

# Stick to the Rivers and Lakes That You’re Used To: A Lacey Act Amendment for Water Rights

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## I. INTRODUCTION

On November 29, 2002, the United Nations Committee on Economic, Social and Cultural Rights recognized the right to water as a human right, describing it as “indispensable for leading a life in human dignity” and “a prerequisite for realization of other human rights.”<sup>1</sup> On July 28, 2010 the U.N. General Assembly acknowledged that drinking water and sanitation are essential to the

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1. Comm. on Economic, Social and Cultural Rights, General Comment 15, Rep. on Its Twenty-Ninth Session, Nov. 11-29, 2002, U.N. Doc. E/C.12/2002/11 (2003), <http://www.unhcr.org/49d095742.html>. R21.7.3.

realization of all rights, calling on states to provide these to all.<sup>2</sup> These calls have not been followed in a manner sufficient to help all people in need.

As of 2012, twenty-nine countries have either explicit or implicit references in their constitutions to a right to safe drinking water and sanitation.<sup>3</sup> And as of 2004, less than ten percent of the world's fresh water was under private control, but that percentage was expected to rise sharply.<sup>4</sup> Developing countries commonly allow companies to pollute as a necessary evil to facilitate revenue streams from developed countries.<sup>5</sup> This pollution happens in significant numbers among several industries, and knows no national or regional boundaries in practice. At least 1.1 billion people do not have adequate access to clean drinking water.<sup>6</sup> That number is expected to rise to 1.8 billion by 2025.<sup>7</sup> Insufficient respect for the right to water is responsible for nearly 250 million cases of disease and between five and ten million deaths per year.<sup>8</sup>

While international solutions are being proposed,<sup>9</sup> this note argues that there is a way to approach this problem by modestly amending existing U.S. law. Part II attempts to make a moral case for action by providing examples of calamitous instances of private acquisition, pollution, and degradation of water. It also shows that many responsible parties operate within the United States and make the average American's daily life possible. In this way, we are indirectly but unequivocally linked to abuses worldwide. Part III details the history of legislation, which may offer a unique legal vehicle for action and a view of the historical coalitions which shaped the statute in question. Part IV looks to a proposal for an amendment to this legislation that would be modest in scope. It discusses inclusions and exclusions to proposed statutory language and contemplates likely pathways to encourage eventual passage. Part V reiterates these points and demands that Congress act to prevent such flagrant abuses.

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2. G.A. Res. 64/292 ¶ 1, 2 (July 28, 2010), <http://repository.berkeleycenter.georgetown.edu/100308UNARES64292.pdf>.

3. WASH UNITED, FRESHWATER ACTION NETWORK & WATERLEX, *THE HUMAN RIGHT TO SAFE DRINKING WATER AND SANITATION IN LAW AND POLICY—A SOURCEBOOK*, at 117–21, 156–60, 214–15, 249, <http://www.waterlex.org/resources/documents/RTWS-sourcebook.pdf>.

4. Maude Barlow & Tony Clark, *Water Privatization*, GLOBAL POL'Y F. (2004), <https://www.globalpolicy.org/component/content/article/209/43398.html>.

5. See, e.g., Jim Yardley, *Bangladesh Pollution, Told in Colors and Smells*, N.Y. TIMES (July 14, 2013), [http://www.nytimes.com/2013/07/15/world/asia/bangladesh-pollution-told-in-colors-and-smells.html?\\_r=1](http://www.nytimes.com/2013/07/15/world/asia/bangladesh-pollution-told-in-colors-and-smells.html?_r=1).

6. *Health through Safe Drinking Water and Basic Sanitation*, WORLD HEALTH ORG., [http://www.who.int/water\\_sanitation\\_health/mdg1/en/](http://www.who.int/water_sanitation_health/mdg1/en/) (last visited Feb. 23, 2016).

7. *Coping with Water Scarcity: Q&A with FAO Director-General Dr. Jacques Diouf*, FAO NEWSROOM (Mar. 22, 2007), <http://www.fao.org/newsroom/en/focus/2007/1000521/index.html>.

8. *Water Usage & Privatization*, FOOD EMPOWERMENT PROJECT, <http://www.foodispower.org/water-usage-privatization/> (last visited Feb. 23, 2016).

9. See, e.g., Jennifer Chau, *Water Markets and the U.N. Watercourses Convention*, 27 GEO. INT'L ENVTL. L. REV. 179 (2014) (discussing water markets and the U.N. Watercourses Convention); Gabrielle E. Eckstein, *Rethinking Transboundary Ground Water Resources Management*, 25 GEO. INT'L ENVTL. L. REV. 95 (2012) (discussing cooperation across the U.S.-Mexico border of subnational entities to ensure sustainable use of water resources).

## II. ABUSES OF WATER LAW

On every continent, there are disputes and lawsuits over the control of water. In Africa, 358 million people are without access to water.<sup>10</sup> In Latin America and the Caribbean, 36 million lack access to clean water.<sup>11</sup> Worldwide, the number reaches 750 million people.<sup>12</sup> Inadequate drinking water and sanitation are responsible for the deaths of approximately 842,000 people per year,<sup>13</sup> or, on average, about 2,307 people per day. Water is used extensively in resource extraction, manufacturing, production, transportation, and distribution of countless products. A moving waterway also provides many companies a ready disposal site, regardless of the uses that same water may have downstream. This has predictable effects, including: spread of disease,<sup>14</sup> introduction of chemicals,<sup>15</sup> damage to natural resources and the environment,<sup>16</sup> and privatization of water rights—often by multi-national companies with great political influence.<sup>17</sup> Often those who bear the brunt of this damage are too poor to demand that their rights be realized, either through government enforcement or corporate compliance.<sup>18</sup>

These practices are especially prevalent in the global south, with notable examples in Zambia,<sup>19</sup> India,<sup>20</sup> and Bolivia.<sup>21</sup> Water rights abuses and weak

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10. WORLD HEALTH ORG. & UNICEF, PROGRESS ON DRINKING WATER AND SANITATION: 2014 UPDATE 14 (2014) [http://apps.who.int/iris/bitstream/10665/112727/1/9789241507240\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/112727/1/9789241507240_eng.pdf).

11. *Id.*

12. *Id.*

13. Annette Pruss-Ustun et al., *Burden of Disease From Inadequate Water, Sanitation and Hygiene In Low- and Middle-Income Settings: A Retrospective Analysis of Data from 145 Countries*, 19 TROPICAL MED. AND INT'L HEALTH 894, 899 (2014), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4255749/pdf/tmi0019-0894.pdf>.

14. John Vidal, 'I Drank the Water and Ate The Fish. We All Did. The Acid Has Damaged Me Permanently.', THE GUARDIAN (Aug. 1, 2015, 5:30 PM), <http://www.theguardian.com/global-development/2015/aug/01/zambia-vedanta-pollution-village-copper-mine>.

15. Bill Meyer, *World's Highest Drug Levels Entering India Stream, Then the Poor Consume the Pharmaceutical Soup*, CLEVELAND.COM (Jan. 25, 2009, 9:18 PM), [http://www.cleveland.com/world/index.ssf/2009/01/worlds\\_highest\\_drug\\_levels\\_ent.html](http://www.cleveland.com/world/index.ssf/2009/01/worlds_highest_drug_levels_ent.html).

16. *Chile Issues Fine for Environmental Permit Violations at Mining Site*, INTERNATIONAL NETWORK FOR ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT (June 27, 2013), [http://inece.org/2013/06/27/chile\\_sma\\_fine/](http://inece.org/2013/06/27/chile_sma_fine/).

17. See, e.g., Anna Lenzer, *Fiji Water: Spin the Bottle*, MOTHER JONES (Sept. 2009) <http://www.motherjones.com/politics/2009/09/fiji-spin-bottle>; Yardley, *supra* note 5.

18. Yardley, *supra* note 5.

19. William James, *Zambian Villagers to Take on Mining Firm Vedanta in UK Court*, REUTERS UK (Aug 2, 2015, 7:45 PM), <http://uk.reuters.com/article/uk-britain-vedanta-zambia-idUKKCN0Q70RW20150802>; Vidal, *supra* note 14; Zambia Watchdog, *Zambia: After Failing to Get Justice in Zambia, KCM Water Pollution Victims Sue Vedanta in London*, ALL AFRICA.COM (Aug. 2, 2015) <http://allafrica.com/stories/201508031483.html>.

20. *Goa Issues Show Cause to Mining Companies for Water Pollution*, INDIA WATER REV. (Aug. 9, 2012, 6:18 PM), <http://www.indiawaterreview.in/Story/News/goa-issues-show-cause-to-mining-companies-for-water-pollution/826/1#.Vcdj8flVikp>.

