

**Approved Unanimously**

May 21, 2012

## **Lacey National Consensus Due Care Defense Standard©**

### **Statement of Intent**

The intent of this Standard is to identify “due care” measures that companies can take, thus demonstrating their ability to address requirements of the 2008 amended Lacey Act. 16 U.S.C. 3371-3378.

The individuals and organizations involved in this Standard activity are extremely supportive of the intent of the amended Lacey Act to address illegal logging and commerce in illegally harvested forest products around the world.

We are also aware that there is currently no single document or action representing definitive compliance with Lacey’s due care requirements. However, from a business, international trade, and, even forest conservation perspective it is critical that there is a clearer understanding of actions that will consistently enable business to meet Lacey requirements. Thus, an important purpose of this Standard is to render clarity for expectations and actions, providing business and government globally with greater certainty on the meaning of Lacey Due Care.

This Consensus Standard on due care for Lacey that meets national consensus standard requirements is intended to:

- Enable companies to provide government and other parties with proof of actions to demonstrate that they are achieving Lacey due care and defenses to liability
- Increase compliance with the law
- Protect and enhance the forest environment

For a complete, updated list of the organizations involved, latest versions of the draft standard, or other questions, please contact the Capital Markets Partnership (CMP) or go to [www.LaceyDueCare.com](http://www.LaceyDueCare.com). CMP is leading this effort in collaboration with many others. CMP is a subsidiary of Market Transformation to Sustainability (MTS). MTS is an ANSI-Accredited Standards Developer.

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# Lacey National Consensus Due Care Defense Standard

## 1. Standard Purpose, Scope, Background & Definitions

- 1.1 The purpose of this Standard is to define Due Care as set forth in the 2008 Lacey Act Amendments making it a crime to sell illegally logged wood. 16 U.S.C. 3371-3378
- 1.2 Scope. The Standard covers wood and paper products.
- 1.3 Consensus standards background and successful precedent. National consensus standards have regulated commerce since the 1850's.

In a similar manner to this Lacey Act Due Care Standard, a consensus standard defines due care under another Federal environmental law: The Comprehensive Environmental Response and Compensation Act (CERCLA or Superfund). Defining statutory due care provisions of Superfund that were codified by the government, is the Phase 1 Environmental Site Assessment Consensus Standard specifying all appropriate inquiry under federal and state environmental cleanup statutes. 73 Fed. Reg. 247 (Dec. 23, 2008), 40 CFR 312.

Due to substantial reduction of risk, uncertainty, and liability the Phase 1 Standard was incorporated by the capital markets into real estate securities and therefore achieved 95% market penetration in five years due to the substantial economic power of the capital markets. *Capital Markets Briefing Paper: Business Case for Commercializing Sustainable Investment* (CMP 2009) <http://webstore.ansi.org/RecordDetail.aspx?sku=ANSI%2FMTS>

As a result of capital markets adoption, the Standard greatly improved the value of commercial real estate, initiated substantial environmental cleanup, and increased and enhanced protection of public health and environment.

Green building securities are a similar real estate capital markets adoption mechanism for this Lacey Due Care Standard given that the greatest amount of wood is used by buildings.

Capital markets adoption of this Lacey Due Care Standard is possible and can provide similar market transformation results as what happened with the Phase 1.

Consensus green building and sustainable product underwriting standards required for national green building financing by the Office of the Comptroller of the Currency and the Federal Housing Finance Agency, recognize Lacey compliance as a valuable attribute increasing cash flow for building owners and manufacturers. Peer reviewed Wall Street due diligence released at the NYSE documented with national statistically valid data, that green buildings are more profitable, less risky, preferred by investors, have top of the market rents, highest occupancy, highest valuation, with this trend increasing in today's

down market. *Capital Markets Briefing Paper* (2009). Based on growing market recognition of this added economic value, national green building financing demand is pent up and substantial, to the extent that leading financial institutions briefed the White House on March 2, 2011, stating that the long term national financing market will automatically launch with the issuance of the first green building security. Preparations for this launch are underway with the development of green building security rating criteria by the credit rating agencies.

- 1.4 Technology Transfer Act created the obligation for federal agencies to adopt consensus standards where agencies have no existing standard. The statute's purpose is to promote standards' conformity and facilitate commerce. Pub. L. No. 104-113, 110 Stat. 775 (Mar. 7, 1996). Judicial review is available for violations of this statute. See *Judicial Review of Technology Transfer Act Violations in Connection with The SEC's Proposed Rule on Auditor Independence*, Center for Regulatory Effectiveness (Sept 11, 2000).
- 1.5 Administrative Procedure Act (APA) rulemaking petition option. If determined to be advantageous, an APA rulemaking petition could be filed requesting that the government codify this Lacey Standard. The APA provides that judicial review is available where the government denies such a petition.
- 1.6 Standard intent to also constitute a legal opinion, thus providing a higher level of diligence and certainty for users that can be relied upon. Legal opinions generally undergo substantial peer review before issuance, in a similar manner to the peer review process that is part of development and adoption of consensus standards. Just like this Lacey Due Care Standard, the Phase 1 Standard contains a legal component that describes the relevant law and resulting defenses to liability where an owner exercises due care by conducting all appropriate inquiry as specified in Superfund.
- 1.7 Standard incorporation of leadership standards providing substantial value to society. The Leadership Standards Campaign Public Draft Framework Appendix recognizes FSC as the leadership wood standard and SMaRT as the leadership sustainable product standard requiring FSC as a prerequisite, due to their leadership prerequisites and pollution reduction and prevention actions. The Campaign is led by National Wildlife Federation, Sierra Club, Corporate Responsibility Association, Perkins+Will and Eaton Corporation.

These leadership standards were uniquely determined to be more profitable, less risky, and preferred by investors in peer-reviewed due diligence released at the NYSE by leading investors, investment banks, and credit rating agencies. *Capital Markets Briefing Paper* (CMP 2009). This added financial value for these standards can be measured for manufacturers and retailers with at least three product lines certified to FSC, SMaRT, or the Clean Vehicle Standard by the consensus national Sustainable Manufacturing Underwriting Standard.

- 1.8 This Standard requires both certification to leadership third party supply chain forest management and chain of custody standards, stepwise approaches to certification, and supplemental legality, risk, and compliance analyses. Corruption without the rule of law is recognized as a major challenge globally for forest operations, and thus sole reliance on legality and risk verification alone are ineffective. Leading wood product manufacturers attempted to conduct legality verification of their own in leading Asian countries. The manufacturers terminated these investigations due to corruption, and concluded that only a

leadership independent third party forest management certification is effective in these and similar countries with substantial global business market share where corruption is prevalent.

A more specific due care standard for wood and paper products reflects the needs and complexity of the global supply chain and practical aspects of increasing Lacey compliance.

“Because the timber industry is a broad market with many large corporate entities, a more specific standard is likely to be helpful in many cases. A clear test will therefore provide the government with a useful analytical starting point when deciding whom to prosecute and what level of offense to charge. ... Whereas personal experience has usually been considered highly probative in fish and wildlife cases, large-scale industries usually have the benefit of established industry custom that supplies them with guidance about what constitutes responsible behavior,” R. Saltzman, *Establishing a “Due Care” Standard Under the Lacey Act Amendments of 2008*, 109 Mich. L. Rev. 1 at 5 (2010).

## 1.9 Definitions.

**Chain of Custody.** Forest certification Standards provide detailed requirements for chain of custody in an effort to ensure that wood and paper products from well-managed forests are tracked throughout the market to ensure protection of the forest environment.

**CITES.** (Convention on International Trade in Endangered Species). CITES is a global treaty ratified by the U.S. that regulates endangered species including plants.

**Express Warranty.** As set forth in the Uniform Commercial Code adopted by almost all States, an express warranty must be incorporated into a contract of sale and binds the parties to the contract to the warranty language specified. Section 11 of this Standard provides for an Express Warranty option to certify compliance to this Standard, by stating in the contract of sale that the Section 11 Certification is accurate, not misleading, and used qualified professionals.

**Federal Trade Commission (FTC) Environmental Marketing Guides.** The Guides set forth environmental marketing requirements for all companies based on federal and state truth in advertising law. Section 11 of this Standard provides for an option to certify compliance to this Standard, that an attestation be provided that the information required for Section 11 Certification is accurate, not misleading, and qualified professionals were used, as required by the FTC Guides.

**Forest Management Unit (FMU).** The FMU is a well defined and demarcated land area, predominantly covered by forests, managed on a long-term basis and having a set of clear objectives specified in a forest management plan (Food and Agriculture Organization of the United Nations, Rome (1998)).

**PEFC.** Programme for the Endorsement of Forest Certification.

**Seneca Creek / American Hardwood Export Council (AHEC).** The peer-reviewed Seneca Creek Study is a comprehensive review of forest management practices for US hardwoods in 33 States (all States east of the Mississippi and Washington and Oregon). The Study determined that:

- Illegal logging is less than one percent of the logging conducted.
- Land area of forests and wood volume is stable or increasing.
- Wood from federal lands in these forests is less than one percent of the wood harvested.

AHEC promotes the export of these hardwoods issuing a certificate of compliance for hardwoods achieving best management practices recommended by the Seneca Creek Study.

**Stepwise or Modular Approach.** The Forest Stewardship Council (FSC) recognizes stepwise approaches to achieving FSC by requiring actions for achievement within specified timeframes. Transparent criteria for each stepwise approach are located on the web sites of the entities administering the stepwise Approach Programs. The Modular Approach (MAP) Standard has been proposed by FSC to provide for many more stepwise approaches globally. Many participating companies have determined that stepwise approaches are an important means for achieving FSC Certification.

## 2. Lacey Statutory Purpose & Retroactive Application

- 2.1 The Statutory purpose is to stop illegal logging and trade in illegally harvested materials and recognizes the need for international legal structures for conservation of threatened species and ecosystems. Senator Ron Wyden in introducing the Lacey Act Amendments emphasized that *“[f]rom the Amazon to the Congo Basin, from Sulawesi to Siberia, illegal logging is destroying ecosystems. It is gutting local economies. It is annihilating ways of life. And because of the speed and violence with which illegal logging is occurring, failing to curb its effects now may result in irreversible damage,”* Cong. Record – Senate, S10621-10623 (Aug. 1, 2007). The 2008 Amendments Conference Report states:

*“The Managers understand illegal logging undermines responsible forest enterprises by distorting timber markets with unfair competition and price undercutting. Illegal logging also threatens the conservation of forest resources, wildlife, and biodiversity, by facilitating forest conversion to non-forest uses and depleting or completely eliminating certain forest ecosystems or the habitat of certain forest dependent wildlife. Finally, illegal logging results in a loss of revenue when taxes or royalties are not paid that could otherwise be invested in sustainable forest management or economic development.”* 110 H. Rpt. 627, Food, Conservation, & Energy Act of 2008 Conference Report to Accompany H.R. 2419 (2008).

