

# **NATIONAL PUBLIC MEETING MINUTES**

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

Public Meeting Held at National Wildlife Federation (NWF), Wash., DC, February 27, 2012  
Minutes Approved at Lacey Due Care Committee Meeting at NWF, April 13, 2012

### **Participants**

**Erik Autor**, [National Retail Federation](#)  
**Wendy Baer**, [Tropical Forest Foundation](#)  
**Nadine Block**, [Sustainable Forestry Initiative](#)  
**Jeff Bradley**, [American Forest & Paper Association](#)  
**Kerry Cesareo**, [World Wildlife Federation](#)  
**Caitlin Clarke**, [World Resources Institute](#)  
**Laurie Everill**, [IKEA](#)  
**Julia Farber**, [Underwriters Laboratory](#)  
**Don Finkel**, [Anderson & National Wood Flooring Association](#)  
**Robert Garner**, [ForestBased Solutions](#)  
**Jim Goldberg**, [Goldberg & Associates & NAMM / National Association of Music Merchants](#)  
**Adam Grant**, [World Resources Institute](#)  
**Jason Grant**, [Jason Grant Consulting](#)  
**John Himes**, [Wood Flooring International](#)  
**Kip Howlett**, [Hardwood Plywood Veneer Association](#)  
**Stephanie Lester**, [Retail Industry Leaders Association](#)  
**Gary Lougee**, [USDA APHIS](#)  
**Mary Luehrsen**, [NAMM, National Association of Music Merchants](#)  
**Amanda Maxwell**, [Natural Resources Defense Council](#)  
**Jeanne Medley**, [Retail industry Leaders Association](#)  
**Andrew Mullen**, [Wood Flooring International](#)  
**Parul Patel**, [USDA APHIS](#)  
**Greg Paul**, [Martin Guitar](#)  
**Scott Paul**, [Greenpeace](#)  
**Cassie Phillips**, [Weyerhaeuser](#)  
**Emily Ruger Beline**, [Government of Canada](#)  
**Tim Schallich**, [Columbia Forest Products](#)  
**Jake Schmidt**, [Natural Resources Defense Council](#)  
**Chris Smith**, [IKEA](#)  
**Cindy Squires**, [National Marine Manufacturers Association](#)  
**Dick Titus**, [Kitchen Cabinet Manufacturers Association](#)  
**Tim Warman**, [National Wildlife Federation](#)  
**Mike Italiano**, [Capital Markets Partnership](#)

**Welcome.** Tim Warman, National Wildlife Federation (NWF), provided the welcome and indicated NWFs support for the Lacey Act and a Due Care Standard that increases the value and effectiveness of Lacey.

**Planning Meeting Conclusion & Objective.** A Planning Meeting was conducted at NWF on December 5, 2011 as a briefing on the need for a Due Care Standard. Two major meeting conclusions were that the Lacey Due Care Standard needs to work anywhere in the world across the global supply chain because Lacey covers the global chain of commerce. Also, participants agreed to proceed with the National Public Meeting at NWF.

Tim Schallich indicated that he appreciated the participation of folks at this Public Meeting and encouraged a dialog on the Standard including comments. Tim also emphasized that both he and Columbia believe that more certainty on what constitutes Due Care will greatly help Lacey compliance and be useful for many companies that are working on complying with the law.

Don Finkell stated that Anderson attempted to conduct legally verification for wood in Asia but determined that a high level of corruption prevented this and thus relied on FSC Certification. The Draft Standard states that forest certification is an important means to protect the forest environment and deal with government corruption because the forest certification systems are independent of the government. Don also stated that Anderson uses the Responsible Product Procurement Program (RPP) Stepwise approach incorporated into the Standard, and that different market needs dictate different systems.

**Lacey Act Amendments & Key Standard Provisions.** Lacey is over a 100 year old statute that initially dealt with protection of wildlife and fisheries and was amended in 2008 to include wood and paper products. This Due Care Standard covers wood and paper products.

The 2008 Amendments were uniquely enacted with broad support of the environmental community as well as most sectors of the US wood industry.