21. Emily Achtenberg, *From Water Wars to Water Scarcity: Bolivia's Cautionary Tale*, NACLA (June 5, 2013), <https://nacla.org/blog/2013/6/5/water-wars-water-scarcity-bolivia%E2%80%99s-cautionary-tale>.

enforcement of the laws that protect such rights are prevalent. Instances of successfully combating these practices represent the minority of claims. Much more publicity exists about local water rights abuses than about lawsuits to combat them. Judicial and political corruption plagues many countries, and many communities are too poor or disenfranchised to pursue litigation or invoke state enforcement to protect rights to water. Thus, many instances of pollution continue unabated.

This section will illustrate instances of water rights abuses around the world as a result of the production of goods. It will look specifically at examples of abuses in the beverage, pharmaceutical waste, manufacture of clothing, and mining and oil production industries. These examples are particularly relevant because the United States imports the resulting products. This critical fact, the following sections will argue, provides the United States with an opportunity to act. While the United States may not directly create these water rights abuses, it does cause them indirectly and facilitates them through its demand for such products. Our consumption of these products makes us responsible to act. Additionally, our ability to enforce water rights against the biggest producers increases this responsibility.

#### A. BEVERAGES

Coca-Cola (“Coke”) provides the most well-known examples of water rights abuses in the beverage industry. In the year 2000, in Plachimada, a small hamlet in Kerala, India, Coke opened a bottling plant after acquiring 34.4 acres of land.<sup>22</sup> The Kerala State Pollution Control Board granted Coke the rights to produce up to 561,000 liters of beverages per day. On average, Coke consumed 3.8 liters of water for every liter of product produced.<sup>23</sup> From boreholes and open wells, the company drew 510,000 liters of water per day.<sup>24</sup>

Six months after the plant began production, residents complained that local water had turned milky white and brackish, and was unsuitable for cooking and drinking.<sup>25</sup> Some months later, villagers began complaining of stomachaches,<sup>26</sup> burning eyes, and skin issues.<sup>27</sup> A local watchdog group found elevated levels of

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22. Rohan D. Matthews, *The Plachimada Struggle Against Coca-Cola in Southern India*, RITIMO (July 1, 2011), <http://www.ritimo.org/The-Plachimada-Struggle-against-Coca-Cola-in-Southern-India>.

23. *Id.*

24. *Case Against Coca-Cola Kerala State: India*, THE RIGHTS TO WATER AND SANITATION, <http://www.righttowater.info/rights-in-practice/legal-approach-case-studies/case-against-coca-cola-kerala-state-india/> (last visited Feb. 23, 2016) [hereinafter THE RIGHTS TO WATER].

25. Matthews, *supra* note 22.

26. *Id.*

27. THE RIGHTS TO WATER, *supra* note 24.

calcium and magnesium in the water, a result of Coke's water consumption.<sup>28</sup> After two years, water pollution and shortages were common, forcing some residents to walk five kilometers twice a day to fetch water.<sup>29</sup>

When the state refused to act, the Village Council, responsible for renewing the water extraction license, decided to let it lapse, stating that renewal was not in the public interest, given the "presence of hazardous and toxic substances in wastes emitted by [Coke], and a scarcity in drinking water."<sup>30</sup> That same year, carcinogens were discovered in the waste produced by Coke.<sup>31</sup> Local farmers, who had previously accepted the waste for free, stopped taking it due to the damage the waste was causing to their crops.<sup>32</sup> Coke then began to dump the waste at the sides of local roads.<sup>33</sup> This waste was later found to contain between 400 and 600 percent of the allowable amount of cadmium.<sup>34</sup>

The state of Kerala stayed the Council's revocation decision, which was reversed by a single-judge bench in the High Court of the state.<sup>35</sup> Coke appealed to the appellate bench of the Kerala High Court, and litigation lasted for another eighteen months. The Divisional Bench of the Kerala High Court granted Coke the right to extract 500,000 liters of water per day for the rest of the year,<sup>36</sup> while a full factual assessment was made.<sup>37</sup> However, that same year, the Indian legislature passed the Kerala Ground Water (Control and Regulation) Act, which listed Plachimada as "overexploited," and consequently prevented further commercial extraction.<sup>38</sup> Four years later, the legislature passed another statute that determined that the company could be held liable, up to US\$48 million for damages it had caused.<sup>39</sup>

Another bottling factory was shuttered in Varanasi, Uttar Pradesh where the company had exceeded its operating license, and operations had dropped groundwater levels by almost eight meters.<sup>40</sup> Additionally, in Charba, Uttarakhand, a local community blocked a proposed plant on environmental grounds after the government had signed a memorandum of understanding with Coke, allowing

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28. Matthews, *supra* note 22.

29. THE RIGHTS TO WATER, *supra* note 24.

30. Matthews, *supra* note 22.

31. *Id.*

32. *Id.*; THE RIGHTS TO WATER, *supra* note 24.

33. Matthews, *supra* note 22.

34. *Id.*

35. *Id.*

36. THE RIGHTS TO WATER, *supra* note 24; Saby Goshray, *Searching for Human Rights to Water Amidst Corporate Privatization in India: Hindustan Coca-Cola Pvt. Ltd. v. Perumatty Grama Panchayat*, 19 GEO. INT'L ENVTL. L. REV. 643, 647 (2007).

37. THE RIGHTS TO WATER, *supra* note 24.

38. Matthews, *supra* note 22.

39. Amit Srivastava, *Coca-Cola Liable for US\$ 48 Million for Damages—Government Committee*, INDIA RES. CTR. (Mar. 22, 2010), <http://www.indiaresource.org/news/2010/1003.html>.

40. Fatima Hansia, *Coca-Cola Forced to Shut Bottling Plant in India*, CORPWATCH (July 10, 2014), <http://www.corpwatch.org/article.php?id=15963>.

production to go forward.<sup>41</sup>

While government action and enforcement took place in the *Kerala* case, compensation has taken more than ten years.<sup>42</sup> For many cases of water rights abuses, victims remain uncompensated, either temporarily or indefinitely.

## B. PHARMACEUTICALS

Pharmaceutical waste presents a major danger to water security. Elsewhere in India, in Patancheru, Telangana, in 2009, about ninety Indian pharmaceutical companies were sending their wastewater to a local waste treatment facility. A report commissioned by the Indian Supreme Court, however, noted that this facility could not manage all of the waste being delivered, leading some to suspect that transporters were actually dumping waste and wastewater into a river.<sup>43</sup> Swedish researchers found twenty-one active pharmaceutical ingredients in the river, some at the highest levels ever detected in the environment,<sup>44</sup> including one hundred pounds of ciprofloaxin, an antibiotic, dumped into the stream by one company every day.<sup>45</sup> This river flowed into a poor community which used the water for livestock, agriculture, fishing, and drinking.<sup>46</sup>

The drug residues are known to inhibit the growth of human cells in the lab.<sup>47</sup> The Swedish report also demonstrated growth-limiting effects and increased mortality of tadpoles caused by these residues.<sup>48</sup> Other researchers are concerned that bacteria resistant to these commonly used drugs will develop in areas where these residues mix with sewage.<sup>49</sup>

The companies are not required to screen the output of water treatment equipment for pharmaceutical residue.<sup>50</sup> Even so, one expert has noted that, although India has acceptable environmental laws in place, enforcement personnel cannot keep up with all of the abuses.<sup>51</sup> These companies export to, among other countries, the United States. Pharmaceutical drug waste imported into the

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41. *BJP to Oppose Coca Cola's Proposed Plant in Uttarakhand*, THE ECON. TIMES (Apr. 23, 2013, 6:34 PM), [http://articles.economictimes.indiatimes.com/2013-04-23/news/38763086\\_1\\_proposed-bottling-plant-state-bjp-chief-chief-tirath](http://articles.economictimes.indiatimes.com/2013-04-23/news/38763086_1_proposed-bottling-plant-state-bjp-chief-chief-tirath); Shishir Prashant, *Chharba Unwilling, Coca-Cola Scouts for New Bottling Plant Site*, BUS. STAND. (Apr. 25, 2014), [http://www.business-standard.com/article/companies/chharba-unwilling-coca-cola-scouts-for-new-bottling-plant-site-114042300904\\_1.html](http://www.business-standard.com/article/companies/chharba-unwilling-coca-cola-scouts-for-new-bottling-plant-site-114042300904_1.html).

42. *Matthews*, *supra* note 22.

43. *See generally* Naomi Lubick, *India's Drug Problem*, 457 NATURE 640 (2009), <http://www.nature.com/news/2009/090204/full/457640a.html>.

44. Meyer, *supra* note 15.

45. *Id.*

46. *Id.*

47. *Id.*

48. Gunnar Carlsson et al., *Effluent from Bulk Drug Production Is Toxic to Aquatic Vertebrates*, 28 ENVTL. TOXICOLOGY CHEMISTRY 2658 (2009), <http://onlinelibrary.wiley.com/doi/10.1897/08-524.1/full>.

49. Meyer, *supra* note 15.

50. *Id.*

51. Lubick, *supra* note 43.

United States has the potential to create great amounts of pollution with little action on cleanup.