- 2.2 **Unique Value of Lacey Act.** World Future Council presented the United States of America the 2011 Future Policy Award for the Lacey Act Amendments of 2008, for being one of the world’s most inspiring and innovative forest policies. This international award recognizes government policies that best contribute to the conservation and sustainable development of forests. In commenting on the value of this award to the United States, the World Future Council emphasized that:

*“Illegal logging and the international trade in illegal timber has been recognised as a major global problem causing environmental damage, costing producer countries billions of dollars in lost revenue, promoting corruption, undermining*



*the rule of law and good governance and funding armed conflict. The United States has become the first country in the world to place an outright, criminally enforceable ban on the import of illegally harvested timber. The issue is addressed both nationally and internationally from the demand side by requiring that importers of wood products and subsequent handlers in the supply chain exercise due care to ensure that wood in their possession is of legal origin. The Lacey Act amendments have forced importers to take responsibility for their wood products and have already produced positive results in increasing due diligence assessments and demand for certified wood products. The Act also has the potential to significantly reduce illegal logging by withdrawing the huge rewards received by illegal loggers from the international market."*

World Future Council, Future Policy Award 2011: Factsheet of Winning Policies.

In response to the US' nomination for the award, the U.S. State Department indicated that *"Illegal logging and the international trade in illegal timber has been recognized as a major global problem causing environmental damage, costing producer countries billions of dollars in lost revenue, promoting corruption, undermining the rule of law and good governance, and contributing to the funding of armed conflict."*

2.3. Retroactive Application of Lacey. See the Mandatory Annex for the discussion regarding retroactive application of the Lacey Act.

### **3. What is the Meaning of Due Care Under the Law?**

3.1 Statutory construction. See Standard §6.8.

3.2 The Legislative History uses reasonable person rule and is based on person's / entity's level of knowledge and responsibility

3.3 Justice & USDA Guidance - Including Support for Industry Standards.

- DOJ acknowledges that third party certifications to standards are useful to manufacturers and importers in their efforts to exercise due diligence with regard to sourcing and species of timber. See Lacey Act Amendment Enforcement of the Declaration Requirement (March 27, 2009 USDA, APHIS).
- DOJ & USDA Guidance states that industry standards are useful due care tools including developing industry standards (DOJ Potomac Forum Presentation, Mar. 24, 2009) (DOJ Environmental Law Institute Presentation, Sept. 23, 2009) (USDA APHIS Lacey Primer Apr. 2010).
- Third party certification systems to standards *"may provide information useful to manufacturers and importers in their efforts to exercise due diligence regarding sources and species of timber,"* (USDA Lacey Q&A, Oct. 19, 2010).
- *"Develop and follow industry standards [as a] useful tool to demonstrate due care,"* presentation on *The Lacey Act Amendments* by U. S. Department of Justice Environment and Natural Resources Division, WWF GFTN Annual Meeting (Oct. 15, 2009).

- Other due care tools cited by DOJ and USDA include questions for suppliers, transporters and others in the chain of potential liability, improved practice based on experience, and compliance plans
- In considering enforcement, Justice suggests that the standard of care be evaluated for the industry in question: “What is the standard of care for trading in this wood or plant product?” And it suggests that evidence of due care be identified: “What admissible evidence is available that any target of the investigation knew or should have known in the exercise of due care that the wood or plant product was ‘taken, possessed, transported or sold’ in some illegal manner?” *The Lacey Act Amendments of 2008: Curbing International Trafficking in Illegal Timber*, E. Colbourn & T. Swegle, Vol. 59, Number 4, ENVIRONMENTAL CRIMES, US Dept. of Justice (July 2011).

Further, the government provides a principle of how wood and paper product sellers can avoid Lacey liability by exercising due care:

*“[P]eople who unknowingly possess a musical instrument or other object containing wood that was illegally taken, possessed, transported or sold in violation of law and who, in the exercise of due care, would not have known that it was illegal, do not have criminal exposure. The Federal government focuses its enforcement efforts on those who are removing protected species from the wild and making a profit by trafficking in them.”*

Justice & Interior Departments Joint letter to Rep. Marsha Blackburn (Sept. 19, 2011)(emphasis in original).

- Check with foreign government authorities
    - Confirm source companies operate legally (licensed / certified)
    - Request pertinent plant protection laws (country of harvest)
- 3.4 Ninth Circuit Jury Instructions also uses reasonable person standard: due care is what a reasonable person would do under similar circumstances including what the person should have known
- 3.5 Case law reinforces the entity’s level of knowledge and responsibility and thus what should have been known: duty of care is higher in the commercial context, for companies in the wood products business, and for places of origin and species where there is a record of illegal activity. In *US v. Proceeds from Sale of Approximately 15,538 Panulinus Argus Lobster Tails*, the court emphasized that the defendant had been in the business for years. 34 F. Supp. 385, 392 (S.D. Fla. 1993). Great weight was given to an importer’s failure to take “affirmative action” to ensure that the species could be lawfully exported. *US v. 2,507 Live Canary Winged Parakeets*, 689 F. Supp. 1106 (S.D. Fla. 1988). Due care means that a licensed hunter whose license requires a knowledge of state game laws, should have known that elk were taken and possessed in violation of Montana law, *US v. Thomas*, 887 F.2d 1341 (9<sup>th</sup> Cir. 1989). Lacey’s criminal due care requirement includes the added requirement of culpability thus protecting the “reasonably naive,” *US v. Lee*, 937 F.2d 1388 (9<sup>th</sup> Cir. 1991) stating “[s]ee 16 U.S.C. § 3373(a), (d); S.Rep. No. 123, 97th Cong., 1st Sess. 10-12, reprinted in 1981 U.S.Code Cong. & Admin.News 1748, 1757-59 (observing that the due care standard should be “applied differently to different categories of persons with varying degrees of knowledge and responsibility”). Thus, the Act itself protects the reasonably naive from unwarranted criminal penalties.”



Thus, due care options are warranted because not every person is at the same level of sophistication or progress in the market.

- 3.6 Requirements for knowing unlawful conduct. Lacey criminal penalty provisions specify that *“Any person who knowingly engages in [specified prohibited conduct] and in the exercise of due care should know”* that the plant was taken. ... illegally ... 16 U.S.C. § 3373(a)(1).(d)(2)
- 3.7 Requirements for unknowing unlawful conduct. Lacey civil Penalty Provisions specify that *“Any person who engages in [specified prohibited conduct] ... and in the exercise of due care should have known”* that the plant was taken ... illegally ... 16 U.S.C. § 3373(a)(1).(d)(2)
- 3.8 Due care is required over the supply chain since anyone who knows or should have known that a plant or plant product was illegal is subject to civil and criminal penalties.
- 3.9 Recognizing Potential Violations: DOJ & USDA / APHIS Lacey Act Primer factors suggesting potential Lacey violations:
- goods priced significantly below the going market rate;
  - cash-only transactions / lower prices for goods without paperwork
  - paperwork that is facially invalid or otherwise suspect
  - unusual sales methods or practices
  - transactions that fit the description of illegal transactions discussed in trade/industry publications
  - a supplier’s inability to provide rational answers to routine questions
- 3.10 Seizure & Forfeiture (See Capital Markets Partnership (CMP) Memo on Seizure / Forfeiture & Their Due Care Provisions, Sept. 2011). Lacey Section 5 on Forfeiture provides that all plant products in violation of Lacey Section 3 Prohibited Acts are subject to forfeiture. The exception is for marking offenses including labeling, governed by Lacey section 3(b). Section 5 also indicates that strict liability applies to seizure and forfeiture.

Forfeiture section 5(c) allows the government to assess costs for storage, care, and maintenance of plant materials for which there was a criminal conviction or a civil penalty.

Section 5 further provides that there is no right of the government to seize vessels, vehicles, aircraft or equipment where there is no consent to or knowledge of the unlawful act by the owner, and the owner exercised due care.

16 U.S.C. 3374.

See also Standard section 6.8 below on the Defense to forfeiture.

## 4. Encouraging Lacey Compliance & Benefits

- 4.1 A Standard Intent is to Drive Use of Credible Leadership Consensus Forest Certification Systems that Operate to Prevent Commerce in Illegal Wood
- Encourages importers from countries where there is a high risk of illegal logging to certify all product lines to qualifying leadership standards thus increasing the

likelihood of Lacey compliance

- Provides competitive advantage, sales, and profitability to companies certifying to leadership forest certification standards whilst encouraging Lacey compliance

- 4.2 Standard is Intended to Satisfy Huge Market Need for Bona Fide Defenses to Lacey Liability for Entities in the Wood and Paper Chain of Custody, by providing more certainty for sellers on how to exercise a high level of due care under Lacey, potentially reducing risk of attendant criminal and civil prosecution, jail time, fines, substantial legal fees, and brand destruction. Lacey strict criminal liability means that sellers are liable without the need to show any fault. For example, the government can seize product without the need to show any fault or culpability. Justice Department Lacey Due Care Definitions have two criminal liability standards, strict liability for forfeiture of wood and vessels carrying the wood, and negligence for selling illegally logged wood. Strict criminal liability means that a seller can be liable even if it is not negligent.
- 4.3 Standard Can Reduce Litigation so Resources can be Used for Lacey Compliance
- 4.4 A Standard Intent is to Appropriately Shift Liability Away from Entities Providing Legally Binding Certification of Lacey Due Care Compliance
- 4.5 Standard Can Contribute Positively to Helping to Stop Imminent Irreversible Unmanageable Dangerous Climate Change / Ongoing Systemic Financial Market Risks already affecting the insurance, government, agricultural, fisheries, & forestry sectors. The Global Canopy Programme of 80 universities led by Oxford determined that about 20% of climate change is caused by illegal logging and deforestation. Deforestation is per se illegal based on international law based on the public trust doctrine. This internationally applicable legal principle imposes a strict fiduciary obligation on government to protect natural resources in trust for the citizens through an inherent constitutional restraint on legislative power, and a fundamental expression of legislative duty. *Illinois Central railroad Co. v. Illinois*, 146 U.S. 387, 453 (1892). *Geer v. Connecticut*, 161 U.S. 519, 533–34 (1896), JAN G. LAITOS, ET AL., *NATURAL RESOURCES LAW*, Chapter 8.II (2006); Joseph L. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 MICH. L. REV. 471, 558- 66 (1970); Harrison Dunning, The Public Trust: A Fundamental Doctrine of American Property Law, 19 ENVTL. L. 515 (1989); Wood, Advancing the Sovereign Trust (Part I), supra note 35. (citing numerous foreign law authorities adhering to the public trust doctrine to protect natural resources). See also “The Economics of Illegal Logging and Associated Trade” (OECD General Secretariat, 2007.) (“2007 OECD study”) at 10, and *Creating an Economic Stimulus & Stopping Climate Credit Risk / Irreversibility* (CMP 2008 with Updates 2010).

