

Consensus National Defense to Lacey Strict Criminal Liability

May 3, 2012

Summary. The Lacey National Consensus Committee is developing the defense to criminal liability using as successful precedent, the Phase 1 National Consensus Innocent Landowner Defense from cleanup liability codified by EPA. The Draft Standard uses components of leadership forest certification systems, legality and risk assessment, and defines “due care” under Lacey providing a defense to liability. The Standard will undergo a 30-day national consensus vote of approval. The process will take about 5 months and include a legal opinion giving it added weight of evidence. The Federal Technology Transfer Act sets forth an affirmative obligation for all Federal Agencies to use consensus standards, and Justice and USDA policy states that Due Care is can be defined with industry standards.

Benefits

- Standard Drives Use of Credible Leadership Consensus Forest Certification Systems Preventing Illegality
 - Encourages all parties in the wood and paper products global supply chain to certify all product lines to qualifying leadership standards thus increasing Lacey compliance
 - Provides competitive advantage, sales, and profitability to companies certifying to leadership forest certification standards thus encouraging Lacey compliance
 - Uses forest certification, risk, compliance, & legal audits to ensure legal supply chain products
- Standard Satisfies Huge Market Need for Defense to Lacey Liability for Entities in the Wood and Paper Chain of Custody, by providing more certainty for parties covered by Lacey on how to exercise a high level of due care under Lacey, reducing risk of attendant criminal and civil prosecution, product seizure and forfeiture, jail time, fines, substantial legal fees, and brand destruction. Lacey strict criminal liability for product seizure and forfeiture is the most punitive liability standard not requiring evidence of intent or fault. Justice Department Lacey Due Care Definitions have two criminal liability standards, strict liability for forfeiture of products and vessels carrying the products, and negligence for selling illegally logged wood and paper. Strict criminal liability means liability without fault, thus a seller can be liable even if it is not negligent. Justice announced that additional prosecutions are expected.
- Standard Reduces Litigation so Resources can be Used for Lacey Compliance
- Standard Appropriately Shifts Liability Away from Entities Providing Legally Binding Certification of Lacey Due Care
- Standard Helps Stop Imminent Irreversible Unmanageable Dangerous Climate Change / Ongoing Systemic Financial Market Risks already affecting the insurance, government, agricultural, fisheries, and forestry sectors. The Global Canopy Programme of 80 universities led by Oxford determined that about 20% of dangerous climate change is caused by illegal logging & deforestation. Deforestation is per se illegal based on international law. See also “The Economics of Illegal Logging and Associated Trade” (OECD General Secretariat, 2007.) (“2007 OECD study”) at 10.
- Lacey Includes Common Law Liability Such as Nuisance and Negligence, 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. 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.

Lacey Defense National Consensus Committee

Don Finkell, Anderson & National Wood Flooring Association
National Wood Flooring Association
Lou Newett, Knoll
David Williams, Williams Sonoma
Susan Inglis, Sustainable Furnishings Council
John Himes, Wood Flooring International
Bruce Mitchell, Esq., Gibson
Mark Buckely, Staples
Ron Jarvis, Home Depot
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NAMM, the National Association of Music Merchants
Howard Sharfstein, Esq., Kimberly-Clark
Tim Schallich, Columbia Forest Products
Greg Paul, Martin Guitar & National Association of Music Merchants
Tim Warman, National Wildlife Federation
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Jim Gould, Floor Covering Institute
Robert Garner, ForestBased Solutions
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Scientific Certification Systems, Robert Hrubes, Ph.D., Sr. VP
Emily Ruger Beline, Esq., Government of Canada (Observer)
Gary Lougee, USDA APHIS (Observer)
Erik Autor, National Retail Federation (Observer)

The Committee has scheduled an organizational meeting and one or two additional meetings to review and revise the Draft Standard. Consistent with the Industry Trade Association Policy of the consensus operating procedures, industry trade associations are encouraged to participate through one or more of their Members.

There will be a 30 day Ballot vote with the objective to approve the Standard on the first Ballot which is expected based on (1) preliminary work completed, (2) strong support for a Standard by leading experts involved, (3) a high level of proficiency in achieving approved consensus leadership certified sustainable product standards, and (4) ability if needed, to negotiate a first standard amendment proposal as part of Standard Approval. The Lacey Consensus Committee has exclusive jurisdiction for all Lacey Due Care Standard content, approval, interpretations, and amendments.

Timeline. It is expected to take three months to approve the Standard in the consensus process. Thus based on successful precedent, an approved National Consensus Standard is expected shortly after the initial Organizational Public Meeting.

Questions Regarding Potential Lacey Strict Criminal Liability Without the National Defense

Question: Since there is no description of what constitutes due care under Lacey other than avoiding liability, what would be a wood or paper products seller’s position or defense in the event of a criminal prosecution against the company and specified employees?

Answer: ???

Question: Why does the government not define due care other than avoiding liability?

Answer: It is reported that the government has no intention to define due care as provided for in the statute, because it does not want to limit its prosecutorial discretion.

Question: What does strict criminal liability mean for a wood or paper products seller?

Answer: It is criminal liability for product seizure and forfeiture even though the seller is not at fault and there is no intent to commit a crime. It is the most onerous liability. Further, criminal liability can also result in fines and incarceration. The threat of criminal liability through raids on company offices and product and record seizure, destroys the seller's brand and business relationships, and incurs substantial legal fees.

Question: Who is accountable for a wood or paper seller in the event of a Lacey Prosecution?

Answer: Employees responsible for procurement, environmental management, sustainability, top management, board of directors.

Question: Why is the government publicly committing to additional Lacey prosecutions and allocated enforcement staff even though there is no new government funding?