### C. CLOTHING

The problem of water pollution from clothing and, specifically, from dyes involved in production, is widespread. A schoolteacher in Saver, Bangladesh (just outside of Dhaka, the capital) observed, “Sometimes [the river] is red. Or gray. Sometimes it is blue. It depends on the colors they are using in the factories.”<sup>52</sup> Clothing exporters often ignore environmental regulations to compete for business around the world, including in the United States. One common example is dumping toxic wastewater into rivers. As a result, fish die, local agriculture is destroyed, and local streams are choked with garbage.<sup>53</sup>

The mayor of Savar points out that such pollution happens everywhere.<sup>54</sup> Politically, the garment industry is strong in Bangladesh. To illustrate, on one occasion, factory owners forced the transfer of a tough enforcement official appointed by the environmental ministry of Bangladesh. The official now runs the state dairy operation.<sup>55</sup>

A scientific study of the industry’s effect on water quality in the area found that more than eighty percent of the industry had no industrial-sized treatment plant for effluent discharge.<sup>56</sup> As a result, “highly polluted and toxic waste waters are discharged into sewers and drains without any kind of treatment.”<sup>57</sup> Less than two percent of factories had adequate facilities to treat wastewater.<sup>58</sup> The smell from the water is so bad that local school children faint when the wind turns against them.<sup>59</sup> Chemicals dissolved into the water include high levels of nitrite, phosphate, alkalis, acids, sulfate, and metallic ions, among others.<sup>60</sup> Many biochemicals released by the factories as waste demand oxygen, starving the natural organisms responsible for cleaning the rivers, as well as local wildlife.<sup>61</sup> Levels of concentration of these chemicals were four to nine times higher than those allowed by regulations.<sup>62</sup>

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52. Yardley, *supra* note 5.

53. *Id.*

54. *Id.*

55. *Id.*

56. Mahfuza S. Sultana et al., *Impact of the Effluents of Textile Dyeing Industries on the Surface Water Quality Inside D.N.D. Enbankment, Narayanganj*, 44 BANGLADESH J. OF SCI. & INDUS. RES. 65 (2009), <http://www.banglajol.info/index.php/BJSIR/article/view/2715/2294>.

57. *Id.* at 66.

58. *Id.*

59. Yardley, *supra* note 5.

60. Sultana et al., *supra* note 56, at 74.

61. *Id.*

62. *Id.* at 75.

Similar issues have also arisen in Chinese rivers, with notable examples in Zhetiang<sup>63</sup> and Henan<sup>64</sup> provinces, where rivers have run blood red. The Pearl River in Guangdong has also been heavily polluted by, among other things, dye for blue jeans.<sup>65</sup> Similar problems have been noted in Mexico.<sup>66</sup> Such problems involving waste from the clothing industry exist worldwide.

#### D. EXTRACTION

Extraction of minerals and oil creates perhaps the worst water pollution of all. Some of the worst examples of this are evidenced by the continuing legal battles between Texaco (now owned by Chevron) and the citizens of Ecuador and Peru. Legal wrangling over this single issue has played out since 1993 in the highest courts of both Ecuador and the United States.<sup>67</sup> One of the world's most contaminated industrial sites is 1,700 square miles of rainforest, which were polluted by Texaco's oil extraction operation in Ecuador. Texaco was polluting from multiple sources on a daily basis for almost three decades.<sup>68</sup> The site was located in an area so deep into the rainforest that it did not have a name as late as the 1950s.<sup>69</sup> Texaco drilled 325 productive wells and built eighteen associated crude oil processing facilities, which ultimately spilled over fifty percent more oil than the *Exxon Valdez* spill.<sup>70</sup> Rain contained soot from the black smoke, oil was used to coat roads to suppress dust, and allegedly unlined, unfenced pits were filled with poisonous muds, cuttings, and crude oil, often dug within feet of the subsurface waters.<sup>71</sup> Soils in the site contain unusually high levels of hexavalent chromium, cadmium, and barium, "all toxic materials associated with the drilling and extraction process."<sup>72</sup>

The amount of crude oil dumped into the Amazon pales in comparison to the volumes of discarded wastewater—at least twelve billion gallons. Compared to

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63. Han Wei, *Officials Failing to Stop Textile Factories Dumping Waste in Qiantang River*, CHINADIALOGUE (Aug. 1, 2013), <https://www.chinadialogue.net/article/show/single/en/5589-Officials-failing-to-stop-textile-factories-dumping-waste-in-Qiantang-River>.

64. Tian Shao, *River in China Turns Red*, CNN (Dec. 16, 2011, 05:49 AM), <http://www.cnn.com/2011/12/16/world/asia/china-river-of-red/>.

65. Emily Chang, *China's Famed Pearl River under Denim Threat*, CNN (Apr. 27, 2010, 11:44 PM), <http://www.cnn.com/2010/WORLD/asiapcf/04/26/china.denim.water.pollution/>.

66. Frank Jack Daniel, *Jeans Firms Pollute Mexican City with Blue Dye*, REUTERS (May 2, 2007, 8:44 PM), <http://www.reuters.com/article/2007/05/03/us-mexico-jeans-idUSN0233714020070503>.

67. *See generally Texaco/Chevron Lawsuits (re Ecuador)*, BUS. & HUMAN RIGHTS RES. CTR., <http://business-humanrights.org/en/texacochevron-lawsuits-re-ecuador> (last visited Feb. 23, 2016) [hereinafter BHRRC].

68. *Chevron's Chernobyl in the Amazon*, AMAZON WATCH, <http://amazonwatch.org/work/chevron> (last visited Feb. 23, 2016) [hereinafter AMAZON WATCH].

69. William Langewiesche, *Jungle Law*, VANITY FAIR (May 2007), <http://www.vanityfair.com/news/2007/05/texaco200705>.

70. *Id.*; the *Exxon Valdez* oil spill was around eleven million gallons, while Texaco's operations in Ecuador spilled more than seventeen million gallons. *Id.*

71. *Id.*

72. *Id.*

levels established by California regulations, salinity was on average thirty times higher, and chloride was eighty-eight times higher (both peaking at one station at 147 and 440 times, respectively).<sup>73</sup> Local indigenous and settler communities continue to suffer from cancer, birth defects, miscarriages, and other ailments, very likely as a result.<sup>74</sup>

A provincial court ruled against Chevron for US\$19 billion after a young lawyer brought the case in 1993.<sup>75</sup> The Ecuadorian Supreme Court, in 2013, affirmed the verdict for the plaintiffs but reduced damages to US\$9.5 billion.<sup>76</sup> However, Chevron had no assets in Ecuador, so the legal battle continued in New York to attempt to enforce the order.<sup>77</sup> While an injunction was issued against enforcement of the order, it was reversed in the Second Circuit,<sup>78</sup> which the Supreme Court later refused to hear.<sup>79</sup> The injunction was reinstated in May 2014,<sup>80</sup> and the Second Circuit is currently reviewing it.<sup>81</sup>

#### E. SUMMARY

This Ecuador court battle has persisted for more than twenty years, and it is still uncertain if the order will be enforceable. A single, clear legal threat in the import market by such an egregious violation would have strongly incentivized Texaco to clean up its operations and abide by local laws. Once Texaco imported the raw materials they had extracted from Ecuador, they faced no threat from the country of import, i.e., the United States.

Many other industries, such as beverages, pharmaceuticals, and clothing, currently have a strong incentive to take their operations abroad to countries with less rigorous enforcement of environmental regulations. If the threat of an exporting country's laws extended to the import market, companies would have less incentive to go abroad in the first place. While one jurisdiction enforcing another's laws is uncommon, it is not unheard of. The next sections will examine a way to make this possibility a reality, and prevent these egregious abuses of water rights around the globe.

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73. *Id.*

74. AMAZON WATCH, *supra* note 68.

75. Paul Barrett, *Chevron Fails to Squelch \$19 Billion Ecuador Verdict*, BLOOMBERG BUS. (Oct. 9, 2012), <http://www.bloomberg.com/bw/articles/2012-10-09/chevron-fails-to-squelch-19-billion-ecuador-verdict>.

76. BHRRRC, *supra* note 67.

77. Miguel Tinker Salas, *Can Ecuador Bring Chevron To Justice?*, AL JAZEERA AMERICA (Apr. 24, 2015 2:00 PM), <http://america.aljazeera.com/opinions/2015/4/can-ecuador-bring-chevron-to-justice.html>.

78. *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581, 660-61 (S.D.N.Y. 2011), *rev'd sub nom.* *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012).

79. Barrett, *supra* note 75.

80. *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 558 (S.D.N.Y. 2014).

81. Letter Brief for Petitioner, Nos. 14-826 (L), 14-832 (Con) (2d Cir. Apr. 20, 2015); *see also* Brief for Petitioner, *Chevron Corp. v. Donziger*, Nos. 14-826, 14-832 (2d Cir. Apr. 20, 2015).