The Justice and Interior Departments support the principle that Lacey is a needed and important tool to stop deforestation: *“The Lacey Act also provides an effective enforcement tool to combat widespread deforestation resulting from illegal timber harvesting and the ecological, societal, and economic harms that result from illegal timber harvesting,”* Justice & Interior Departments Joint letter to Rep. Marsha Blackburn (Sept. 19, 2011).

- 4.6 Standard Includes Common Law Liability Such as Nuisance and Negligence That are Within the Scope of Lacey, thus Standard’s reach covers problems such as clearcutting causing water pollution and habitat destruction that may not be prohibited by a State’s or country’s statutory and administrative law. Accordingly, voluntary best management practices requiring buffer zones and protection of streams and water courses that protect water quality, habitat and property would not be common law Lacey violations. Common

law inclusion in the Defense also puts an end to the mistaken concept that there can be “legal deforestation” as advocated by one party at 2010 Congressional Lacey Briefing, Wash., DC. The statute states that prohibited acts are those “in violation of any law” and this includes common law. 16 U.S.C. 3372(a).

## 5. Rationale for Due Care Requirements & Implications

The best ways to ensure substantial market share working on Lacey compliance can be reasonable and effective due care requirements fulfilling the statutory purpose, including stepwise approaches toward more sustainable management of forests and enhanced procurement/sourcing systems, with time limits or transparent milestones.

Lacey enforcement places significant incentives for achieving the due care requirements in the Standard, thus maximizing the opportunity for compliance per the statutory purposes and decreasing the risk of illegal logging and production of illegal forest products.

Government enforcement alone won’t work due to limits on resources, extensive corruption in many countries, extensive global greenwash regarding Lacey or other types of legal compliance as indicated on many corporate websites with no documentation, together with the substantial complexity of the myriad of laws and countries globally involved in the wood and paper products supply chains. Greenwash which is unlawful, is widespread as documented by the Capital Markets Partnership and California Attorney General and submitted in 2008 to the Federal Trade Commission Attorneys showing that about 90% of corporate product ads in four leading green building magazines were greenwash, i.e., false, inaccurate, or misleading. Reaching similar results that 95% of company claims are greenwash is *The Sins of Greenwashing* (TerraChoice 2010). Likely as a result, a recent survey shows that few consumers believe corporate claims about climate pollution reductions (“Greenwashing Fears Common, Carbon Trust Finds – Only 7% of Public Believe Companies,” *Environmental Leader*, Mar. 24, 2011).

This due care initiative is intended to provide a private sector-driven complement to government enforcement and both clarify and codify in a more definitive fashion effective, applicable “due care” options.

## 6. Principles Governing Due Care, Action Plan & Due Care Charts

For convenience of the reader, the Action Plan and graphic summary Due Care charts are all in one location in Appendix F.

6.1 Statutory construction

6.2 Case law

6.3 Legislative history. “[T]he degree of care which a reasonably prudent person would exercise under the same or similar circumstances.” S. Rep. No. 97-123 (1981). The standards of due care are applied differently to different categories of persons with varying degrees of knowledge and responsibility. *Id.*

- 6.4 Agency guidance. “Due care simply requires that a person facing a particular set of circumstances undertakes certain steps which a reasonable man would take to do his best to insure that he is not violating the law.” Lacey Act Primer, APHIS (Oct. 2009) citing Legislative History.
- 6.5 Fulfilling the statutory goal, intent, and purpose to stop illegal logging and protect species, habitat, and ecosystems
- 6.6 Industry consensus standards. Consistent with the above principles, industry standards can be an important component of due care, can increase Lacey Compliance, and can stop substantial Lacey “legality” greenwash that in and of itself is unlawful based on truth in advertising law extant in developed countries.
- 6.7 Forest Certification. The Forest Stewardship Council (FSC) is the pre-eminent recognized global leadership forest management and supply chain standard for well-managed forests (operational in 107 countries, as of October 2011). It is applicable to wood, paper and other forest products with a clear mandate to further purposes embodied within the 2008 Lacey Act Amendments: stop illegal logging and protect and enhance forest habitat and ecosystems. FSC’s forest management standard provides unequivocal coverage of legality issues at the forest level, and its chain of custody standard increasingly ensures verification of legal products, through the FSC system that tracks FSC Certified product through all stages of production and supply chain. See Leadership Standards Campaign Public Draft Framework (Aug. 17, 2011). PEFC and Seneca Creek AHEC certification options are also specified in this Due Care Standard.
- 6.8 Legal Framework for Due Care set forth in the statute, Legislative History, case law, and Justice and US Circuit Court guidance:
- **Defense to Civil Liability.** Any person who engages in conduct prohibited by Lacey (other than marking, false label, and declaration violations) and in the exercise of due care should know that the fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty, or regulation, may be assessed a civil penalty. This Defense does not apply to knowing violations of false label and declaration provisions. 16 U.S.C. 3373 (a).  
  
In other words, there is no civil liability if due care was exercised and resulted in no recognition or knowledge of illegality. This does not apply to marking, false label or declaration violations.
  - **Defense to Criminal Liability.** Any person who knowingly engages in conduct prohibited by any provision of this Act (other than marking, false label, and declaration violations) and in the exercise of due care should know that the fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty or regulation shall be fined or imprisoned. 16 U.S.C. 3373 (d)(2).  
  
In other words, there is no criminal liability If due care was exercised and there is no personal knowledge of the illegality or culpability. See 16 U.S.C. (d)(1) and *US v. Lee*, 937 F.2d 1388 (9<sup>th</sup> Cir. 1991). This does not apply to marking, false label or declaration violations.

- **Defense to Seizure & Forfeiture.** Lacey Civil Forfeiture, 16 U.S.C. 3374, and 18 U.S.C. 981 & 983. This section shows that:
  - A bona fide and executed Standard section 11 legally binding certification of compliance including pursuant to the FTC Environmental Marketing Guides, qualifies for the innocent owner provisions of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA) forfeiture statute used by the Lacey Act, because the section 11 certification means that the wood or paper product is consistent with Lacey Due Care, not contraband, and is lawfully possessed.
  - This interpretation is consistent with relevant case law, Justice's position on the case law, legislative history, and recommendations by the environmental community on the innocent owner Lacey forfeiture provisions.
  - This bona fide section 11 Certification is consistent with the strict liability nature of Lacey forfeiture.

The Innocent Owner defense of 18 U.S.C. 983(d) (2005) can be pleaded asserting that this Standard's section 11 legally binding certification that is bona fide and executed, is evidence of compliance with Lacey Due Care requirements, and thus the product subject to seizure is:

- lawfully possessed
- not contraband or other property that it is illegal to possess, and
- meets chain of commerce to the first placement and the supply chain.

Accordingly, a bona fide Standard section 11 certification means that possession of the wood or paper product is (1) *not* a Lacey prohibited act or product taken, possessed, transported, or sold in violation of US or foreign law and imported, transported, sold, received or acquired in interstate or foreign commerce, (2) *not* treated as contraband or unlawfully possessed, and (3) *not* in violation of 18 U.S.C. 983(d)(4) civil forfeiture provision governing the Lacey Act. See *US v. 144,774 Pounds of Blue King Crab*, 410 F.3d 1131 (9th Cir. 2005) (innocent owner defense of federal forfeiture statute (18 U.S.C. 983(d)(4) (2005)) does not apply to contraband or any other property that it is illegal to possess. “[I]t is clear that if the government can establish that the crab was received in violation of [Lacey] §3372(a)(2)(A), the crab is ‘property that is illegal to possess.’” (At p. 4).

See also Justice Opposition Brief to Cert Petition to the Supreme Court, *US v. Deep Sea Fisheries*, No. 05-315, (Sept. 7, 2005) (supports 9<sup>th</sup> Cir. decision in *US v. 144,774 Pounds of Blue King Crab*.) Justice states at p. 4: “[F]ish or wildlife illegally imported into the United States in violation of the Lacey Act constitutes contraband or, at the very least, ‘other property it is illegal to possess.’ CAFRA’s innocent owner defense does not apply to forfeitures of such items.” Justice also states that the crab violated Russian fishing regulations even though the defendant was not aware of the violation. *US v. 144,774 Pounds of Blue King Crab* at 410 F.3<sup>rd</sup> 1132 set forth facts indicating that the crab violated Russian regulations.

Opponents to changing the innocent owner defense for Lacey forfeiture (18 U.S.C. 983(d)) urged that the defense not be allowed for products that are contraband or unlawfully possessed. See House Hearing on H.R. 1497, Legal Timber Protection Act, before the Subcommittee on Fisheries, Wildlife & Oceans of the Committee on Natural Resources (Oct. 16, 2007) (Statement of World Wildlife Fund) (WWF) at 93: *“WWF does not believe that H.R. 1497 should provide for an ‘innocent owner’ defense. I.e., allow wood products that the U.S. government proves to come from illegal sources (and by doing so proves such products are contraband) from entering the U.S.”* Also testifying in support of the proposed 2008 Lacey Act Amendments was the Natural Resources Defense Council (NRDC) stating *“This bill would authorize the forfeiture of timber and timber products when U.S. authorities can prove that these items were taken illegally. This is consistent with decades of U.S. precedent for other stolen or illegal goods, including natural resource products such as wildlife and plants.”* (emphasis in original) (NRDC testimony for the House Committee on Natural Resources, Subcommittee on Fisheries, Wildlife & Oceans, Hearing on the Legal Timber Protection Act (Oct. 29, 2007).

