiture up to \$500,000, which would likely result in even more cases being forfeited administratively.

#### Administrative Forfeiture; Property Valued at Less than \$15,000

Proposed § 356.7 sets forth the administrative forfeiture procedure for property valued at less than \$15,000.

Proposed paragraph (a) relates to the notice of proposed forfeiture, which alerts any interested party that PPQ is initiating an administrative forfeiture action. Proposed paragraph (a)(1) states that the notice of seizure referred to in § 356.4 shall be accompanied by a notice of proposed forfeiture but also indicates that the two notices may be consolidated into one document.

Proposed paragraph (a)(2) indicates that the notice would have to include information on when and where the property was seized, a description of the seized property, including its value, and the reason for seizure. The notice would indicate that interested parties would have the option to file a petition for remission or mitigation of forfeiture. The notice also would provide that unless a claim is filed, the property will be forfeited to the United States. Lastly, the notice would indicate the time period allowed for filing a claim. If a claim were to be filed, the administrative forfeiture would cease and, instead, the matter would be referred for judicial

forfeiture. The proposed requirements pertaining to the notice are incorporated from the existing regulations.

Proposed § 356.7(b) states that, in the absence of a claim, forfeiture would occur 36 calendar days after the owner was handed or mailed the notice of seizure and proposed forfeiture. In the event that the notice of seizure and proposed forfeiture was not received (as indicated by return of the notice sent by certified or registered mail), the property would be forfeited to the United States in 66 calendar days, which is 31 calendar days after the date the notice of seizure is no longer required to be posted. These proposed timeframes stem from the time requirements to file a claim, as enacted by CAFRA. Once property is forfeited to the United States, the owner would no longer have any right or title to, or interest in, the property.

Proposed § 356.7(c)(1) states that although the administrative forfeiture is effective upon the conclusion of the time period specified in proposed paragraph (b) and that no other action would be required, PPQ nonetheless would complete a declaration of forfeiture. Proposed paragraphs (c)(2) and (c)(3) set forth the type of information that is to be included in the declaration and how (certified or registered mail) and to whom (the owner and any other persons known by the Administrator to have an interest in the property) the declaration is mailed. These proposed requirements closely parallel the ones pertaining to notices of seizure and forfeiture and are adapted from the existing regulations.

Proposed § 356.7(d) addresses how a claim may be filed to contest the forfeiture of property valued at less than \$15,000. Proposed paragraph (d)(1) states that a document would be considered to be a claim only when it is clearly labeled with the word “Claim,” identifies the specific property being claimed, states the claimant’s interest in the property, and is made under oath and subject to penalty of perjury. These proposed requirements would conform to

CAFRA's description of what items shall be included in a claim. Proposed paragraph (d)(2) would state that the claim must be filed with the Administrator via the National CITES Coordinator located in Riverdale, MD. The claim would be considered “filed” when it is received by the National CITES Coordinator. It would have to be filed within 35 calendar days after the notice of seizure had either been personally handed or mailed to the owner. If the owner did not receive the notice of seizure, then the claim may be filed within 65 calendar days of seizure, which is 30 calendar days after the date the notice of seizure is no longer required to be posted. These proposed timeframes are in compliance with CAFRA. Proposed paragraph (d)(3) states that if a claim is filed, the administrative forfeiture is terminated, and the matter will be referred to the U.S. Attorney’s Office for the district in which the property was seized for institution of judicial forfeiture in U.S. District Court. These procedures are incorporated from the existing regulations. To make the regulations compliant with CAFRA, however, the proposed paragraph would not include the existing requirement that a claimant post a bond in order to be eligible to contest a forfeiture.

#### Petition for Remission or Mitigation of Forfeiture

Proposed § 356.8 sets forth the procedures with regard to filing a petition for remission or mitigation of administrative forfeiture. The petition is a written request to the Administrator that the proposed forfeiture not be completed, or in the alternative, be mitigated.

As in the corresponding section of the existing regulations, proposed paragraph (a) would provide that any person who has an interest in the property may file a petition for remission or mitigation of forfeiture. The proposed paragraph clarifies the procedures for submitting such a petition by providing an address. The petition is to be filed with the Administrator by submitting

it to the National CITES Coordinator in Riverdale, MD. It is considered “filed” when it is received by the National CITES Coordinator.