### III. THE LACEY ACT: A HISTORY

The law that can help with the water issues discussed above is the oldest federal wildlife conservation law in the United States, the Lacey Act (“the Act”).<sup>82</sup> The Act is uniquely suited to this task given its particular approach to combating a social problem at the time of its passage. Passed at the beginning of the Twentieth century, the Act originally targeted what the author of the bill called “pothunters” (poachers), who would cross state lines with their kills to escape prosecution. Since enactment, the Act has undergone many changes, including a significant amendment as recently as 2008. This section shows how the original purpose of the Act, its amendments, and its unique character make this piece of legislation uniquely suited to tackle international water rights abuses. The section also examines some recent case law to illustrate the breadth and strength of the Act.

#### A. PASSAGE IN 1900

Originally proposed by Representative John F. Lacey (R-IA), the Act exercised Congress’s interstate commerce power<sup>83</sup> to control the introduction of birds into local ecosystems.<sup>84</sup> The Act also supplemented state authority with a focus on “protecting game and birds.”<sup>85</sup> Comments on the House floor pointed to these two purposes, and to the authorization it provided to the Department of Agriculture to “assist with the reintroduction of game birds and other wild birds where they had become locally scarce or extinct.”<sup>86</sup> Insectivorous birds, which were being hunted for game and for their feathers (for women’s hats),<sup>87</sup> were declining at a rapid pace.<sup>88</sup> It was feared that this had dire consequences for agriculture in many regions of the United States, as insects previously kept in check by birds were multiplying and infesting crops.<sup>89</sup> The best way to combat this, Lacey believed, was to supplement state legislation by making it illegal to sell game that had been taken in violation of the laws applicable when and where it was killed.

Long before state long-arm statutes were available to reach someone beyond a state’s borders, the Act served an important role. Before passage, if a poacher killed a species protected by a state law, and transported the illegal game into a new state, they were no longer under the jurisdiction of the original state. The

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82. *Lacey Act*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/international/laws-treaties-agreements/us-conservation-laws/lacey-act.html> (last visited Feb. 23, 2016).

83. *See generally* U.S. CONST. art. I, § 8, cl. 3.

84. Robert S. Anderson, *The Lacey Act: America’s Premier Weapon in the Fight Against Unlawful Wildlife Trafficking*, 16 PUB. LAND L. REV. 27, 37 (1995).

85. H.R. REP. NO. 474, at 1–2 (1900).

86. Anderson, *supra* note 84, at 37.

87. *Id.*

88. *Id.*

89. *Id.* at 37 n.58.

new state could not regulate the game, as it was now in interstate commerce. A strong doctrine existed at the time preventing a state law from having more than a *de minimis* effect on interstate commerce.<sup>90</sup> This was believed to be the exclusive realm of Congress.<sup>91</sup> The Act solved this, assigning liability under a federal regime to poachers who escaped state laws by crossing borders to sell their catches.<sup>92</sup> This is one of the reasons why, during the original passage of the Act, game wardens strongly supported the bill, along with farmers, hunters, and bird lovers—a coalition as uncommon then as it would be today.<sup>93</sup> The Act instituted multiple mechanisms. It prohibited the shipping of animals that were killed in contravention of local laws,<sup>94</sup> required clear labeling,<sup>95</sup> and subjected all game to the laws of the state into which it was brought.<sup>96</sup>

The Act's first amendment came in 1935, when it was selected as the vehicle to combat wildlife trafficking, which entered the United States from foreign jurisdictions. The amenders accomplished this through a small addition that changed the inherent character of the Act. Language was added to prohibit the sale or transportation of any wild animal or bird (or parts thereof) that was "captured, killed, taken, shipped, transported, carried, purchased, sold or possessed contrary to the law of any foreign country or State, Province, or other subdivision thereof in which it was captured, killed, taken, purchased, sold, or possessed."<sup>97</sup> This applied to animals shipped "by any means whatsoever."<sup>98</sup> The amended act gave enforcement authority to agents of the Department of Agriculture, and not just game wardens, as the original Act had done.<sup>99</sup>

Subsequently, the Act was amended several times. In 1981, Congress added tribal laws, U.S. treaties,<sup>100</sup> and domestic federal law.<sup>101</sup> It also included fish,<sup>102</sup> in addition to wildlife and birds, and prohibited the importation of wild animals

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90. See generally *Schollenberger v. Com. of Pa.*, 171 U.S. 1 (1898) (holding unconstitutional a law which prohibits import of a product into a state, as a state has no power to regulate interstate commerce).

91. *Id.*

92. 16 U.S.C. § 3372(a)(2)(A) (2008) (prohibiting the "import, export, transport, [sale], [receipt], [acquisition], or purchase in interstate or foreign commerce" of "any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State").

93. C. Jarrett Dieterle, *The Lacey Act: A Case Study in the Mechanics of Overcriminalization*, 102 GEO. L.J. 1279, 1288 (2014).

94. Lacey Act, 56th Cong., ch. 553, § 3, 31 Stat. at 188.

95. *Id.* § 4.

96. *Id.* § 5.

97. Act of June 15, 1935, ch. 261, § 242, 49 Stat. 378, 380.

98. *Id.*

99. *Id.* § 243.

100. *Oversight Hearing on the 2008 Lacey Act Amendments Part 1 and 2, Before the H. Subcomm. on Fisheries, Wildlife, Oceans, and Insular Affairs, H. Comm. on Nat. Res., 113th Cong. 13* (2013) (statement of Stephen D. Guertin, Deputy Director, U.S. Fish and Wildlife Service, Department of the Interior), <http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg80980/pdf/CHRG-113hhrg80980.pdf>.

101. S. REP. NO. 97-123, at 4 (1981).

102. This was accomplished by repealing the Black Bass Act in its entirety and folding the provisions into the Lacey Act. H.R. REP. NO. 276, 97th Cong., 1st Sess. 1, 5 (1981).

or birds in “inhumane or unhealthful conditions.”<sup>103</sup> Finally, the 1981 amendment included plants, so long as they were indigenous to states and either listed as endangered there, or listed on one of the Appendices of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”).<sup>104</sup> At the time, CITES was the only treaty available to protect vulnerable plant species.<sup>105</sup>

Additionally, the amendment made enforcement easier. The *mens rea* requirement for a criminal violation was lowered from a “knowing and willful” standard<sup>106</sup> to simply “knowing”<sup>107</sup> or should have known after performing due diligence.<sup>108</sup> The maximum penalty was also doubled.<sup>109</sup> As one senator put it, “it was time to put teeth into the Lacey Act.”<sup>110</sup>

While many were not in support of these amendments, diverse stakeholders still came together to support a stronger version of the Act.<sup>111</sup> Their shared interests helped create a unique act to solve a social ill.

#### B. AMENDMENTS OF 2008

The most recent set of amendments to the Act became law 108 years after the Act’s original passage, and created a significant change. Illegal logging remains a significant environmental to this day. The practice is extremely common in the east of Russia.<sup>112</sup> The pace of illegal logging in Brazil increased by thirty-three percent from 2013 to 2014, to 5,900 km<sup>2</sup> of lumber.<sup>113</sup> In the late 1990s, the World Bank estimated that as much as seventy percent of all timber harvested in Indonesia was harvested illegally.<sup>114</sup> Around the same time, one estimate placed illegal timber harvesting on U.S. public lands at \$100 million worth of lumber.<sup>115</sup>

Senator Ron Wyden (D-OR) first tackled this problem in 2007 by introducing a measure to amend the Act in the Senate.<sup>116</sup> The proposal was to expand the

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103. Act of May 24, 1949, ch. 139, § 2, 63 Stat. 89. This provision was later codified in 1981 in 18 U.S.C. § 42(c), which requires the Secretary of the Interior to promulgate regulations to ensure humane and healthful conditions, and prohibiting the opposite.

104. S. REP. NO. 97-123, at 4 (1981).

105. Raffi Khatchadourian, *The Stolen Forests: Inside the Covert War on Illegal Logging*, NEW YORKER (Oct. 6, 2008), <http://www.newyorker.com/magazine/2008/10/06/the-stolen-forests>.

106. S. REP. NO. 526, at 12–14 (1969).

107. This is still the case. See 16 U.S.C. § 3373(a)(1).

108. S. REP. NO. 97-123, at 3 (1981); see also 16 U.S.C. § 3373(a)(1).

109. S. REP. NO. 97-123, at 3 (1981).

110. 127 Cong. Rec. S17,329 (1981) (statement of Sen. Thurmond).

111. See Anderson, *supra* note 84, at 50–51.

112. Khatchadourian, *supra* note 105.

113. Damian Carrington, *Activists Use GPS to Track Illegal Loggers in Brazil’s Amazon Rainforest*, THE GUARDIAN (Oct. 15, 2014, 02:00), <http://www.theguardian.com/environment/2014/oct/15/activists-use-gps-to-track-illegal-loggers-in-brazils-amazon-rainforest>.