A bona fide legally binding certification pursuant to section 11 / FTC Environmental Marketing Guides, establishes the Due Care defense that the wood or paper product is not contraband or unlawfully possessed, and thus complies with the innocent owner forfeiture defense provisions of 18 U.S.C. 983(d) and 983(d)(4) and the strict liability provisions governing Lacey forfeiture.

Even though the strict liability provisions allow for seizure and forfeiture without any showing of fault, the property must still be contraband or unlawfully possessed to constitute a Lacey prohibited act. House Report 110-882 on the Legal Timber Protection Act (Sept. 28, 2008) indicates that *“[s]ince 1981, when substantive amendments were adopted, the Act has provided for forfeiture of fish, wildlife, and plants on a strict liability basis when violations of the Lacey Act are found.”*

Under criminal forfeiture (U.S.C. 3374), the government seizes wood as “contraband,” and the party has a cause of action in federal court to retrieve its wood. The claimant has to prove its innocence to the government’s presumption of guilt that the wood or paper product is contraband. This Standard’s section 11 legally binding certification can be pleaded asserting that the seized product is lawfully possessed and not contraband or other property that it is illegal to possess, and meets chain of commerce to the first placement.

All vessels, vehicles, aircraft, and other equipment used to aid in the importing, exporting, transporting, selling, receiving, acquiring, or purchasing of fish or wildlife or plants in a criminal violation of this Act for which a felony conviction is obtained shall be subject to forfeiture to the United States if (A) the owner of such vessel, vehicle, aircraft, or equipment was at the time of the alleged illegal act a consenting party or privy thereto or in the exercise of due care should have known that such vessel, vehicle, aircraft, or equipment would be used in a criminal violation of this Act, and (B) the violation involved the sale or purchase of, the offer of sale or purchase of, or the intent to sell or purchase, fish or wildlife or plants. 16 U.S.C. 3374(a).



In other words, there is no right of the government to seize vessels, vehicles, aircraft or equipment where there is no consent to or knowledge of the illegal act by the owner, and the owner exercised due care.

- **Seller Responsibilities.** The wood and paper product seller must act reasonably under the circumstances based on the party's level of knowledge, responsibility and what the party should have known. Duty of care is higher in the commercial context, for companies in the wood products business, and for places of origin and species where there is a record of illegal activity.

## 6.9 Due Care Action Plan

### Lacey Due Care Action Plan

The Action Plan Purpose is to Identify & Achieve Needed Steps to Execute a Legally Binding Certification of Compliance With the Lacey Due Care Standard, and thus a Defense to Liability.

1. **Select Appropriate Forest Certification Option for Due Care** that the company or independent third party will certify compliance to the Standard pursuant to §11.
2. **Identify Timeline for Achieving Compliance** with the applicable level of Due Care.
3. **Decide Whether to Achieve FSC, or PEFC, or Seneca Creek / AHEC US Hardwood Program.** If an FSC option is specified, decide which FSC Standards to comply with.
4. **Complete Required Risk, Compliance & Legal Audits.**
5. **Decide How to Complete the §11 Legally Binding Certification** to the Lacey Due Care Standard. FSC Step 3 / PEFC and Seneca Creek AHEC allow self certification to §11 as well as third party. FSC Steps 2 & 1 require independent third party certification to §11. Decide whether the §11 Certification will be to the FTC Environmental Marketing Guides or an express warranty that is part of the contract of sale of the wood or paper product.
6. **Place Summary of the §11 Certification on a Web Site** so that it is publicly available.
7. **Decide Whether There is Internal Capacity to Complete this Action Plan,** or whether outside services should be engaged.



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## 7. Due Care Requirements

### 7.1 Risk Audit

1. Map the supply chain to identify where products are coming from and identify country of origin.
2. Evaluate supply chain risk based on relevant and appropriate law, and ecological significance of place of origin. Risk factors include species type, CITES list, supplier integrity and practices, and level of perceived corruption and serious social issues including conflict in place of origin. See Transparency International Global Corruption Perception Index report including section on forestry governance. CITES is the Convention on International Trade in Endangered Species of Wild Fauna and Flora. See additional risk reduction resources in the Appendix.
3. Determine supplier integrity and identify preferred suppliers.
4. Prepare a risk audit document including findings based on the above information in 1-3 above for the wood and paper products in question.

### 7.2 Legal Audit

1. Check with government including foreign government authorities and other sources:
  - Confirm that source companies operate legally (licensed / certified) with proof of legal right to harvest.
  - Identify plant species in question for the wood or paper products sold.
  - Identify pertinent plant protection laws (country of harvest) for plant species.
  - Request copies of official documentation for permitting, taxes, processing and export from individual suppliers and governments because they can identify legal compliance and affect forest management practices affecting the forest environment.
  - For countries identified in the Risk Audit, determine forest governance regulatory structure, and land ownership structure including leases for the wood or paper or paper products sold. These structures can identify any unlawful activities that affect the forest environment.
  - Identify any wood and paper processing requirements or restrictions for export, because they can identify any unlawful activities that affect the forest environment.
  - Consider laws identified in any Voluntary Partnership Agreement between the EU and other countries such as the Congo, Cameroon, and Ghana.
2. Prepare legal audit document including findings containing the information in 1. above for the wood and paper products in question.

### 7.3 Compliance Audit

1. Conduct the following:
  - Inspections, qualifications and audits for suppliers, recordkeeping, compliance plan, compliance monitoring & continuous improvement.
  - Develop questions for suppliers, transporters and others in the transaction chain / chain of potential liability.

- Provide training for improved practice.
  - Develop procurement policy(s) for engaging vendors that incorporate the requirements of this Standard. Procurement policies must be binding on not only the primary vendor, but on all vendors within the supply chain of the wood or paper product harvested since Lacey liability covers the global chain of commerce of products in the US. The procurement policy must be part of the executed contract for services with the vendor to ensure all supply chain vendors take responsibility.
  - Notify suppliers of procurement policy and types of audits and records/declarations that will be required annually to see if they are acceptable for inclusion in vendor contract.
  - Execute contracts with preferred suppliers identified in Risk Audit.
  - Conduct supplier site visits based on level of risk assigned.
  - Identify corrective action requirements for vendors where the procurement policy is not being adhered to, timeframe for compliance, and procedures for vendor termination in a reasonable, stated timeframe.
  - Develop supply chain mapping and auditing objectives and actions. These objectives and actions must be part of the contract with the vendor, otherwise, the wood seller can still be at risk from vendors in the supply chain that normally do not have privity of contract with the wood or paper product seller. The vendor contract should specify that the wood or paper seller must identify and allow the seller to audit any and all vendors in the supply chain.
2. Complete compliance audit document including findings containing the information in 1. above.

#### 7.4 Forest Certification Options: FSC Step 3 / PEFC / Seneca Creek / AHEC

Use one of the Transparent FSC Stepwise Practices, **OR** PEFC Certification, **OR** the Seneca Creek / American Hardwood Export Council (AHEC) Program Protecting & Enhancing US Hardwood Forests.

- Use FSC Stepwise Approach to FSC forest certification requiring advancement to FSC Step 2 within the specified limited timeframes, and the option of achieving FSC Step 1. FSC stepwise approaches are listed Appendix 13 b.
- **OR** certify to another forest certification system recognized by PEFC (Programme for Endorsement of Forest Certification): PEFC Sustainable Forest Management (PEFC ST 1003:2010) or PEFC Chain of Custody Standard (PEFC ST 2002:2010).
- **OR** obtain a Certificate of Compliance from the AHEC Responsible Procurement Policy for Exporters or equivalent, and meet the conditions set forth herein comprising this Seneca Creek / AHEC Program Protecting & Enhancing US Hardwood Forests. The AHEC Certificate is also used for US interstate wood shipments. As documented below, this Program shows that:
  - US Hardwoods are healthy based on many indicators
  - Incidence of illegal logging is less than 1%
  - Programs are established to maintain the health of the forest and reduce even further the very low incidence of illegal logging

### **FSC Stepwise Approaches OR PEFC Certification.**

Four FSC Stepwise Approach Programs are identified in Appendix b. The FSC Modular Approach Program (MAP) Standard sets forth performance requirements for stepwise approaches that can be certified by 21 bodies globally allowing additional stepwise approach programs than the four programs recognized and ensuring global capacity.

Principles for establishing these requirements are ensuring global capacity for FSC Step 3 / PEFC so it can reasonably work anywhere in the world as emphasized by participants at the December 5, 2011 Lacey Due Care Standard Planning Meeting at National Wildlife Federation.

*Just joining one of the stepwise approaches does not achieve Level 3 requirements of this Standard. There must be significant and independent third party field audited achievement of risk reduction activities as part of the stepwise approach.*

**(1) Pre-FSC stepwise approach or Pre-PEFC Certification 2 yr. Timeframe Requirements.** Only an estimated 13% of the world's forests are certified as noted in "7 Ways to Help Stop Tropical Deforestation & Illegal Logging," ECOLOGIST (Mar. 11, 2011). Accordingly, companies in many parts of the world will need to set up systems to achieve participation in a stepwise approach to FSC certification or PEFC recognized certification. Therefore, companies are allowed two years to achieve requirements for FSC Step 3 or PEFC provided that:

1. The Legal, Compliance and Risk Audits required in 7.1, 7.2 and 7.3. are achieved.
2. A corporate policy must be approved to implement the Legal, Compliance and Risk Audit activities.
3. This Standard's Section 11 Certification Requirements are still required as is.
4. A Forest Management Plan must be completed with a written *in situ* audit, which can be a self-audit.
5. An internal staff professional(s) must be identified and charged with policy compliance and document maintenance.