Proposed paragraph (b) describes the information required for a petition, namely that it be marked “Petition for Remission or Mitigation of Forfeiture” and contain a description of the property, when and where it was seized, evidence of the petitioner’s interest in the property, and all facts and circumstances relied upon by the petitioners to justify remission or mitigation of forfeiture. These requirements are incorporated from the existing regulations.

Proposed paragraph (c) states that the petition shall be signed by the petitioner or the petitioner’s attorney under oath and upon penalty of perjury. If the petitioner is a business, the petition shall be signed by a partner, officer, or the petitioner’s attorney under oath and upon penalty of perjury. These requirements are incorporated from the existing regulations.

Proposed paragraph (d) provides that the Administrator would decide whether to grant relief. In making the decision, he or she would consider the petitioner’s submission and any other available information relating to the matter. The Administrator also is authorized to take testimony. This paragraph is also incorporated from the existing regulations.

Proposed paragraph (e) states that if the Administrator finds that there are mitigating circumstances justifying remission or mitigation, the Administrator may remit or mitigate with terms and conditions as he or she deems reasonable and just. However, remission or mitigation will not be granted if such action would frustrate the purposes of the act under which authority the property had been seized. As an example, remission or mitigation typically will not be granted with respect to plants that are without documentation required by CITES. This paragraph is also incorporated from the existing regulations, albeit with some minor editorial changes.

Proposed paragraphs (f) through (h) provide that the Administrator shall notify the petitioner in writing whether the petition was granted or denied, and the reason for the decision. The notification would be sent by registered or certified mail, return receipt requested. If the petition is denied fully or in part, the petitioner may file a supplemental petition within 14 calendar days from the date the petitioner received the denial. The Administrator would notify the petitioner in writing as to whether the supplemental petition was granted or denied and would provide the reason for the decision. The Administrator's decision would be discretionary and unreviewable. If a petition is received within 30 calendar days of the initial posting of a notice of seizure, the applicable property would not be forfeited until the Administrator makes his or her initial determination on the petition. These procedures do not differ substantively from the ones in the existing regulations, except for the insertion of specified time periods and for the statement clarifying the point that the Administrator's decision is discretionary and unreviewable.

Proposed paragraph (i) makes clear that submitting a petition for property valued at less than \$15,000 does not trigger the matter's being referred for judicial forfeiture. In order for the administrative forfeiture to be terminated and the matter referred for judicial forfeiture, a claim must be filed in accordance with § 356.7(d).

#### Storage and care; Recovery of Costs

The existing regulations provide that seized property shall be stored and, if living maintained and cared for, in a place determined by the Administrator to be most appropriate and convenient with due regard to the expense involved. The regulations do not, however, provide for the recovery of these costs by APHIS. The cost of transporting, storing, caring for, maintaining, and disposing of seized property is staggering, and we are unable to continue to assume this financial burden.

Proposed § 356.9, therefore, would provide for the recovery of these costs. Proposed paragraph (a) provides that the Administrator determines where the seized property will be stored or maintained, as do the existing regulations. Proposed paragraph (b) stipulates who will be responsible for handling, maintenance, and storage costs associated with seized property. If the property is seized and forfeited under the ESA, by statute any person whose act or omission was the basis for the seizure would be responsible for the cost of the transfer, board, handling, or storage of such property. If the property is seized with regard to a violation of the Lacey Act, by statute any person convicted or assessed a civil penalty thereof, would be responsible for the cost of the storage, care, and maintenance of the property at issue in the violation. These regulations reflect those provisions. Proposed paragraph (c) states that APHIS shall send to the responsible party an itemized invoice for the amount of the expenses and include instructions on the time and manner of payment. Proposed paragraph (d) allows for the recipient of the invoice to file a written objection, provided it is filed within 30 calendar days of the date upon which the invoice is received. An objection is deemed “filed” when it is received by the National CITES Coordinator in Riverdale, MD. Finally, proposed paragraph (e) states that the Administrator will promptly review the objections and mail his or her final decision to the party who filed the objection. That decision would constitute the final administrative action on the matter.

#### Disposal of Property

The existing regulations do not set forth requirements for disposal of seized property. Proposed § 356.10 would contain such requirements. The section would provide that upon a waiver of title or upon forfeiture, the property would be disposed of in a manner that is most convenient, appropriate, and in accordance with law. Additionally, the person responsible for the violation that was the basis of the seizure would not benefit from the disposal. This proposed

provision would prevent the violator from attempting to repurchase the property if the Government, after gaining title to the property, subsequently auctions it.