**Statutory Purpose.** It was pointed out that key statutory purposes are to protect the forest environment and level the playing field so that companies selling illegally logged wood do not secure an unfair price and competitive advantage. Thus, it has been a misconception that “legality” does not relate to protecting the forest environment.

**Value of the Lacey Act.** Support for the 2008 Amendments also comes from many parties recognizing that critical global environmental and resource tipping points can be ameliorated through substantial global Lacey compliance. The Standard indicates that the U.S. received an award for the high value to society of the 2008 Lacey Act Amendments. On page one of the Draft Standard, it indicates that the Standard intent is to support the Lacey Amendments and add value and effectiveness to the statute.

**Liability Scheme.** The Lacey liability scheme has been in force for many years and has many stringent provisions that are now applicable for wood and paper products. Lacey provides for strict criminal liability which allows the government to seize wood, records, and products without a

court order and any showing of fault. This has resulted in brand destruction for companies, and a greater need for clarity of how to comply with Due Care.

Standard is Similar to Rulemaking. Before the Public Meeting, the Draft Standard was posted at [www.LaceyDueCare.com](http://www.LaceyDueCare.com). It is different than most consensus standards because it is similar to rulemaking interpreting a statutory provision. Thus the Standard includes both a legal interpretation of relevant statutory provisions as well as definition of technical Due Care Requirements.

Standards Can Be an Important Part of Due Care. Both the Justice Department and USDA state that industry standards can be an important measure of Due Care. It was stated that the Draft Standard is the 13<sup>th</sup> iteration of a Standard document and the government and other key stakeholders have been briefed on the process and Draft Standard components.

Technology Transfer Act is covered in the Draft Standard. It places an affirmative obligation for the federal government to use consensus standards where there is no applicable government standard. In response to questions, it was stated that success of the Standard will be based on market use and adoption, just like any other voluntary consensus standard.

Successful Precedent. The Draft Standard identifies successful precedent whereby the Due Care Standard under Superfund environmental cleanup was approved (Phase 1 Environmental Assessment), providing similar defenses to liability as set forth in the Draft Lacey Due Care Standard. The Phase 1 was rapidly adopted by the market due to substantial risk and uncertainty reduction, and use by the real estate capital markets. The Phase 1 was subsequently codified by EPA. The Phase 1 resulted in substantial environmental cleanup and eliminated the need for litigation on Superfund due care for innocent landowners.

Defenses to Liability & Legally Binding Certification of Compliance to the Standard are identified in the Draft Standard. Defenses are available where there is a bona fide and effective legally binding certification of compliance to the Standard pursuant to Standard Section 11. The legal basis for the Due Care and Innocent Owner Defenses are set forth in the Draft Standard as available for companies providing bona fide Standard Section 11 certifications with a summary of the certification on a web site. This means:

- The wood or paper product is lawfully possessed and not contraband.
- Companies can assert the Due Care and Innocent Owner Defenses before the government, customers, investors, US District Courts with Lacey Act jurisdiction, and any other interested parties.
- The Due Care requirements set forth in the Standard have been achieved.

It was noted that the Standard Section 11 provisions are intended to work effectively in the market as they have with other Standards, obviating the need to create an administrative process for collection, approval, or auditing of Section 11 Certifications. This saves compliance costs and time while preventing greenwash, with the expectation that the vast majority of companies will accurately certify given this higher level of diligence and transparency.

Retroactive Application of the 2008 Amendments. It was noted that the Draft Standard Mandatory Annex sets forth the relevant constitutional and statutory provisions, and case law interpretations that show the Amendments are not retroactive. Thus antique or other products from wood harvested before the 2008 Amendments effective date, are not subject to Lacey liability where an accurate Declaration is filed.

**Standard Consensus Process.** In response to comments from Meeting participants, a request was made for them to indicate if they are aware of other folks that should be notified of this Standard activity. As stated on the web site, all interested and affected parties can participate in the Consensus Committee.

Over 8,000 individuals were notified of the Public Meeting including the news media. Efforts are made on an ongoing basis to let entities know about the Standard. Over 150 companies have been personally contacted and provided background information. It is not feasible to notify all interested and affected parties so the consensus requirements do not mandate this.