**(2) Limited Time Extensions for Achieving FSC Step 2 Option.** In many parts of the world, there are bona fide reasons why it may take longer than the specified time, usually three years, to allow a wood or paper products seller to achieve FSC Step Level 2 Option for the forest harvest area, including:

- Warfare and conflict
- Government imposition or fostering of improper social conditions violating FSC Step 2 requirements such as child labor, forced labor, and other human rights violations
- Government monopoly of forest concessions and timber licensing barring or effectively precluding establishment of stepwise approaches
- Government corruption precluding establishment of bona fide stepwise approaches
- Leadership forest certifications required by FSC Step 2 have been postponed by the certifying body in the applicable forest area
- Another local problem governing the forest environment precluding all reasonable efforts to establish a stepwise approach that is not in anyway caused by the wood or paper products seller or sellers or their agents or contractors

For these situations enumerated above, a stepwise approach may not be immediately feasible for the applicable forest harvest area and thus a wood or paper products seller is allowed three years to achieve the minimum stepwise approach requirements of this subsection, and for documented extenuating circumstances, a one time exception allowing a maximum of five years. However, in no circumstances may the timeframe go beyond five years.

In the alternative, for the situations enumerated above in this subsection for purposes of Due Care, the company working to achieve Due Care may go beyond the three year timeframe to achieve FSC Step 2 and take four years, and for documented extenuating circumstances, five years. However in no case may the seller go beyond five years to achieve FSC Step 2, except for the case enumerated above where FSC Step 2 leadership forest certifications continue to be postponed for the applicable forest area.

The decision to extend the timeframe to establish a stepwise approach and / or achieve FSC Step 2, is one based on best professional judgment of the certifier pursuant to Section 11 of this Standard and all of the relevant facts and circumstances, and must be documented in the public disclosure of certification to this Standard required in Section 11.

#### **Seneca Creek / AHEC Program Protecting & Enhancing US Hardwood Forests.**

Peer-reviewed independent research verifies that American hardwoods derive from legal and well managed forests. The American Hardwood Export Council (AHEC) commissioned an *Assessment of Lawful Harvesting and Sustainability of U.S. Hardwood Exports* (2008) in response to increasing demands in major export markets for independent assurances that U.S. hardwoods derive from legal and sustainable sources (AHEC 2012) (Seneca Creek Report): [www.ahec.org/publications/.../AHEC\\_RISK\\_ASSESSMENT.pdf](http://www.ahec.org/publications/.../AHEC_RISK_ASSESSMENT.pdf). The Seneca Creek report concludes: *"Every state has both regulatory and non-regulatory authorities and programs addressing different aspects of forest management,"* (Seneca Creek Study at ii) (for the 33 States studied).

Seneca Creek also concludes at p. ii that US hardwoods have low risk in all of the five following risk factors identified by the FSC Controlled Wood Standard (FSC-STD-40-005) that applies to the non-certified portion of mixed products:

- "(1) illegally harvested wood;*
- (2) wood harvested in violation of traditional or civil rights;*
- (3) wood harvested in forests where high conservation values are threatened by management activities;*
- (4) wood harvested in forests being converted to plantations or non-forest use; and*
- (5) wood harvested from forests where genetically modified trees are planted."*

Required Conditions for Seneca Creek / AHEC Program Protecting & Enhancing US Hardwood Forests. This option allows North American Hardwoods identified in the 33 States on p. 25 of the Seneca Creek Report to meet Due Care provided that the following conditions are achieved:

- Forest Land Volume. There is no material change in the volume of forest land comprising US hardwoods in the 33 States.

- Forest Timber Volume. There is no material change in the standing inventory of timber volume of forest land comprising US hardwoods.
- Illegal Logging Minimum. There is no material change in the level of illegal logging identified as less than 1% by the Seneca Creek Study.
- Study Update. The Seneca Creek Study be updated as needed periodically.
- Adherence to the Seneca Creek Recommendations. The following Seneca Creek Report recommendations are followed:
  - AHEC Responsible Procurement Policy be adhered to by executing the AHEC Certificate of Compliance to the AHEC Responsible Procurement Policy for Exporters (or equivalent). This further assures that hardwood supplies derive from legal sources. The Policy requires communications about commitments to specific environmental objectives and to progressively increasing the proportion of American hardwoods that can be tracked to forest of origin. Adherence to the corporate commitments in the AHEC Policy is required. The executed AHEC Certificate of Compliance requires companies to in part:

*"Monitor regularly and verify that its procurement processes and suppliers operate in accordance with all applicable laws and regulations of the United States and the State of [identify the applicable States]. ... This Company recognizes it has a responsibility to its customers, suppliers and staff to base its commercial activities on legally and responsibly managed forests."*

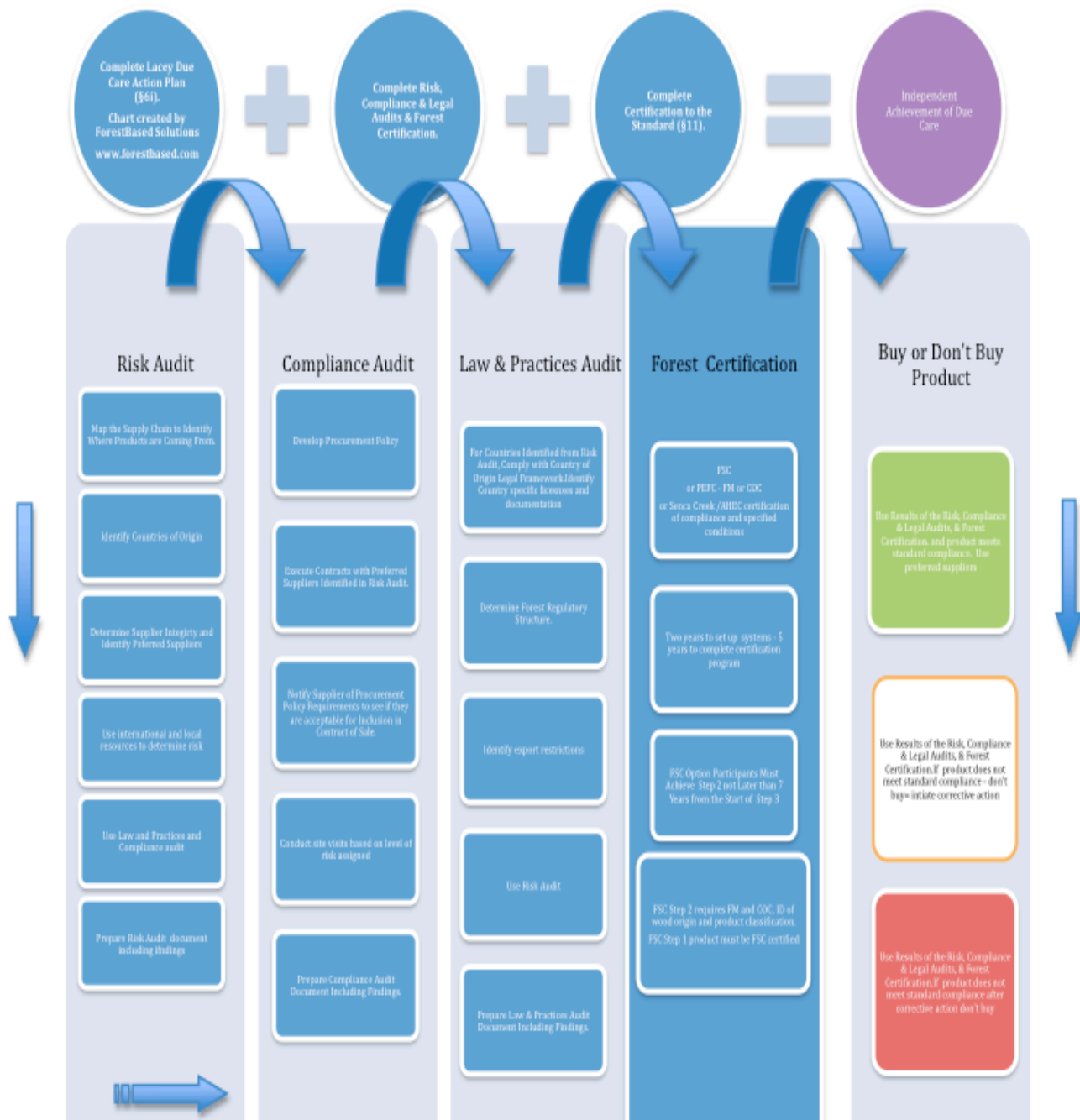
- State of Origin. Wood shipments must clearly indicate the US State of origin where the timber was harvested.
  - The Wood Harvester Shall Identify Public and Private Sector Anti-Theft & Sustainability Initiative Participation at the state and local level designed to address timber theft and other sustainable forestry challenges.
- The Legal, Compliance and Risk Audits required in b. – d. of this section are achieved.
- A corporate policy must be approved to implement the Legal, Compliance and Risk Audit activities.
- This Standard's Section 11 Certification Requirements are still required as is.
- Every Three Year Review of This Seneca Creek / AHEC Option. This Threshold Due Care Requirement option and all preceding conditions are reviewed through a written recommendation on any needed changes to protect the forest environment, with a stated rationale, submitted to and approved by the Lacey Due Care Consensus Committee every three years during the required Standard review update, and this recommendation will cover the status of the preceding five risk factors identified above by Seneca Creek at ii.

7.5 Consistency With Global Illegal Logging Rules. Due Care requirements of this Standard are similar to the Articles 5 & 6 traceability, due diligence, and risk assessment" throughout the supply chain requirements of the *EU 2010 Timber Regulation 995* dealing with legal logging.



## 7.6 Flow Charts of Due Care.





## 8. FSC Step 2 Option

8.1 Prerequisites. In order to certify pursuant to section 11 that FSC Step 2 is achieved, FSC Step 3 requirements must have been achieved. The Risk, Legal, and Compliance Audits in Sections 7.1, 7.2, and 7.3 must be completed.

### 8.2 FSC Certification Requirements

The company certifying to this Standard shall use or require to be used, FSC Principles & Criteria Standard (FSC-STD-01-001) since this sets forth the principles for protecting the forest environment, sustainability, and complying with the law.

Forest management units (FMU) certifying to this Standard must be certified to the FSC international standard for Forest Management Evaluations (FSC-STD-20-007) because this is the Standard that governs well-managed timber harvesting. FSC Controlled Wood Standard for Forest Management Enterprises (FSC-STD-30-010 V2-1) Is required because this Standard addresses requirements for baseline forest management protection and assurances of legal harvest.

FSC regional standards for forest management for the forest management unit where the wood is harvested are required because these standards take into account the unique regional nature of forests and their management.