#### Computation of Time

Lastly, proposed § 356.11 makes clear that the references in part 356 to “calendar days” mean that Saturdays, Sundays, and Federal holidays are included in computing the time allowances for meeting the various time-sensitive requirements, such as for filing a claim, described above; however, if time requirements expire on a Saturday, Sunday, or Federal holiday, the time period is extended to the next business day. The requirements contained in this section are incorporated from the existing regulations.

#### Executive Orders 12866 and 13563 and Regulatory Flexibility Act

This proposed rule has been determined to be significant for the purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget.

We have prepared an economic analysis for this rule. The economic analysis provides a cost-benefit analysis, as required by Executive Orders 12866 and 13563, which direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The economic analysis also examines the potential economic effects of this rule on small entities, as required by the Regulatory Flexibility Act. The economic analysis is summarized below. Copies of the full analysis are available by contacting the person listed under FOR FURTHER INFORMATION CONTACT or on the Regulations.gov Web site (see ADDRESSES above for instructions for accessing Regulations.gov).

This proposed rule would amend the forfeiture regulations in 7 CFR part 356. Among other things, the proposed rule would change the basis for appraising the value of seized property; increase the monetary threshold of seized items requiring judicial forfeiture from \$10,000 to \$15,000; provide for the assessment and recovery of the costs of transferring, storing, caring for and maintaining seized plants and plant products; and prohibit a violator from attempting to buy the unlawfully imported item if it is sold at auction by APHIS.

Among the expected benefits of this proposed rule is that forfeiture provisions would be made easier to understand by importers and the general public than are the current ones. An example is the proposed streamlining of the appraisal process for seized property. Under this proposed rule, the value of the property would be that shown on the imported item's invoice, which is a much simpler formula for determining value than that specified under the current regulations.

The increase in the threshold value for judicial forfeiture would allow for more efficient use of U.S. Attorney resources. We anticipate that more cases will proceed through administrative forfeiture, rather than judicial, as a result of this proposed change.

This proposed rule would also relieve APHIS and U.S. taxpayers of the financial burden associated with the transfer, storage, care, and maintenance of seized property by requiring the person whose act or omission was the basis for the seizure to bear these costs.

Costs of the proposed rule would be minimal. Because the threshold for a case proceeding through judicial forfeiture would be raised from \$10,000 to \$15,000, there would be more cases proceeding through administrative forfeiture. However, any additional demands on administrative resources are expected to be manageable, and would not represent a net increase in costs for the Federal Government. Costs incurred with regard to the transfer, storage, care,

and maintenance costs of seized property would be appropriately directed from the Federal Government to persons responsible for violating the ESA or Lacey Act.

It is clear that most entities covered by the proposed rule are considered small, as most importers are considered small. However, the only entities affected would be ones that violate the Endangered Species Act or the Lacey Act, such as by attempting to import illegal plants or submitting false records for plant or plant product imports. The majority of the imports are consistent with these Acts.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action would not have a significant economic impact on a substantial number of small entities.

#### Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

#### Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. If this proposed rule is adopted: (1) All State and local laws and regulations that are inconsistent with this rule will be preempted; (2) no retroactive effect will be given to this rule; and (3) administrative proceedings will not be required before parties may file suit in court challenging this rule.

#### Paperwork Reduction Act

This proposed rule contains no new information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). The information

collection or recordkeeping requirements included in the regulations that would be amended by this proposed rule have been approved by the Office of Management and Budget (OMB) under OMB control numbers 0579-0076 and 0579-0349.

#### List of Subjects in 7 CFR Part 356

Administrative practice and procedure, Endangered and threatened species, Exports, Imports, Law enforcement, Plants (Agriculture), Reporting and recordkeeping requirements, Seizures and forfeitures.

Accordingly, we propose to revise 7 CFR part 356 to read as follows:

#### PART 356 – FORFEITURE PROCEDURES

Sec.

356.1 Definitions.

356.2 Property subject to forfeiture procedures.

356.3 Determination of property value.

356.4 Notice upon seizure; distribution of forms.

356.5 Waiver of title.

356.6 Judicial forfeiture; property valued at \$15,000 or greater.

356.7 Administrative forfeiture; property valued at less than \$15,000.

356.8 Petition for remission or mitigation of forfeiture.

356.9 Storage; recovery of costs.

356.10 Disposal of property.

356.11 Computation of time.

Authority: 16 U.S.C. 1540(f); 16 U.S.C. 3374; 7 CFR 2.22, 2.80, and 371.3.