114. Khatchadourian, *supra* note 105.

115. *Id.*

116. 153 CONG. REC. S10,622 (2007), <https://www.congress.gov/congressional-record/2007/senate-section/page/S10622-10623>.

coverage of plants under the Act beyond those listed in CITES and to extend the same protections to plants as Congress had extended to wildlife—almost.<sup>117</sup> Plants taken in contravention of certain foreign laws were covered as any fauna, so long as the foreign or federal law contravened was for the purpose of protecting plants, or regulating (1) the theft of plants, (2) the taking of plants from an officially protected or designated area, including parks and forest reserves, or (3) “the taking of plants without, or contrary to, required authorization.”<sup>118</sup> Congress also added language to trigger the Act’s penalties upon failure to pay “appropriate royalties, taxes, or stumpage fees.”<sup>119</sup>

Co-sponsors of these amendments included Senator Lamar Alexander (R-TN) and then-Senators Olympia Snowe (R-ME), John Kerry (D-MA), Joe Biden (D-DE), and Barack Obama (D-IL).<sup>120</sup> Whereas Senator Wyden had originally been approached by environmental groups,<sup>121</sup> several labor<sup>122</sup> and industry groups agreed to support the amendments as well.<sup>123</sup> They complained of increased competition from Chinese hardwood importers due to “tariff misclassification to subsidies to fraudulent labeling to illegal logging.”<sup>124</sup> All of these practices lowered the cost of imports and gave the Chinese what the American hardwood manufacturers called an unfair advantage. While the United States pursued the matter before the World Trade Organization (“WTO”),<sup>125</sup> Congress referred the proposal, called the Combat Illegal Logging Act of 2007, to the Committee on Agriculture, Nutrition, and Forestry.<sup>126</sup> Though the bill never made it out of committee, Senator Wyden reintroduced it in the Food, Conservation, and Energy Act of 2008<sup>127</sup> as an amendment<sup>128</sup> with no debate.<sup>129</sup> The bill eventually passed after Congress overrode a veto by then President George W. Bush,<sup>130</sup> and the amendment became law on May 22, 2008.<sup>131</sup>

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117. S. 1930 110th Cong. § 2(a)(i) (2007).

118. *Id.*

119. *Id.* While there is no definition for “stumpage fee” in the Act, at least one commentator has suggested that this is a way to protect land ownership and land tenure. See Duncan Brack, *Treatment of Conversion Timber in Consumer Country Measures*, FOREST TRADE AND FIN., Dec. 2013, at 32.

120. 153 CONG. REC. S10,621 (2007).

121. *Id.*

122. 153 CONG. REC. S10,622 (2007); see also GREEN PRESS INITIATIVE, THE U.S. LACEY ACT: FREQUENTLY ASKED QUESTIONS ABOUT THE WORLD’S FIRST BAN ON TRADE IN ILLEGAL WOOD2, <http://www.greenpressinitiative.org/documents/LaceyActFAQ.pdf> [hereinafter GREEN PRESS INITIATIVE].

123. 153 CONG. REC. S10,622 (2007); see also Khatchadourian, *supra* note 105.

124. 153 CONG. REC. S10,622 (2007).

125. *Id.*

126. Combat Illegal Logging Act of 2007, S.1930 110th Cong. (2007).

127. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 8204, 122 Stat. 1651 (2008).

128. S. Amdt., S14518 3698, 3697, 3502, 110th Cong. (2007).

129. The amendments changed in form slightly to include an exception for scientific specimens. 16 U.S.C. § 3371(f)(2)(B). This was done in order to get the support of Monsanto and the Biotechnology Industry Organization. Khatchadourian, *supra* note 105.

130. H. Doc. No. 110-125 (2008).

131. 16 U.S.C. § 3371 *et seq.*

Whereas this represents a significant departure from the original text of the Lacey Act, the amendments are similar in spirit. They were put forth to protect American industry, promote environmental conservatism, and attack a social ill.<sup>132</sup> This type of action can sharply reduce demand for illegally taken flora and fauna around the world, disincentivizing the taking in the first place.<sup>133</sup> This sort of law can also promote reciprocity: if the United States closes its markets to illegal timber and wildlife, and helps a foreign country enforce its environmental conservation laws, that country may take similar action, and prohibit the sale of flora and fauna taken illegally from the United States. Indeed, since these amendments passed, similar statutes have passed in the European Union (“EU”)<sup>134</sup> and Australia.<sup>135</sup>

The amendments also do not increase government largesse, instead prompting businesses to investigate their timber supply lines.<sup>136</sup> Similarly, at least one commentator has noted that by not defining specifically what constitutes legal documentation of lawful import, “a company is not required to match any one standard of legality [for] documentation or due diligence—and, conversely, no document is a 100% guarantee of legality in and of itself.”<sup>137</sup> This was a huge step forward as the world’s first ban on trade in illegal wood.<sup>138</sup>

### C. SCOPE

A few recent examples of the Act’s usage illustrate one of its biggest strengths. Courts have read the Act’s provisions extremely broadly, making this relatively short statute quite powerful. In *United States v. Lee*,<sup>139</sup> the National Marine Fisheries Service ran a sting operation on an importer of 500 metric tons of salmon taken in violation of a Taiwanese regulation.<sup>140</sup> After making the transfer in international waters, the importers were arrested and charged.<sup>141</sup> The defendants argued that the Act’s prohibition on selling fish taken in violation of “any

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132. 153 CONG. REC. S10,622 (2007).

133. Marcus Asner & Katherine Ghilain, *The 2008 Lacey Act Amendments and the Fight Against Illegal Logging*, BLOOMBERG LEGAL (July 8, 2013), <http://www.bna.com/the-2008-lacey-act-amendments-and-the-fight-against-illegal-logging/> (“The potential benefits from the 2008 Amendments are promising. As companies eliminate risky suppliers, fewer illegal goods will enter the U.S. This protects U.S. interests and decreases illegal logging by reducing demand. 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.”).

134. European Union Timber Regulation, Commission Regulation 995/2010, art. IV(1) 2010 O.J. (L 295) 27.

135. Illegal Logging Prohibition Bill 2012 (Cth) (Austl.).

136. This is accomplished through the due diligence requirement. *See* 16 U.S.C. § 3373(a)(1).

137. GREEN PRESS INITIATIVE, *supra* note 122, at 2.

138. *Id.* at 1.

139. *United States v. Lee*, 937 F.2d 1388 (9th Cir. 1991), *cert. denied*, 502 U.S. 1076 (1992).

140. *Lee*, 937 F.2d at 1390.

141. *Id.*

foreign law”<sup>142</sup> referred to foreign legislation, and not the regulation. To buttress this argument, they noted that the 1981 amendments had removed the words “law or regulation of any State or foreign country.”<sup>143</sup> The court disagreed. The court reasoned that it was unable to directly translate foreign laws into the U.S. legal system, as well as the 1981 amendments’ purpose to strengthen the then “inadequate” Act. Thus the court read “any foreign law” broadly to include regulations and civil penalties.<sup>144</sup>

This case relied significantly on an earlier case, *United States v. 594,464 Pounds of Salmon*,<sup>145</sup> where the defendants violated a regulation promulgated by the same Taiwanese office. “[B]ecause of the wide range the forms of law may take given the world’s many diverse legal and governmental systems,” the court reasoned, “Congress would be hard-pressed to set forth a definition that would adequately encompass all of them.” Forcing the world’s various legal systems to fit the American model would not only be well beyond the competencies of a court, but possible disagreements between courts forced to undertake such an endeavor would be practically unresolvable. “Moreover,” the court stated, “if Congress explicitly included ‘foreign regulation,’ then there would have been a problem with enforcement. The door would have been opened for defendants to argue that a violation of a ‘law’ (in the broad sense) which does not fall easily into either ‘law’ (in the more narrow ‘statutory sense’) or ‘regulation’ categories” does not trigger the Act’s forfeiture provision.<sup>146</sup> The court also feared letting free “smugglers in violation of laws of foreign countries that do not have a system that fits within the ‘laws/regulations’ rubric.”<sup>147</sup>

In *United States v. Three Pallets of Tropical Hardwood*,<sup>148</sup> the U.S. Fish and Wildlife Service (“FWS”) caught an importer bringing three pallets of tropical hardwood from Peru to Tampa, Florida, with stolen and forged documents. The court found, “alleged violations of [foreign] law could include operating a business without a permit and a violation of using stolen and forged documents.”<sup>149</sup> Ultimately, the defendant was found liable for relying on forged documents.<sup>150</sup> Courts generally interpret relevant foreign law that triggers liability broadly. As one commentator noted, so long as an applicable law falls under the statute or protects plants, “all foreign laws must be considered, no

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142. 16 U.S.C. § 3372(a)(2)(A).

143. *Lee*, 937 F.2d at 1391.

144. *Id.* at 1391–92.

145. *United States v. 594,464 Pounds of Salmon*, 871 F.2d 824, 827 (9th Cir. 1989).

146. *Salmon*, 871 F.2d at 827–28.

147. *Id.* at 828.