Beyond the FMU, all businesses in the succession of ownership of wood or paper products certifying to this Lacey Due Care Standard must be certified to the FSC Chain of Custody Standard (FSC-STD-40-004): manufacturers, processors, brokers, distributors, suppliers or entities of last transformation of the wood or paper product. This certification is required because this standard tracks well managed forest products from the forest to the market throughout the global chain of commerce. The FSC Standard for Company Evaluation of FSC Controlled Wood (FSC-STD-40-005 V2-1) is required because it addresses requirements for baseline forest management protection and assurances of legal harvest for companies in the global chain of commerce.

### 8.3 Classification of Wood Product Type

All companies certifying to this FSC Step 2 Option must be certified to the FSC Product Classification Standard (FSC-STD-40-004a EN) because this FSC standard covers all of the different types of wood and paper products and their appropriate attributes in accordance with the requirements of FSC Chain of Custody Certification.

### 8.4 Identification of Wood Origin, Source & Category

To increase risk baseline accuracy, all companies must use a qualified third party to identify wood and paper product origin and source by verifying their supplies by the following categories:

- Country of origin
- Supplier
- FSC Certified material & product as defined in the FSC Chain of Custody Standard
- FSC Controlled Wood
- Non-FSC Wood

## 9. FSC Step 1 Option

9.1 Prerequisites. In order to certify pursuant to section 11 that FSC Step 1 Option is achieved, FSC Step 2 requirements must have been achieved. The Risk, Legal, and Compliance Audits in Sections 7.1, 7.2, and 7.3 must be completed.

### 9.2 Identification of Wood Origin and Source

To increase risk baseline accuracy, all companies must use a qualified third party to identify wood and paper product origin and source by verifying their supplies by:

- Country of origin
- Supplier
- **Forest management unit**

9.3 Product Must be “FSC Certified Product” as defined in the most recent FSC Chain of Custody Standard

**10. Equivalency Petitions to the Standard & Burden of Proof.** Equivalency Petitions are allowed and can be determined as an Official Interpretation to this Standard. The burden of persuasion is upon the petitioner. All Petitions are decided by a balanced subcommittee of the national consensus Lacey Due Care Committee. Subcommittee members are appointed by the Committee Officers. Any conflicts of interest by Subcommittee Members and Committee Officers must be disclosed and the disclosing party may have to be recused.

**11. Legally Binding Certification to the Standard & Disclosure – Options & Product Marking.** This mandatory provision is required to maintain the integrity of the Standard, and reduce the potential for Standard greenwash which is unlawful in violation of truth in advertising law. All purchasers and sellers of wood and wood products at any point in the supply chain, must have a certification of compliance pursuant to this section, in order to show evidence of achievement of due care.

Certifications of compliance to the Standard must be dated and updated every three years, and a summary of achievement to the Standard as certified pursuant to this section, must be publicly available and posted on a stated website as evidence of certification, including:

- Qualifications of the certifier
- Due Care Options achieved, and
- Key findings and rationale for each component of due care: Stepwise approach or PEFC or AHEC Seneca Creek (where applicable), risk reduction activities, legal audit, and compliance actions.
- An executed / signed certification to either option a or b below

Certifiers must be a qualified environmental professional as defined by EPA, show evidence of training and experience in sustainable forest management certification, chain of custody,

legality verification, and legitimately do business in the US. EPA's environmental professional definition is at EPA 560-F-05-241 (Oct. 2005) [http://epa.gov/brownfields/aai/ep\\_defactsheet.pdf](http://epa.gov/brownfields/aai/ep_defactsheet.pdf)

As part of the decision in awarding a certificate of compliance with this Standard, the certifier of compliance shall use best professional judgment based on the Risk, Legal, and Compliance Audit and forest certification requirements, including the progress and status of the wood or paper seller in any stepwise approach, and any other relevant and material factors.

For FSC Step 3 / PEFC / Seneca Creek AHEC, self-certification (either first or second party) to this Standard by the seller is allowed. First party means verified or audited internally by the operation. Second party may involve a 2<sup>nd</sup> party, e.g. forest products association or technical advisor. For FSC Steps 2 & 1, independent third party certification to this Standard is required.

**Product Lines.** Certification to this Standard pursuant to Section 11 can be by product line or by Company. If by Company it must cover all product lines and all product lines must be identified in the Section 11 Certification. A product line is a specifically identified and branded wood or paper product that is sold.

**Product Marking.** Companies certifying compliance to this Standard may mark their products showing achievement of compliance.

- a. Express Warranty Option by the wood seller in the sales contract that the company or product line(s) information documenting compliance with this Standard, is accurate, not misleading, and prepared by qualified professionals.

Consistent with the preceding Section 11 requirements, compliance with this Standard is evidenced by expressly warranting achievement to the Standard requirements in writing which includes the professional's typed name, signature, and affiliation.<sup>1</sup>

I, \_\_\_\_\_, as the certifying professional hereby expressly warrant as part of the engagement agreement, or if the company is self-certifying as provided by this Standard as part of the wood or paper products sales contract, that the company or product line(s) information documenting compliance with this Standard, and data gathered in determining Lacey Due Care compliance pursuant to this Standard, including responses to any third-party information requests, are accurate, reliable, and not misleading to the best of my knowledge as set forth by the Federal Trade Commission Environmental Marketing Guides requiring accurate and true environmental communications.

Both the express and implied meaning of this certification concerning the data used, responses to information requests, and provisions of the Standard are reasonable and based on competent and reliable evidence prepared by a qualified professional using procedures to produce accurate and reliable results.

<Signature>

Name

Professional Designation

Date

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<sup>1</sup> Federal Trade Commission Environmental Marketing Guides at 16 C.F.R. Part 260 (1998)

OR

- b. Certification by the Wood or Paper Product Seller to FTC Environmental Marketing Guides Option **that the company or product line(s) information documenting compliance with this Standard, is accurate, not misleading, and prepared by qualified professionals.**

**Equivalent Option.** An equivalent option can be used satisfying this legally binding certification requirement in lieu of providing the express warranty above for general adherence to this Standard. To do this, the certifying professional must certify in writing that their communications regarding this Standard and applicable sections, including certification of compliance to this Standard, comply with the Federal Trade Commission *Environmental Marketing Guides* at 16 C.F.R. Part 260 (1998) for accurate, reliable, and documented communications: <http://www.ftc.gov/bcp/gnrule/guides980427.htm>.

This certification must also state that "both the express and implied meaning of the certification about the data, responses to information, and provisions of the Standard, is reasonable and based on competent and reliable scientific evidence prepared by qualified professionals in the relevant area, using procedures to produce accurate and reliable results." See 16 C.F.R. § 260.5. Further, such certification and its documentation will be publicly available.

<Signature>

Name

Professional Designation

Date

**12. Amendments & Jurisdiction.** This Standard shall undergo mandatory revision every three years, and the National Consensus Committee has exclusive jurisdiction for Standard content, interpretations, and amendments.

**13. Non-mandatory Appendix**

- a. Technology Transfer Act <http://standards.gov/ntta.cfm>
- b. Approved Stepwise Approaches & List of 21 Certifiers that Can Approve Additional Stepwise Programs
  - Approved Stepwise Approaches
    - Responsible Procurement Program <http://www.nwfa.org/member/RPP.aspx>
    - Global Forest & Trade Network & Participation Rules [http://gftn.panda.org/practical\\_info/basics/sound\\_forest/certification](http://gftn.panda.org/practical_info/basics/sound_forest/certification)
    - SmartStep Program <http://www.rainforest-alliance.org/forestry/certification/services/smart-step>
    - The Forest Trust & Member Handbook **with achievement of FSC Step 2 Due Care in Standard §8 within three years:** [http://clients.squareeye.com/uploads/tft/documents/July\\_10\\_TFT%20Members%20Handbook\\_EN.pdf](http://clients.squareeye.com/uploads/tft/documents/July_10_TFT%20Members%20Handbook_EN.pdf)
  - List of 21 Global Certifiers That Can Approve Additional Stepwise Approaches
    - Advanced Certification Solutions, providing service in association with GFA Consulting Group, 800-450-0141 [www.advancedcertificationsolutions.com](http://www.advancedcertificationsolutions.com)
    - Bureau Veritas Certification, [www.bureauveritas.com](http://www.bureauveritas.com)
    - QMI-SAI Global, 819-243-8016 [www.qmi-saiglobal.com](http://www.qmi-saiglobal.com)
    - SGS Systems & Services Certification, [www.sgs.com](http://www.sgs.com)



- Rainforest Alliance/Smartwood Program, [www.rainforestalliance.org/smartwood](http://www.rainforestalliance.org/smartwood)
  - Scientific Certification Systems, Inc., 510-452-8007 [www.scscertified.com](http://www.scscertified.com)
  - Soil Association – Woodmark, [www.soilassociation.org/woodmark](http://www.soilassociation.org/woodmark)
  - AQA Certificazioni Fondazione Edmund Mach (AQA)
  - BM Trada Certification Ltd. (TT)
  - Certification Association “Russian Register” (RR)
  - Certiquality (CQ)
  - Control Union Certifications B.V. (CU)
  - CTIB-TCHN Belgian Institute for Wood Technology (CTIB)
  - Det Norske Veritas Certification AB (DNV)
  - GFA Consulting Group GmbH (GFA)
  - HolzCert Austria (HCA)
  - ICILA S.r.l (ICILA)
  - Institut für Marktökologie (IMO)
  - KPMG Forest Certification Services Inc. (KF)
  - LGA InterCert GmbH (IC)
  - PricewaterhouseCoopers LLP (PWC)
- c. Environmental Investigation Agency Graphic Showing Potential Lacey Violations Over the Supply Chain: *Legality From Stump to Shelf* [http://www.eia-global.org/images/Lacey\\_Act\\_chart.pdf](http://www.eia-global.org/images/Lacey_Act_chart.pdf)
- d. FSC GLOBAL FOREST REGISTRY: free source of information on the risk of sourcing controversial timber throughout the world <http://www.globalforestregistry.org>
- e. Resources:
- a. [www.illegallogging.info](http://www.illegallogging.info)
  - b. Corruption Perception Index <http://cpi.transparency.org/cpi2011/results/>
  - c. IUCN Redlist of Endangered Species <http://www.iucnredlist.org/>
  - d. CITES (Convention on International Trade in Endangered Species) <http://www.cites.org/eng/disc/text.php>
  - e. Rainforest Alliance Verification of Legal Origin (VLO) & Verification of Legal Compliance (VLC) Principles –
    - i. Principle 1 – Legal Right to Harvest
    - ii. Principle 2 – Approved Planning Authorizations
    - iii. Principle 3 – Payment of Fees and Taxes Required to Maintain Rights
    - iv. Principle 4 – Legal Registration, Transport and Trade
    - v. Principle 5 – Fulfillment of Harvesting Regulations
    - vi. Principle 6 – Fulfillment of Harvesting Regulations
    - vii. Principle 7 – Fulfillment of Social Regulations
    - viii. Principle 8 – Control of Unauthorized Activities
    - ix. Principle 9 – Chain of Custody
- f. Due Care Action Plan and Summary Charts

# Lacey Due Care Action Plan

The Action Plan Purpose is to Identify & Achieve Needed Steps to Execute a Legally Binding Certification of Compliance With the Lacey Due Care Standard, and thus a Defense to Liability.