Answer: Many organizations including those in the environmental and forest products communities, are lobbying for Lacey enforcement due to known Lacey compliance greenwash by many companies globally and substantial evidence of illegal logging globally. The European Union is very aggressively negotiating compacts with foreign countries to stop illegal logging, and the US is thus being pressured to also act on illegal logging through enforcement.

Question: Would the government prosecute another company with FSC Product Lines?

Answer: ??? Justice's only known Lacey enforcement priority is that enforcement is a top priority. Wood and paper products sold in US interstate commerce from anywhere in the world are subject to Lacey.

Question: Why have Rainforest Alliance, National Wildlife Federation, Forest Ethics, Forest Stewardship Council, Anderson, National Wood Flooring Association, Knoll, Wood Flooring International, Sustainable Furnishings Council, Home Depot, Williams Sonoma, Mannington, Staples, NAMM, the National Association of Music Merchants, Columbia Forest Products, C.F. Martin & Co., Danzer Group, leading global retailers and consumer products companies and Capital Markets Partnership and others supported development of the national consensus standard defining Lacey Due Care based on best supply chain forest management practices, and legality and risk assessment?

Answer: To increase Lacey compliance, improve the forest environment, help stop irreversible dangerous climate change, address the substantial risks and uncertainties detailed above, provide an added sales and competitive advantage for leadership forest certification market leaders, and follow successful precedent where a similar defense to liability was secured before in the capital markets by Lacey Due Care National Consensus Committee Leaders.

Responses to Misconceptions

- **There are no guarantees against Lacey criminal or civil prosecution and product seizure.** However, based on successful precedent, the Standard is intended and expected to provide a defense to liability by defining Lacey due care. Further, Justice and USDA have repeatedly stated that industry standards are an important measure of Due Care, and the Technology Transfer Act requires the Federal Government to use consensus standards. The law allows companies with bona fide legally binding certifications to the Lacey Due Care Standard to raise this certification as a defense to liability with the government including US District Courts with jurisdiction for Lacey enforcement.
- **One of the purposes of the Lacey Act inclusion of wood and paper products is to protect the forest environment.** (Conference Report, Lacey Act amendments 2008). In fact, it's likely that where there is no violation of law that affects the protection of the forest environment, it's outside the jurisdiction of the Lacey Act.
- **Lacey Due Care requires the wood or paper seller to be in compliance throughout the global**

supply chain for all wood or paper products sold in the US.

- **Forest certification is a primary part of the Standard, because it is the recognized and credible means of defining and ensuring sustainable forestry and protection of the forest environment as required by Lacey. The other primary parts of the Standard are legality, risk and compliance audits, and the legally binding certification of compliance to the Standard.** Forest certification is the recognized leading global tool to improve the sustainability of forests. Due to widespread government corruption in many parts of the world, the rule of law is undermined and also the ability of wood and paper sellers to thus comply with the law including Lacey. Accordingly, another important part of forest certification is to provide a check on government corruption since forest certification is independent and not controlled by government.
- **The Standard recognizes multiple forest certification schemes.**
- **The Standard allows three levels each independently achieving due care and sets a credible minimum threshold.** This type of tiered compliance scheme has proven to work the best for market based standards because it allows the greatest market participation and differentiates superior performance. The Standard requires for all levels of due care, legal, risk, and compliance audits and forest certification. Each one of these four components is required to achieve compliance with this Standard plus a legally binding certification of compliance with this Standard.
- **The Standard does not shift liability, including to certifiers.** The Standard only requires independent third party certification for Level 1 Due Care, the highest level of Due Care which increases the likelihood of Lacey compliance the most. Accordingly, the most rigorous form of certification is appropriate for Level 1. The legally binding certification including for Level 1, simply requires certifiers to state what they already have an independent legal responsibility to do: ensure the certification of compliance to the Standard is accurate, not misleading, and qualified professionals were used.
- **The Standard does not require redundant certifications or audits.** The Certifications and audits required are needed to ensure Due Care compliance and prevent greenwash which is rampant and unlawful. Levels 3 and 2 Due Care of the Standard allow self certification to the Standard. To ensure Due Care compliance and prevent greenwash, all three Due Care levels require a legally binding certification and publication of a summary of the certification on a web site. This legally binding certification is not an added burden on companies because they already have an independent legal responsibility to ensure accurate communications that are not misleading and use qualified professionals.
- **This Standard promotes Lacey compliance.** Clarity and certainty provided by a consensus national Standard on Due Care promotes Lacey compliance. Where there is not clarity on how to comply, it is very difficult to ensure substantial Lacey compliance.
- **The Standard scheme does not create an unneeded bureaucracy.** The Standard works in the marketplace and does not require any filing of certifications of compliance, just a legally binding certification and public disclosure of the summary of the certification.
- **The Standard process and governance is fully transparent, democratic, and Standard approval is required by a 30 day consensus Ballot vote.**
- **The Lacey Defense National Consensus Committee has exclusive jurisdiction for the Standard including approvals, interpretations, and amendments, and Standard approval is required by a 30-day ballot vote of all interested and affected parties.**
- **Any interested and affected party can participate in the Lacey Defense National Consensus Committee.**

Capital Markets Partnership (CMP)

CMP is an IRC § 501(c)(3) nonprofit public charity. Contributions are tax deductible. See CMP Fact Sheet. The one time Partnership amount for companies is \$5k and \$10k for trade associations. CMP is a subsidiary of the nonprofit public charity Market Transformation to Sustainability (MTS). As a balanced coalition, MTS is working to increase certified sustainable product

and green building market penetration including through standards. MTS is an ANSI Accredited Standards Developer.