148. *U.S. Dep’t of the Interior v. Three Pallets of Tropical Hardwood (Crouch)*, Inv. No. 2009403072, at 2 (Office of the DOI Solicitor June 22, 2010).

149. *Id.*

150. *Id.* at 5.

matter how insignificant.”<sup>151</sup>

Finally, in *United States v. McNab*,<sup>152</sup> the defendant had imported lobsters from Honduras that were taken in violation of laws regulating lobster fishing. The laws restricted the size of the lobsters that could be caught and regulated the manner of packaging.<sup>153</sup> When the defendants challenged the validity of the Honduran laws, the court relied on Honduran officials to verify them.<sup>154</sup> These assurances were made during investigation and trial. However, once the defendants were convicted, the officials reversed their position, insisting that the laws be repealed retroactively.<sup>155</sup> On appeal, the court upheld the sentence, due to the validity of the laws at the time of indictment.<sup>156</sup> Subsequent repeal was irrelevant to the validity of the law when it was violated.<sup>157</sup>

The broad manner in which the courts have interpreted the Act, with *McNab* often being mentioned, has also led to most of the criticism of the Act, especially after its expansion in 2008. Some have upheld the verdict in *McNab* as “enforce[ment of] international conservation laws where the offenders elude prosecution by the foreign government or where that government lacks the resources to enforce its own laws.”<sup>158</sup> Others, however, see the decision as emblematic of over-criminalization,<sup>159</sup> citing *McNab* specifically as “a battle cry for politicians and members of the press who see this expansive reading of the Act as being overly broad and hurtful to the average American.”<sup>160</sup> Convictions for labeling failures have also prompted criticism.<sup>161</sup>

The U.S. Department of Justice filed a famous case against the guitar maker Gibson in 2011,<sup>162</sup> after two raids on the company’s factories by FWS agents,<sup>163</sup> for importing Indian ebony wood in violation of an Indian law. Gibson decided to

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151. Trevor Krost, *The World’s Laws in American Justice*, 8 PITT. J. ENVTL. PUB. HEALTH L. 55, 69 (2013).

152. *United States v. McNab*, No. 01-15148 2003 U.S. App. LEXIS 5561 (11th Cir. Mar. 21, 2003).

153. *Id.* at \*5.

154. *Id.* at \*5–6, 8.

155. *Id.* at \*29.

156. *Id.* at \*45.

157. *Id.* at \*44.

158. Victor J. Rocco, *Wildlife Conservation Under the Lacey Act: International Cooperation or Legal Imperialism?*, N.Y. ST. B.J. 10, 14 (May 2008).

159. See generally Matthew S. White, *Overcriminalization Based on Foreign Law: How the Lacey Act Incorporates Foreign Law to Overcriminalize Importers and Users of Timber Products*, 12 WASH. U. GLOBAL STUD. L. REV. 381 (2013).

160. Meredith Pryce, *Reason to Fret: How the Lacey Act Left the Music Industry Singing the Blues*, 65 RUTGERS L. REV. 295, 313 (2012).

161. Stephanie Eberhardt, *The Lacey Act Amendments and United States’ Policing of International Trade*, 35 HOUS. J. INT’L L. 397, 416–17 (2013) (discussing the need for a *de minimis* exception in the cases of fraudulent labeling).

162. Verified complaint in rem, *United States v. 25 Bundles of Indian Ebony Wood*, No. 11-cv-00913 (M.D. Tenn. Sept. 27, 2011).

163. Pete Kasperowicz, *Gibson Guitar Agrees to Pay \$300,000 Penalty to Settle Lacey Act Violations*, THE HILL (Aug. 6, 2012, 4:23 PM), <http://thehill.com/blogs/floor-action/house/242357-gibson-guitar-agrees-to-pay-300000-to-settle-lacey-act-violations>.

settle the case rather than fight it out in the courts, paying fines of \$350,000 and forfeiting the wood, which was worth about \$260,000.<sup>164</sup> But it has maintained its innocence.<sup>165</sup> Gibson also agreed to set up a compliance program to prevent importing illegally sourced wood.<sup>166</sup>

However, criticism abounds.<sup>167</sup> Gibson, in a court filing, compared the raids to “something out of an Orwellian novel,” maintaining that any violation was a mere accident on the side of their Indian counterparts.<sup>168</sup> Some Members of Congress even introduced legislation in response to the raid,<sup>169</sup> though it never passed the House. A measure to remove all references to foreign law from the Act has been introduced in the Senate in three different Congresses though again has never progressed beyond that chamber.<sup>170</sup> The Act remains strong and broad.

#### D. USEFULNESS

The Act—called a “rarely used federal criminal statute unknown even to many experienced criminal lawyers,”<sup>171</sup>—has the potential to criminalize a great deal of conduct. One commentator notes that violation of the Act in importation can also support a charge of smuggling. If the profits from smuggling are then used to repeat the process (for instance, if a business engages in more than one such transaction), money laundering can also be added on.<sup>172</sup> All of this creates the

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164. *Id.*

165. Henry E. Juskiewicz, *Gibson Comments on Department of Justice Settlement*, GIBSON.COM (Aug. 6, 2012), <http://www.gibson.com/News-Lifestyle/Features/en-us/Gibson-Comments-on-Department-of-Justice-Settlement.aspx>; see also James R. Hagerty & Kris Maher, *Gibson Guitar Wails on Federal Raid Over Wood*, WALL STREET JOURNAL (Sept. 1, 2011), <http://www.wsj.com/articles/SB10001424053111903895904576542942027859286> (“Henry Juskiewicz, chief executive officer of the closely held company, said in an interview that a broker probably made a mistake in labeling the goods but that the sale was legal and approved by Indian authorities.”).

166. Kasperowicz, *supra* note 163.

167. Hagerty & Maher, *supra* note 165; *Editorial: Gibson Axed Up By Lacey Act*, WASH. TIMES (Aug. 14, 2012), <http://www.washingtontimes.com/news/2012/aug/14/gibson-axed-up-by-lacey-act/>; Talia Buford, *Furor over Gibson Guitar Raid Strikes Only Minor Chords on Hill*, POLITICO (Sept. 27, 2011, 16:54), <http://www.politico.com/news/stories/0911/64563.html>.

168. Hagerty & Maher, *supra* note 165.

169. Retailers and Entertainers Lacey Implementation and Enforcement Fairness Act, H.R. 3210, 112th Cong. (2011) [hereinafter RELIEF Act].

170. S. 2062, 112th Cong. (2012); S. 1019 114th Cong. (2015); see also *FOCUS Act*, RAND PAUL UNITED STATES SENATOR FOR KENTUCKY, <http://www.paul.senate.gov/about-rand/issues/reversing-burdensome-regulations/focus-act> (last visited Aug. 23, 2015).

171. Rocco, *supra* note 158, at 11.

172. *Id.* at 14.

possibility that enforcement of foreign wildlife conservation laws can be stricter in the United States than domestic legislation.<sup>173</sup>

The Act, however, has not been quite the job-crushing money-wasting scourge that opponents decry.<sup>174</sup> One of the few studies of the Act after the 2008 amendments suggests that the changes have had a noticeable effect on the worldwide illegal timber trade. The prices of timber around the world “have been higher since the advent of the [2008 Amendments] by about 40% and quantities lower by nearly double that amount.”<sup>175</sup> The largest change was for teak lumber in Malaysia and mahogany in Bolivia,<sup>176</sup> two regions suffering from severe deforestation.

Although high profile cases such as Gibson and large settlement amounts<sup>177</sup> have kept the Act in the public eye, its infrequent use may not hinder its effectiveness. Rather, it may be an attempt by the U.S. Department of Justice to let companies form their own means of compliance with the Act. The due diligence requirement to investigate the source of imported wood<sup>178</sup> allows companies making proper, good faith efforts to comply with the law to escape liability. A spokesperson for the Hardwood Federation saw the Act as allowing companies this flexibility, and another guitar manufacturer, Taylor Guitars, stated it had no problem complying with the Act.<sup>179</sup> Others have expressed that the new requirements are not unduly burdensome.<sup>180</sup>

Indeed, the rarity of the Act’s use is not surprising, given the resources required to prosecute a case, which include finding and interpreting a foreign law, and consulting the foreign country as to its validity and applicability. Perhaps it is most effective when it achieves compliance by prosecuting high-profile cases such as that against Gibson.

Having a few high-profile cases that cause widespread compliance is an effect that framers of most international agreements dream of having. Most such

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173. *Id.*

174. Hagerty & Maher, *supra* note 165; Joe Luppino-Esposito, *The Lacey Act: From Conservation to Criminalization*, HERITAGE FOUND. (May 7, 2012), <http://www.heritage.org/research/reports/2012/05/the-lacey-act-from-conservation-to-criminalization>.