1. **Select Appropriate Forest Certification Option for Due Care** that the company or independent third party will certify compliance to the Standard pursuant to §11.
2. **Identify Timeline for Achieving Compliance** with the applicable level of Due Care.
3. **Decide Whether to Achieve FSC, or PEFC, or Seneca Creek / AHEC US Hardwood Program.** If an FSC option is specified, decide which FSC Standards to comply with.
4. **Complete Required Risk, Compliance & Legal Audits.**
5. **Decide How to Complete the §11 Legally Binding Certification** to the Lacey Due Care Standard. FSC Step 3 / PEFC and Seneca Creek AHEC allow self certification to §11 as well as third party. FSC Steps 2 & 1 require independent third party certification to §11. Decide whether the §11 Certification will be to the FTC Environmental Marketing Guides or an express warranty that is part of the contract of sale of the wood or paper product.
6. **Place Summary of the §11 Certification on a Web Site** so that it is publicly available.
7. **Decide Whether There is Internal Capacity to Complete this Action Plan,** or whether outside services should be engaged.



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# Achievement of Due Care

Achievement of Lacey Due Care & Defense to Liability. Forest Certification and Risk, Compliance & Legal Audits are All Required. §10 Allows Equivalency Petitions.

## §11 Legally Binding Certification That Forest Environment is Protected

Joint Statement of the Lacey Conference Managers: A Primary Statutory Purpose is to Protect the Forest Environment From Illegal Logging.  
110 H. Rpt. 627, Food, Conservation & Energy Act of 2008 Conference Report to Accompany H.R. 2419 (2008)

### FSC OR PEFC OR Seneca Creek / AHEC Program Protecting & Enhancing US Hardwood Forests.

**FSC Step 3 / PEFC:** Required is independent field audited achievement of risk reduction activities. Needed means to counter government corruption undermining the rule of law & meet statutory purpose. With forest management preconditions, two years are allowed to set up systems for Stepwise Approach or PEFC, and 5 years to achieve FSC Step 2.. **Seneca Creek / AHEC:** Achieve AHEC Certificate of Compliance or equivalent, and achieve conditions ensuring low risk of illegal logging with 3 year review of material forestry and logging activities and indicators. **FSC Step 2:** Stds. - Principles & Criteria, Forest Management Evaluation, Controlled Wood for Forest Mgt. Enterprises, Regional Std. for Forest Management Unit, Chain of Custody for all companies, Company Evaluation of FSC Controlled Wood, Product Classification. Identification of Wood Source, Origin & Category. **FSC Step 1:** Identification of Wood Origin & Source by forest management unit & Product Must be "FSC Certified Product" as defined in the most recent FSC Chain of Custody Standard.

### Risk Audit

Evaluate supply chain risk based on relevant and appropriate law, and ecological significance of place of origin. Risk factors include species type, CITES list, supplier integrity and practices, and level of corruption and other serious social issues like conflict in place of origin.

### Law & Practices Audit

Confirm license to operate, plant species & plant protection laws, permits, tax payments, supplier export license, forest governance regulatory structure, export restrictions, first placement compliance, and law in any EU Voluntary Partnership Agreement.

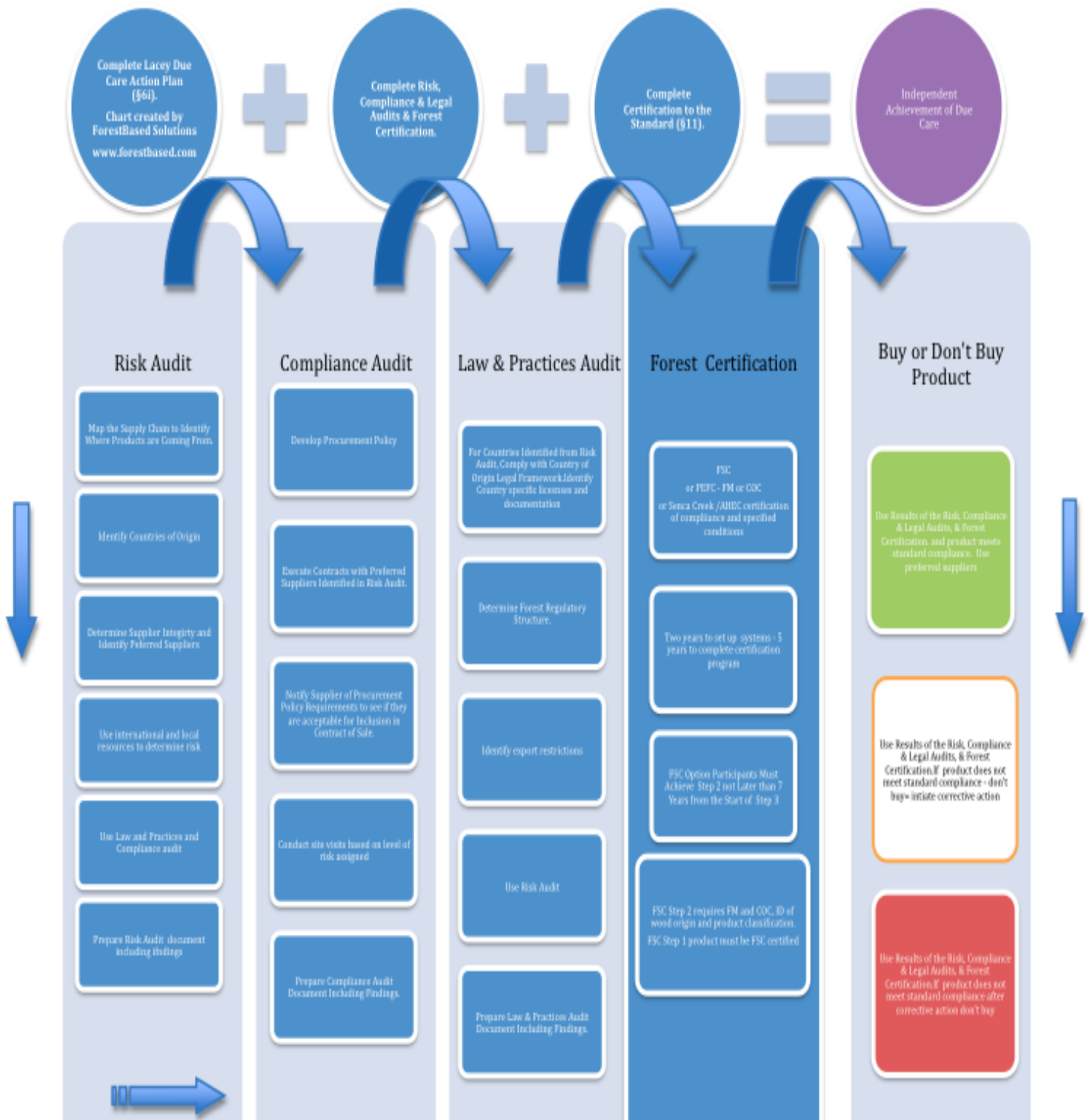
### Compliance Audit

Conduct inspections, audits for suppliers, continuous improvement programs, and determine needed qualifications. Develop procurement policy ensuring contractual agreement with vendors throughout the supply chain to adhere to Lacey Due Care Standard and allow compliance auditing.



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## 14. Mandatory Annex: Discussion of Retroactive Application of the Lacey Act

On its face, it appears that the 2008 Lacey Amendments may not be retroactively applied because there is no evidence of retroactive intent. With regard to the import declaration requirement, there is specific intent that the 2008 Amendments are not retroactive since Lacey § 3372 (f) prohibits import of any plant unless an import declaration is filed, “180 days from the date of enactment of this subsection.” The Legislative History is consistent with the Lacey amendment perspective, with no retroactive intent:

*“[The bill] also adds a new subsection (f) to Section 3, making it unlawful for any person to import a plant without filing an accompanying declaration that identifies the scientific name of the plant, the value and quantity of the plant being imported, and the name of the country from which the plant was taken. Where the species and country of origin cannot be specified because the shipment contains products with multiple possible species and/or countries of origin, the declaration may list the possibilities. These declaration requirements become effective 180 days after enactment.”*

House REPORT 110-882 LEGAL TIMBER PROTECTION ACT (Sept. 24, 2008 at 8).

This understanding was emphasized in an advanced notice of proposed rulemaking requesting comment in June 2011, where USDA / APHIS states:

*"the Act as amended, including the plant import declaration requirement, applies to all imports of plants, plant parts, and products thereof as of the effective date of the amendments," (76 Fed. Reg. at 38331 June 30, 2011).*

The statute is clear on the fact as stated by APHIS that an import declaration must be filed for imported plant products as of the effective date of the amendments:

“§ 3372. Prohibited acts

\* \* \* \*

(f) Plant declarations

(1) Import declaration

Effective 180 days from the date of enactment of this subsection, and except as provided in paragraph (3), it shall be unlawful for any person to import any plant unless the person files upon importation a declaration that contains--

(A) the scientific name of any plant (including the genus and species of the plant) contained in the importation;

(B) a description of--

(i) the value of the importation; and

(ii) the quantity, including the unit of measure, of the plant; and

(C) the name of the country from which the plant was taken.