§ 356.1 Definitions.

Administrative forfeiture. A forfeiture action initiated by the Administrator.

Administrator. The Administrator, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, or any other person authorized to act for the Administrator.

Claim. A written request to the Administrator for the return of property that is the subject of an administrative forfeiture action. Submittal of a claim in an administrative forfeiture action mandates that the matter proceed through judicial forfeiture.

Judicial forfeiture. A forfeiture action initiated in a U.S. District Court.

Notice of proposed forfeiture. A document alerting someone with an ownership interest in property valued at less than \$15,000 that Plant Protection and Quarantine is initiating an administrative forfeiture action against that property.

Notice of seizure. A document alerting someone with an ownership interest in property that Plant Protection and Quarantine has taken custody of that property. The notice sets forth when and where the property was seized, a description of the property, the reason for seizure, and the determined value of the property.

Petition for remission or mitigation of forfeiture. A written request to the Administrator that the proposed forfeiture not be completed, or in the alternative, be mitigated.

Plant Protection and Quarantine (PPQ). The Plant Protection and Quarantine program of the Animal and Plant Health Inspection Service, U.S. Department of Agriculture, or any agency delegated to act in its place.

Property. Any plant, plant product, equipment, or means of transportation seized under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.), or the Lacey Act Amendments of 1981, as amended (16 U.S.C. 3371 et seq.).

Waiver of title. The divestiture of an owner's right, title and interest in the property to the United States. If a waiver is signed, the United States becomes the owner of the property and the signatory relinquishes all right, title and interest in the property.

§ 356.2 Property subject to forfeiture procedures.

This part sets forth the procedures relating to the forfeiture of any property seized by APHIS under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.), or the Lacey Act Amendments of 1981, as amended (16 U.S.C. 3371 et seq.), by the Administrator, and is in PPQ's actual or constructive custody.

§ 356.3 Determination of property value.

Promptly following seizure of the property, the Administrator shall determine the value of the seized property. If an invoice of the property is available, the value is the amount as represented on the invoice. If an invoice is not available, or is determined by the Administrator not to represent a reasonable value, the value of the property shall be determined by ascertaining the price at which similar property is offered for sale at or as near as possible to the time and place of seizure.

§ 356.4 Notice upon seizure; distribution of forms.

(a) A notice of seizure shall be completed when the property is seized. This notice alerts an owner that PPQ has taken custody of certain property. The notice sets forth the date, time, and place the property was seized; a description of the seized property, including any identifying information; the reason for seizure, including the provisions of the act, permit, certificate, or regulations allegedly violated and under which the property is subject to forfeiture; and the determined value of the property.

(b) A notice of seizure shall be posted in a publicly accessible location at the port office of the seizing agency and shall remain displayed for a period of 35 calendar days. The date and time the notice is posted shall be indicated on the notice. If the property is valued at less than \$15,000, a notice of proposed forfeiture shall be posted with the notice of seizure. The notice of seizure and notice of proposed forfeiture may be consolidated into one document.

(c) If the owner of the property is present at seizure, the owner shall receive a copy of the notice of seizure. The owner also shall receive copies of forms providing for filing, at the owner's discretion, a waiver of title and a petition for remission or mitigation of forfeiture. If the property is valued at less than \$15,000, the owner furthermore shall receive a copy of the notice of proposed forfeiture and a form providing for filing, at the owner's discretion, a claim.

(d) If the owner of the property is not present at seizure, the notices and forms provided under paragraph (c) of this section shall be sent by certified or registered mail, return receipt requested, to the owner and to any other persons having an interest in the property, to their addresses last known to PPQ. The forms shall be mailed as soon as is practical and not more than 60 calendar days after the date of seizure.

#### § 356.5 Waiver of title.

(a) A waiver of title is the divestiture of an owner's rights, title, and interest in the property to the United States. Provided the value of the property does not exceed \$500,000, the owner of any seized property may waive title by completing and signing a waiver of title form provided to the owner at the time of seizure. The form shall be submitted to the port office of the seizing agency or to the Administrator by submitting it to the National CITES Coordinator, PPQ, APHIS, 4700 River Road Unit 52, Riverdale, MD 20737.