175. Jeffrey P. Prestemon, *The Impacts of the Lacey Act Amendment of 2008 on U.S. Hardwood Lumber and Hardwood Plywood Imports*, 50 FOREST POL’Y & ECON. 31, 41 (Oct. 29, 2014), [http://www.srs.fs.usda.gov/pubs/ja/2014/ja\\_2014\\_prestemon\\_002.pdf](http://www.srs.fs.usda.gov/pubs/ja/2014/ja_2014_prestemon_002.pdf).

176. *Id.* at 42.

177. *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*, U.S. DEP’T OF JUSTICE (June 14, 2013), <http://www.justice.gov/usao-sdny/pr/officers-fishing-and-seafood-corporations-ordered-pay-nearly-225-million-south-africa?print=1>.

178. 16 U.S.C. § 3373(a)(1).

179. Buford, *supra* note 167.

180. Asner & Ghilain, *supra* note 133 (“Like any new regulatory regime, it takes time and effort to set up the proper compliance framework, and industry and the agencies will need to continue to work together to improve the regulatory framework. But in our experience, companies have been able to comply with the 2008 Amendments without an undue burden.”).

agreements languish from incomplete domestic counterpart legislation,<sup>181</sup> if they enter into force at all. It is for this reason that such legislation may be the best vehicle for action to solve the global water issues discussed above.

#### IV. THE PROPOSED AMENDMENT: RESPECT FOR WATER RIGHTS

With the strengths of the Lacey Act in mind, this section looks at the best location for an amendment to bolster water rights. It then examines possible additions from counterpart legislation in the EU, examines a suggestion for a *de minimis* exception from a commentator, and proposes language which would enforce protections of water rights. Lastly, this section examines political considerations regarding passage of the proposed amendment.

##### A. LANGUAGE OF A WATER AMENDMENT

Any possible amendment to combat water rights abuses should closely adhere to the language of the Act. This is a thornier issue than it may first appear. Current language targeting illegal timber or protected wildlife may not fit the required scope of a water rights provision.

One major change would be to focus on the manifested object entering the borders of the United States. Since there is no provision relating to inanimate objects, the proposed amendment would need to include one. Instituting a new section of the Act could potentially risk losing the provisions that make the Act so well-suited for this new task. Congress could water down a new section from the strength of other sections for political reasons. Also, if separated from the rest of the Act in a new statutory number, revising the new provision may be easier for courts to defang through new interpretations, or increase the perception of severability by future legislation. Folding the new water protection provisions into the Act as neatly as possible would be the best approach to preserve the power and breadth of the original Act.

The prohibitions in 16 U.S.C. § 3372(a)(2) would be the obvious choice for a new provision, as this section already includes all of the prohibited actions, and would fit within the structure of the Act itself. It could be effective to add two subsections to § 3372(a)(3) that mimic the prohibitions on “import, export, transport, sell[ing], receiv[ing], acquir[ing], or purchas[ing] in interstate or foreign commerce”<sup>182</sup> and possession “within the special maritime and territorial

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181. Saudi Arabia’s Royal Decree No. 25 of 28/5 of 28 August 2000 reserved the supremacy of Islamic law where it may contradict the U.N. Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”). See *Perpetual Minors: Human Rights Abuses Stemming From Male Guardianship and Sex Segregation in Saudi Arabia*, HUMAN RIGHTS WATCH 34–41 (Apr. 2008), [http://www.hrw.org/reports/2008/saudiarabia0408/5.htm#\\_ftn113](http://www.hrw.org/reports/2008/saudiarabia0408/5.htm#_ftn113) (discussing how this reservation renders Saudi Arabia’s accession to CEDAW meaningless).

182. 16 U.S.C. § 3372(a)(2).

jurisdiction of the United States,”<sup>183</sup> respectively.

This would also allow border control officers and the Secretaries of Interior, Commerce, and Agriculture to continue to enforce the statute.<sup>184</sup> It would also allow the defendant to escape liability by performing due diligence,<sup>185</sup> which remains undefined. Such a change would ensure continued use of competences, and would avoid the unpalatable option of enforcement by a more politically charged agency, for example, the Environmental Protection Agency (“EPA”). While some environmental laws that are enforced by agencies other than the EPA still receive criticism,<sup>186</sup> spreading environmental enforcement around the government would ensure that it could not as easily be blocked by appropriations shifts and would potentially ensure greater penetration into the governing culture and structure. The EPA is also heavily burdened by mandates to administer many other environmental laws. Additionally, non-environmentally focused agencies may understand the non-environmental aspects of a problem more deeply,<sup>187</sup> allowing them to more smoothly incorporate enforcement into their standard operating procedures. For these reasons, modest changes to the Act’s language and no modification of enforcement authorization would best suit a water rights amendment.

#### B. THE EUROPEAN UNION’S TIMBER REGULATION

The EU’s Timber Regulation (“EUTR”)<sup>188</sup> merits a potential amender’s attention. The EU has attempted to improve on the language in the Lacey Act’s current prohibitions in the EUTR. The EU empowered an enforcer to evaluate the validity of permits for harvesting plants when determining the risk that a product had been harvested illegally. This was not included within the statutory language of the EUTR, but is in the Guidance Document issued alongside it. One factor an enforcer considers is the level of corruption within the source country.<sup>189</sup> In many cases, government officials issue illegal or invalid licenses to allow harvesting within protected areas,<sup>190</sup> such as in Cambodia, which creates an unclear legal

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183. 16 U.S.C. § 3372(a)(3).

184. 16 U.S.C. § 3371(h).

185. 16 U.S.C. § 3373(a)(1).

186. See Megan Mullin, *Will Obama’s New Clean Water Act Rule Stir States to Revolt?*, WASH. POST (June 5, 2015), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2015/06/05/will-obamas-new-clean-water-act-rule-stir-states-to-revolt/>; Brett Hartl, *Senate Republicans Take Aim at Endangered Species Act*, CTR. FOR BIOLOGICAL DIVERSITY (May 6, 2015), [http://www.biologicaldiversity.org/news/press\\_releases/2015/endangered-species-act-05-06-2015.html](http://www.biologicaldiversity.org/news/press_releases/2015/endangered-species-act-05-06-2015.html).

187. Todd S. Aagaard, *Environmental Law Outside the Canon*, 89 IND. L. J. 1239, 1273 (2014).

188. Commission Regulation, *supra* note 134.

189. EUROPEAN COMM’N, GUIDANCE DOCUMENT FOR THE EU TIMBER REGULATION 5 (2013), <http://ec.europa.eu/environment/forests/pdf/Final%20Guidance%20document.pdf>.

190. Daphne Hewitt, *Potential Legality Issues From Forest Conversion Timber*, FOREST TRADE AND FIN.,

terrain.<sup>191</sup> Without this provision, a court decision within the source country invalidating the license would potentially be required to establish a Lacey Act violation.

Including corruption as a factor should not be taken lightly. Even if an enforcer's consideration were restricted to licenses, this puts courts in a position they are not likely comfortable inhabiting. They would need to make decisions about what level of corruption is unacceptable, and whether the corruption involves a given licensing program, administrative branch, or even an official. Additionally, relying on legal experts from the country would no longer be viable after establishing a suspicion of corruption—how could one trust representatives of the issuing agency before determining the extent of the corruption? Of course, a court could ask no one else, as such representatives are the experts in their fields.<sup>192</sup>

More onerous is deciding whether to consider the democratic process in the creation of a given law. While excluding this factor would render the corruption consideration toothless, including it could force a court to criticize entire swaths of foreign political machinery. The baseline to use is also unclear, as the United States is certainly not without its own share of corruption.<sup>193</sup> Even if this process were resolved, this could result in an American Due Process standard being applied to the rest of the world, which, in extreme cases, could potentially be the basis for a WTO violation.<sup>194</sup> This would also augment a problem identified by a commentator on *McNab*: that U.S. courts are deciding which foreign laws to enforce.<sup>195</sup> Although considering corruption in determining the legitimacy of permits for water use would be a noble goal, it may be unworkable no matter the

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Nov. 2013 at 1, 5; *see also* Sam Lawson et al., *Consumer Goods and Deforestation*, FOREST TRADE AND FIN., Sept. 2014 at 1, 57, 64, 68, 83.

191. Lawson et al., *supra* note 190, at 68.

192. 16 U.S.C. § 3372(c)(1) establishes offering “a hunting or fishing license or permit for the illegal taking, acquiring, receiving, transporting, or possessing of fish or wildlife” as a “sale” within the meaning of the Act. Such a determination would still require the legal decision of an Agency of the source country. If the Agency is routinely ignoring established water rights, the permit or license in question, if enlarged to apply to water rights, would likely still require a court decision invalidating it. One instance in Bangladesh involved the transfer of a government agent who attempted to enforce water laws. *See* Yardley, *supra* note 5.