(2) Declaration relating to plant products

Until the date on which the Secretary promulgates a regulation under paragraph (6), a declaration relating to a plant product shall--

(A) in the case in which the species of plant used to produce the plant product that is the subject of the importation varies, and the species used to produce the plant product is unknown, contain the name of each species of plant that may have been used to produce the plant product;

(B) in the case in which the species of plant used to produce the plant product that is the subject of the importation is commonly taken from more than one country, and the country from which the plant was taken and used to produce the plant product is unknown, contain the name of each country from which the plant may have been taken; and

*(C) in the case in which a paper or paperboard plant product includes recycled plant product, contain the average percent recycled content without regard for the species or country of origin of the recycled plant product, in addition to the information for the non-recycled plant content otherwise required by this subsection.*

*(3) Exclusions*

*Paragraphs (1) and (2) shall not apply to plants used exclusively as packaging material to support, protect, or carry another item, unless the packaging material itself is the item being imported."*

APHIS has also recognized in its Declaration "Special Use Codes" drafted for use on Import Declarations that despite due diligence, importers may not be able to trace and identify "pre-amendment materials" (i.e., those manufactured prior to May 22, 2008). If in the exercise of due care, importers are not able to identify pre-amendment materials, then such Declarations do not have to include specific genus, species, or country of harvest information. See USDA APHIS Guidance, "Lacey Act: Plant and Plant Product Declaration Special Use Codes," (April 21, 2011). Filing a Declaration for the present-day import of an antique made in 1945 that is made from wood harvested in 1944 is required.

However, USDA/APHIS have demonstrated through guidance, such as the "Special Use Codes," that this does not mean that the 2008 Lacey Amendments intended potential liability for violating the laws of the country of harvest for that antique product when harvested in 1944.

The intent of this Lacey Due Care Standard for researching pre and post Amendment wood and paper products, and formally implementing the USDA/APHIS guidance via regulation, provide needed predictability and consistency for U.S. importers.

There is further evidence that the Legislative History did not contemplate retroactive liability for harvesting prior to the enactment of the 2008 amendments.

Senator Ron Wyden of Oregon originally introduced the Lacey Amendments as the Combat Illegal Logging Act of 2007 (S. 1930) on August 1, 2007. He addressed the Senate on that day stating that he had been approached by "*a group of hardwood plywood manufacturers*" who identified "*illegal practices*" related to Chinese hardwood plywood imports, including "*illegal logging*." Senator Wyden also stated that the legislation would "*halt the trade in illegal timber and timber products*" and "*level the playing field ... for all American manufacturers across the country struggling to compete against imported, low-priced wood and wood products harvested from illegal sources,*" and "*help address an illegal logging crisis.*"

On November 6, 2007, Senator Wyden and the bill's Co-Sponsor Senator Lamar Alexander, addressed the Senate, and Senator Wyden reiterated that the bill would "*level the playing field for all American plywood manufacturers [and] make it against the law to import timber illegally harvested and obtained in a foreign country*" (Congressional Record – Senate, S10621-10623, Aug. 1, 2007, Senate, S13967-13969, Nov. 6, 2007).

The House Report on the Lacey Act Amendments, LEGAL TIMBER PROTECTION ACT, SEPT. 24, 2008, to accompany H.R. 1497, states that need for the legislation is increased illegal deforestation in recent years:

*"Many regard Indonesia as one of the most dramatic examples of*



*the impacts that result from illegal logging. The rate of deforestation in Indonesia is among the worst globally, and commercial logging, most of which is illegal, is the primary cause of that deforestation. In 1950, forests covered 84 percent of the country, but more recently, it has been estimated that at least 40 percent of the forests have been cleared.<sup>3</sup> Currently, illegally cut wood is estimated to comprise 73–88 percent of the total supply coming from Indonesia,<sup>4</sup> and the country continues to lose about five million acres of forests per year.”*

*“According to a recent summary of studies compiled by the Congressional Research Service, the situation in Indonesia is hardly unique. In Cambodia, 90 percent of the logging is estimated to be illegal. In the Philippines, sixteen million hectares of forests that once existed have been reduced to less than 100,000 today, largely due to illegal logging, and in Brazil, 80 percent of the logging in the Brazilian rainforest is considered illegal. These are just a few examples of the impacts that are being felt throughout Southeast Asia and Latin America.”*

It is clear from the Legislative History above that Congress did not contemplate regulating illegal harvest before the enactment of the amendments since key factors driving the Amendments were:

- The emergence of cheap illegal plywood imports from Chinese manufacturers. Chinese wood sellers note that China imported 2 million m3 annually and exports did not exceed imports until 2001, and then exports surged to 2 million m3 in 2003 and 8.3 million m3 in 2006: <http://www.daxili.com/info/show/China-Plywood-Manufacturing-Industry.html> Chinese plywood exports were not a factor anywhere until at least the 1990s.
- Adverse effects of deforestation as a major source of illegally logged wood. These effects have only occurred on a large scale to have a material impact since the 1950's.

Retroactive application of the Lacey Act becomes almost impossible to apply when one looks at the practical side of determining the country of harvest and specific national laws in effect at the time of harvest for pre-amendment products, including antiques. Typically, accurate information, records, and even people with knowledge of the products' origins are not available. Maintaining supply chains of custody was not customary. For almost all antiques, there is no feasible way to conduct due care as intended by the statute. As noted, APHIS has recognized this issue in principle with the implementation of its “Pre-Amendment” Special Use Code. The same principles apply to reused products harvested prior to the 2008 Lacey Amendment date.

US precedent unequivocally stands for the constitutional principle that statutes are not retroactive without clear legislative intent. The U.S. Supreme Court has established a long-standing presumption against retroactive rules as they generally result in unjust results. The “presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other,” *United States Fidelity & Guaranty Co. v. United States ex rel. Struthers Wells Co.*, 209 U.S. 306, 314 (1908).

"The presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than the Republic." *Landgraf v. USI Film*

*Prods.*, 511 U.S. 244, 265, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994). The antiretroactivity principle was of such concern to the founders that it was safeguarded in various provisions of the Constitution, including the *Ex Post Facto Clause*, the *Fifth Amendment's Takings Clause*, prohibitions on Bills of Attainder, and the *Due Process Clause's* protection of the interests in fair notice and repose:

“These provisions demonstrate that retroactive statutes raise particular concerns. The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsiveness to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals. . . . [It] restricts governmental power by restraining arbitrary and potentially vindictive legislation.”

*Landgraf*, 511 U.S. at 266-67 (internal quotation and citations omitted).

Retroactive legislation is said to be unfair because it deprives citizens of notice and can create economic uncertainty. *U. S. v. Ubaldo-Figueroa*, 347 F.3d 718 (9th Cir. Cal. 2003). The Justice Department supports this Supreme Court presumption against retroactivity. Supreme Court Reply Brief at 8-9, *Reno v. Raul Perchira Goncalves* (No. 98-835 Oct. 1998).

Retroactive intent is required to be expressly provided in the statute or its judicial interpretation. See *U.S. v. Tyson*, No. 84-2663, 12 Chem. Waste Lit. Rep. 872 (E.D. Pa. 1986), *U.S. v. Stringfellow*, 20 Environmental Reporter Cases 1912 (C.D. Ca 1984), as examples of some 20 cases holding that CERCLA §107 federal statutory environmental cleanup liability for pre-enactment activities was explicit and ruled constitutional. Congress clearly intended CERCLA to apply retroactively. *Kelly v. Thomas Solvent*, 741 F. Supp. 1443 (W.D. Mich. 1989).

The Administrative Procedure Act (APA) provides that rules created by administrative agencies should only possess a prospective effect. Under the Federal APA, rules are defined as agency statements having general or particular applicability and future effect. 5 U.S.C.S. § 551 (4).

There are apparently no reported cases where the 2008 Amendments to have been applied retroactively. See, e.g., an update of Lacey 2008 legal issues by the Justice Department including enforcement cases covering forfeiture, false labeling, and trafficking. “*The Lacey Act Amendments of 2008: Curbing International Trafficking in Illegal Timber*,” *Environmental Crimes*, Volume 59, Number 4, US Department of Justice (Colbourne & Swegle July 2011).

As to pre-2008 cases covering retroactivity, there is no evidence that the Lacey Act (as of its original enactment or under any subsequent Amendments) has been applied retroactively. For example, in *U.S. v. One Piper PS-32-260 Single Engine Aircraft* (9<sup>th</sup> Cir. 1988), the Court held that general savings statute precluded retroactive application of 1981 amendments to Lacey where a bear was killed at a time that the Act did not require prior felony conviction or violation involving sale or purchase to warrant forfeiture.

Retroactive application for purposes of this Due Care Defense Standard applies to

retroactive application of the Lacey Act, and not retroactive application of the predicate law violation that is a condition for a Lacey Act violation. See *U.S. v. McNab*, 331 F.3d 1228 (11<sup>th</sup> Cir. 2003), *cert. denied*, 124 S. Ct. 1407 (2004), where lobsters taken contrary to Honduran predicate law is Lacey violation when sold, notwithstanding Honduran repeal of predicate law after Lacey conviction. Defendants unsuccessfully argued Honduran predicate law was inappropriately applied retroactively.

Another case illustrates that retroactive application of criminal Lacey provision violates ex post facto clause of the Constitution. *U.S. v. Todd*, 735 F.2d 146, (5<sup>th</sup> Cir. 1984), *cert. denied*, 469 U.S. 1189, 105 S.Ct. 957 (1985). In *Todd*, the Court focused on the fact that several of the alleged Lacey Act violations took place before the 1981 Lacey Amendments, and several took place after 1981; and that all of these were part of an “ongoing conspiracy” to violate Lacey. The Court held that only if a criminal conspiracy starts before Lacey amendment, and continues beyond the effective date of the Amendment, would implementing the “new” enhanced 1981 penalties not be a violation of the *ex post facto* clause. “The *ex post facto* clause applies to any law that imposes punishment for an act which was not criminal at the time it was committed or that aggravates a crime making it greater than it was when it was committed.” *Id.*, *accord*, *U.S. v. Allemand*, 34 F.3d 923 (10<sup>th</sup> Cir. 1994) (Lacey Act violation initiated before 1988 Lacey amendment but continued after amendment enactment is not retroactive application and ex post facto violation).

Accordingly, where there is no knowledge or ability to obtain knowledge as to a product’s source, and a truthful and accurate Plant and Plant Product Import Declaration is filed, the import, export, transport, sale, receipt, acquisition, or purchase of a 100-year old antique, should be outside the scope of the 2008 Lacey Act Amendments because it is not in line with prior application of the statute and does not support the primary conservation goals of the Act.