(b) Upon submittal of the waiver of title to the port office or to the Administrator, all right, title, and interest in the property by the owner of the property is fully and finally forfeited to the United States. By submitting the waiver of title, the owner also waives and relinquishes all rights to judicial review of the seizure and forfeiture and any further rights or proceedings relative to the property. Once property is thus forfeited to the United States, no other right, title, or interest of the owner shall exist therein, and no further notice or declaration by the Administrator shall be required.

§ 356.6 Judicial forfeiture; property valued at \$15,000 or greater.

Promptly following the seizure of any property appraised at a value of \$15,000 or greater, the matter will be referred to the U.S. Attorney's Office for the district in which the property was seized for institution of judicial forfeiture proceedings in U.S. District Court.

§ 356.7 Administrative forfeiture; property valued at less than \$15,000.

(a) Notice of proposed forfeiture. (1) For property valued at less than \$15,000, the notice of seizure shall also be accompanied by a notice of proposed forfeiture, which notifies any interested party that PPQ is initiating the administrative forfeiture process. The notice of seizure and notice of proposed forfeiture may be consolidated into one document.

(2) The notice of proposed forfeiture shall set forth the date, time, and place the property was seized; a description of the seized property, including any identification information; the reason for seizure, including the provisions of the act, permit, certificate, or regulations allegedly violated and under which the property is subject to forfeiture; the determined value of the property; the option for interested parties to file a petition for remission or mitigation of forfeiture; and a notice providing that the property will be forfeited to the United States unless a

claim is filed. The notice shall also set forth the time period during which a claim must be filed and shall indicate that if a claim is filed, the matter will be adjudicated in U.S. District Court.

(b) Forfeiture. If a claim is not filed in accordance with paragraph (d) of this section, the property is forfeited to the United States 36 calendar days after the owner either was handed in person or mailed the notice of seizure and proposed forfeiture. In the event that the notice of seizure and proposed forfeiture was not received, as evidenced by return receipt, the property will be forfeited to the United States 31 calendar days after the date the notice of seizure is no longer required to be posted at the port office (i.e., 66 calendar days after seizure). Once property is forfeited to the United States, the owner no longer retains any right or title to, or interest in, the property.

(c) Declaration of forfeiture. (1) Administrative forfeiture is effective upon the conclusion of the time period specified in paragraph (b) of this section. No other action is required to effectuate forfeiture. Within a reasonable time after forfeiture, PPQ shall complete a declaration of forfeiture.

(2) The declaration of forfeiture shall be sent by certified or registered mail, return receipt requested, to the owner and to any other persons having an interest in the property known to the Administrator, to their addresses last known to PPQ.

(3) The declaration of forfeiture shall include the date, time, and place the property was seized; a description of the seized property, including any identification information; the reason for seizure, including the provisions of the act, permit, certificate, or regulations violated and under which the property was forfeited; and the duration and place the notice of proposed forfeiture was posted and to whom and the manner in which service was effectuated. The declaration also shall state that no claim was received and, therefore, through default, the

allegations contained in the notice of proposed forfeiture are admitted as true. The declaration shall conclude with an order providing that the property is condemned and forfeited to the United States and that no other right, title, or interest exists therein.

(d) Claim. (1) An owner may contest the forfeiture of property valued at less than \$15,000 by filing a claim, which is a written request for the return of property. A claim shall be labeled a “Claim” and identify the specific property being claimed, state the claimant’s interest in the property, and be made under oath and subject to penalty of perjury.

(2) A claim shall be filed with the Administrator by submitting it to the National CITES Coordinator, PPQ, APHIS, 4700 River Road Unit 52, Riverdale, MD 20737. The claim is deemed filed when it is received by the National CITES Coordinator. It shall be filed within 35 calendar days after the notice of seizure was either personally handed or mailed to the owner. If the owner did not receive the notice of seizure, then the claim may be filed no later than 30 calendar days after the date the notice of seizure is no longer required to be posted (i.e., 65 calendar days after seizure).

(3) If a claim is filed, the administrative forfeiture is terminated, and the matter will be referred to the U.S. Attorney’s Office for the district in which the property was seized for institution of judicial forfeiture in U.S. District Court.

§ 356.8 Petition for remission or mitigation of forfeiture.

(a) Once a notice of seizure has been issued for property valued at \$15,000 or less, any person who has an interest in the property may file a petition for remission or mitigation of forfeiture. A petition shall be filed with the Administrator by submitting it to the National CITES Coordinator, PPQ, APHIS, 4700 River Road Unit 52, Riverdale, MD 20737. The petition is deemed filed when it is received by the National CITES Coordinator.