193. *See, e.g.*, Joseph Spector, *Top N.Y. Lawmaker Arrested on Corruption Charges*, USATODAY (Jan. 22 2015), <http://www.usatoday.com/story/news/politics/2015/01/22/new-york-speaker-sheldon-silver-corruption-charges/22151823/>; Tom Lutey, *Republican Lawmaker Fined \$54,000 in Campaign Corruption Case*, BILLINGS GAZETTE (Aug. 21, 2015 21:30), [http://billingsgazette.com/news/government-and-politics/republican-lawmaker-fined-in-campaign-corruption-case/article\\_ed870d99-dbab-5345-bf6c-56700f89a9cd.html](http://billingsgazette.com/news/government-and-politics/republican-lawmaker-fined-in-campaign-corruption-case/article_ed870d99-dbab-5345-bf6c-56700f89a9cd.html); Howard Mintz, *Leland Yee Pleads Guilty in Corruption Case*, SAN JOSE MERCURY NEWS (July 1, 2015), [http://www.mercurynews.com/crime-courts/ci\\_28415152/leland-yee-pleads-guilty-corruption-case](http://www.mercurynews.com/crime-courts/ci_28415152/leland-yee-pleads-guilty-corruption-case).

194. Generally, a rule in WTO law is that one country may not legislate for the world. *See, e.g.*, Agreement on Technical Barriers to Trade, April 15, 1994, 1868 U.N.T.S. 120, art. 2 (allowing technical barriers to trade to limit trade in order to fulfill an objective), [https://www.wto.org/english/docs\\_e/legal\\_e/17-tbt\\_e.htm](https://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm). A possibility for an exception under Article XX exists, but a meaningful discussion of this issue is well beyond the scope of this note.

195. Rocco, *supra* note 158, at 14.

care that goes into shaping the statutory language.

The EUTR Guidance Document also defines “applicable legislation” to include “third parties’ legal rights concerning use and tenure that are affected by timber harvesting.”<sup>196</sup> A small change to “water usage” would suit this provision to the Act, similar to the undefined “stumpage fees”<sup>197</sup> which can potentially encompass the same considerations for plants. However, many of the same uncomfortable decisions would apply as well. Water rights are in flux in many developing countries, which are no doubt the targets of this proposed amendment. This would also incorporate the doctrine from international law of Prior, Free, and Informed Consent, which, again, is not routinely followed in the United States.<sup>198</sup> This uncertainty of water rights would carry legal uncertainties along with the targeted products. A balancing scheme would substitute judicial opinion for local expertise, and thus, this too should be left out. Violations of clear, established water rights should be the basis of the proposed amendment. There always remains the potential to amend again later after seeing the successes and failures such a proposed amendment would bring. For now, leaving behind the innovations of the EUTR is recommended.

### C. *DE MINIMIS* EXCEPTION

One additional consideration, raised by a commentator,<sup>199</sup> is inclusion of a *de minimis* exception. This would likely go a long way toward making a water rights amendment politically palatable. The main criticism of the current Act is over-criminalization<sup>200</sup>—putting people in jail for potentially simple mistakes like incorrect labeling of imports.<sup>201</sup> While due diligence should, in theory, protect against these sorts of issues, water rights can be notoriously complex, arcane, and uncertain. If one liter out of a million were taken illegally, a prosecution would not serve the purposes of this amendment. Applying a *de minimis* exception would also limit the application of this prohibition to those large companies most likely to deal heavily in imports and foreign production. Thus, inclusion of a *de minimis* exception would help tailor the amendment to target the biggest offenders.

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196. Commission Regulation, *supra* note 134, at 23 (laying down the obligations of operators who place timber and timber products on the market).

197. 16 U.S.C. § 3372(a)(2)(B)(ii–iii).

198. *See, e.g., Mission 2012: Clean Water: Reservation Water Rights*, MASS. INST. OF TECH. (2012), <http://web.mit.edu/12.000/www/m2012/finalwebsite/problem/waterrights.shtml>; Jack Healy, *Water Rights Tear at An Indian Reservation*, N.Y. TIMES (Apr. 21, 2013), [http://www.nytimes.com/2013/04/22/us/bitter-battle-over-water-rights-on-montana-reservation.html?\\_r=0](http://www.nytimes.com/2013/04/22/us/bitter-battle-over-water-rights-on-montana-reservation.html?_r=0); Michael R. Moore, *Native American Water Rights: Efficiency and Fairness*, 29 NAT. RES. J. 763 (1989), [http://lawschool.unm.edu/nrj/volumes/29/3/07\\_moore\\_native.pdf](http://lawschool.unm.edu/nrj/volumes/29/3/07_moore_native.pdf).

199. Eberhardt, *supra* note 161, at 415–21.

200. *See generally* Dieterle, *supra* note 93; Pryce, *supra* note 160.

201. This is Gibson’s current explanation for their prosecution. Hagerty & Maher, *supra* note 165.

## D. PROPOSED LANGUAGE

Proposed language for an amendment is simple and clear. The following language presents a starting point: 16 U.S.C. § 3372(a)(2)(D), “any product ready for final sale or conversion into final sale made using more than a *de minimis* violation of any law or regulation of any state, or any foreign law or regulation concerning right to water use, access, pollution, or any similar right of a third party.” Under 16 U.S.C. § 3372(a)(3), “within the special maritime and territorial jurisdiction of the United States (as defined in section 7 of Title 18),” add (C), “to possess any product ready for final sale or conversion into final sale made using more than a *de minimis* violation of any law or regulation of any state, or any foreign law or regulation concerning right to water use, access, pollution, or any similar right of a third party.” While this draft language may not solve every problem identified, it serves as a starting point to contemplation and creation of such an amendment.

## E. POLITICAL CONSIDERATIONS FOR POTENTIAL PASSAGE

Given the recent repeated attempts to defang the Lacey Act<sup>202</sup> by removing its most powerful provision,<sup>203</sup> as well as the current parsimonious atmosphere in Congress, there is little hope for such an amendment to pass in the near future. But if these partisan hurdles are temporary, passage could occur in a favorable (or even neutral) atmosphere. It would be crucial to involve industry players who stand to benefit from the new regulation, as was done in 2008, in the development of the amendment. Natural gas, nuclear, and renewable energy companies would be prime targets for supporting such an amendment, due to the hurdles it would place on traditional extractive industries. The same is true of certain companies in the clothing and agriculture industries,<sup>204</sup> as this would raise penalties for their competitors who violate water rights in production. While support from international companies that import to the United States would be beneficial, support from wholly domestic companies would be the most valuable. In addition, the many companies compliant with the environmental ISO 14000 series<sup>205</sup> would likely

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202. See RELIEF Act, H.R. 3210, 112th Cong. (2011).

203. S. 2062, 112th Cong. (2012); S. 1019, 114th Cong. (2015).

204. Many companies already voluntarily perform the supply line verification which would be required under this amendment. See, e.g., *What Is Fair Trade? Global Reach Map*, FAIR TRADE USA, <http://fairtradeusa.org/what-is-fair-trade/global-reach-map> (last visited Jan. 30, 2016); *Products & Partners*, FAIR TRADE USA, <http://fairtradeusa.org/products-partners> (last visited Jan. 30, 2016).

205. See, e.g., *Performance: Supply Chain Gaining Ground*, CERES, <http://www.ceres.org/roadmap-assessment/progress-report/performance-by-expectation/supply-chain/performance-supply-chain-gaining-ground> (last visited Feb. 23, 2016); *ISO 14000 News & List of Companies Certified to ISO 14001, Updated for 2010*, ENVTL. HEALTH & SAFETY ONLINE (Feb. 18, 2010), <http://www.ehso.com/EHServices/iso14new.htm>; Nabil Tamimi & Rose Sebastianelli, *Examining the Impact of ISO 1000 Certification on Shareholder Value by Industry Sector*, N.E. DECISION SCI. INST., <http://www.nedsi.org/proc/2012/proc/p111015006.pdf> (last visited Aug. 23, 2015).

support the amendment, as both this new amendment and that program require monitoring of supply and production lines.

Given that many countries are overwhelmed with enforcement of their environmental laws, or simply lack the ability to enforce for one reason or another, passage of this amendment would add an incentive to sign trade deals with the United States as well. Increased trade would provide additional opportunities to enforce the Act. Congress will find the increase in free trade agreements more palatable if such agreements can guarantee that this trade is done fairly, with protections for American businesses that comply with the laws in place. Environmentalists would be an easy constituency to recruit. Once fear of environmental protections has ebbed, an effort by a diverse collection of interests could possibly be enough to ensure passage, as was the case in 1900 and in 2008.

#### V. CONCLUSION

While this note does not offer final, tested language for an amendment, the proposed language is a simple, clear, and effective way for Congress to prevent worldwide water rights abuses. This note has shown that the Lacey Act has the unique capacity to tackle exactly this challenge. It has done so for illegal timber trading recently, and illegal wildlife trading before that. A modest addition of statutory language would make change possible in multiple industrial sectors, particularly in the developed world, where key players have taken little action. Calamitous abuses of water rights worldwide demand action, and the United States is well positioned to act by taking the lead in enforcement of a fundamental and existential human right around the globe. The need for change is clear, and the successes and the benefits of the Lacey Act have been proven. All that is left is to act.