A successful 30 Day Ballot vote is required and voting procedures were described as specified by the accredited consensus requirements.

**Review of the Draft Standard's Due Care Requirements.** The four independent Draft Standard Due Care requirements were reviewed:

- Forest Certification
- Risk Audit
- Compliance Audit
- Legal Audit

Rob Garner mentioned that he just returned from Cameroon helping a small company with the Draft Standard's due care requirements, which Rob believes can be adopted reasonably anywhere in the world including areas with high levels of corruption.

In response to comments from the wood industry, the Draft Standard now has one requirement for Due Care with several options for forest certification which reflect how the market differentiates forest certification.

Rob stated that in his many years of helping companies globally with responsible sourcing, companies want certainty. Rob believes that the Draft Due Care Standard requirements are doable everywhere because they are practical and reasonable. The Audits specify best practices that are in companies' best interests including:

- Mapping the supply chain
- Program for supplier integrity
- Use of international risk tools
- Notify suppliers of procurement program & institute contractual commitments
- Use of the Risk Audit to determine priorities

**Review & Markup of the Standard.** The Standard was reviewed and questions answered regarding:

- Operation of Section 11 Legally Binding Certification of Compliance to the Standard
- Operation of the Defenses to Liability
- Section 10 Equivalency Petitions that can be decided administratively

- Industry Trade Association Policy on the website encouraging industry trade associations to join through one or more of their Members. It was decided that industry trade association staff can participate in the April 13 Committee Meeting as Observers.
- Observers. Any other entity can participate as an Observer if this is how they wish to be identified.
- Nature of AHEC. In response to a question, Kip Howlett provided background on the American Hardwood Export Council (AHEC) stating that the AHEC Certificate of Compliance was developed in response to Japanese law and EU requirements.
- The Seneca Creek Study is a provision of the Standard helping to achieve due care for US hardwoods in 33 States.
- Forest Certification. The differences in forest certification and the reason for Draft Standard use of forest certification since this is the primary way the market ensures protection of the forest environment
- Sustainable Value of Wood. How wood over the life cycle can be a very sustainable product and how the wood industry has been a sustainable product market leader
- Draft Standard Due Care Requirements Relating to Wood Origin
- Federal Government Role in Environmental Protection. Why the federal government is not currently a market leader on certified sustainable products, but since the 1940's has provided over 30 federal and comparable State laws protecting public health & environment and thousands of regulations. Accordingly, a market based approach for a Lacey Due Care Standard can make sense.
- Small entity compliance was discussed including experience under Lacey fisheries enforcement where small retail business owners were incarcerated because they did not understand how to comply. Companies that harvest wood are responsible for Lacey compliance, and the Standard was drafted with this in mind for both large and small companies. Comments were requested on any additional ways to deal with small business.
- Committee Balance and Potential Classification of Interests as users, producers and general interest. The Committee is substantially in balance with 20 Users, 3 Producers and 6 General Interest. A Committee is out of balance when producers exceed users + general interest. Users benefit from the Standard, producers have a vested financial interest in the Standard, and general interest are government / ENGOs. The Committee is more democratic than most ANSI activities because it is open to any interested and affected party as stated on the web site. In contrast, most ANSI Standard activities restrict Committee Membership.
- Reliance on Standard Section 11 Certifications. Meetings with retailers on the Draft Standard have covered how they can rely on a Standard Section 11 Certification of Compliance for retailer due care under Lacey and Section 11. It was agreed that a template for the Section 11 Legally Binding Certification will be placed in the Standard. This template was added to the Draft Standard on the website.
- A Market Test of the Standard will be conducted after Standard approval.
- Surveys can be used to test Standard compliance.
- Product Marking of the Standard Section 11 Certificate of Compliance is allowed and Guidelines for on and off product marking will be developed after Standard approval.

## **April 2 Comment Deadline and April 13 Committee Meeting at NWF.**

After substantial discussion, these dates were selected subsequently. The Committee Meeting will be from 10:00 – 4:30.

The Public Meeting was adjourned at 12:30.