(b) A petition shall be labeled a “Petition for Remission or Mitigation of Forfeiture” and contain the following information:

(1) A description of the property;

(2) The time, date, and place of seizure;

(3) Evidence of the petitioner’s interest in the property, such as contracts, bills of sale, invoices, security interests, certificates of title; and

(4) A statement of all facts and circumstances relied upon by the petitioners to justify remission or mitigation of forfeiture.

(c) The petition shall be signed by the petitioner or the petitioner’s attorney under oath and upon penalty of perjury. If the petitioner is a business, the petition shall be signed by a partner, officer, or petitioner’s attorney under oath and upon penalty of perjury.

(d) Upon receiving the petition, the Administrator shall decide whether to grant relief. In making his or her decision, the Administrator shall consider the information submitted by the petitioner, as well as any other available information relating to the matter, and may require that testimony be taken.

(e) If the Administrator finds that there are mitigating circumstances justifying remission or mitigation, the Administrator may remit or mitigate with terms and conditions as he or she deems reasonable and just. However, remission or mitigation will not be granted if such action would frustrate the purposes of the act under which authority the property had been seized. As an example, this section typically would not allow for remission or mitigation with respect to plants that are without documentation required by the Convention on International Trade in Endangered Species of Wild Fauna and Flora.

(f) The Administrator shall notify the petitioner in writing as to whether the petition was granted or denied and shall state the reason for the decision. The notification shall be sent by registered or certified mail, return receipt requested.

(g) If the petition is denied fully or in part, the petitioner may file a supplemental petition, but a supplemental petition will not be considered unless it is received within 14 calendar days from the date on which the petitioner received the denial. The Administrator shall notify the petitioner in writing as to whether the supplemental petition was granted or denied and shall state the reason for the decision. The Administrator's decision is discretionary and unreviewable.

(h) If a petition is received within 30 calendar days of the initial posting of a notice of seizure, no property will be forfeited until the Administrator makes his or her initial determination on the petition.

(i) If a petition is submitted for property valued at less than \$15,000, the matter will not be referred for judicial forfeiture; in order for that to occur, a claim must be filed in accordance with § 356.7(d).

§ 356.9 Storage and care; recovery of costs.

(a) Seized property shall be stored in a place that, in the opinion of the Administrator, is most convenient and appropriate, with due regard to the expense involved.

(b) If any property is seized and forfeited under the Endangered Species Act, 16 U.S.C. 1531 et seq., any person whose act or omission was the basis for the seizure shall be assessed the amount of the expenses incurred in connection with the transfer, board, handling (including care and maintenance of live plants), or storage of such property. If any property is seized with regard to a violation of the Lacey Act Amendments of 1981, 16 U.S.C. 3371 et seq., any person convicted or assessed a civil penalty under the Lacey Act shall be assessed the amount of the

expenses incurred in connection with the storage, care, and maintenance of the property at issue in the violation.

(c) Within a reasonable time after forfeiture, APHIS shall send to such person by registered or certified mail, return receipt requested, an invoice for the amount of the expenses. The invoice shall contain an itemized statement of the applicable expenses, together with instructions on the time and manner of payment. Payment shall be made in accordance with the invoice.

(d) The recipient of any assessment of expenses under this section who has an objection to the reasonableness of the expenses described in the invoice may file, within 30 calendar days of the date upon which the invoice is received, written objections with the Administrator by submitting it to the National CITES Coordinator, PPQ, APHIS, 4700 River Road Unit 52 Riverdale, MD 20737. An objection is deemed filed when it is received by the National CITES Coordinator.

(e) The Administrator will promptly review the objections and mail his or her final decision to the party who filed the objection. The Administrator's decision shall constitute the final administrative action on the matter.

§ 356.10 Disposal of property.

Upon a waiver of title or upon forfeiture of property to the United States under this part, such property shall be disposed of in a manner that is most convenient, appropriate, and in accordance with law. The person responsible for the violation that was the basis of the seizure shall not receive financial or other gain from the disposal.

§ 356.11 Computation of time.

Saturdays, Sundays, and Federal holidays shall be included in computing the time allowed for in this part, provided that, when such time expires on a Saturday, Sunday, or Federal holiday, such period shall be extended to include the next following business day.

Done in Washington, DC, this 14<sup>th</sup> day of May 2013.

Max Holtzman,

Acting Deputy Under Secretary for Marketing and Regulatory Programs.

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