

August 1, 2013

Mr. Allan Skodowski, Chair  
Mr. S. Richard Fedrizzi, President & CEO  
USGBC Executive Committee of the Board  
U.S. Green Building Council  
2101 L Street NW, Suite 500  
Washington, DC 20037

Dear Mr. Chairman and Members of the Executive Committee:

**RE: Appeal of LEED v4**

On July 2<sup>nd</sup> the USGBC<sup>1</sup> adopted LEED v4 without resolving what President and CEO Rick Fedrizzi described as “the single most contentious issue in USGBC’s history.”<sup>2</sup> Despite letters of opposition from 89 Members of Congress, 14 Governors, and thousands of other affected stakeholders, LEED v4 continues to award credit to one brand of certified forest products (FSC) to the exclusion of competing products from the certification systems most widely used in the U.S. (SFI and ATFS).

The USGBC’s records contain ample evidence that the preference for FSC-certified products is not technically sound.<sup>3</sup> FSC standards vary widely and the labels do not tell consumers which FSC standard a product comes from. A large percentage of FSC-labeled products come from places with no endorsed standard at all: the prime example is Brazil, the globally dominant source of pulp in FSC-labeled products positioned to earn credits under LEED v4.

SFI- and Tree Farm-certified products<sup>4</sup> come from environmental and social conditions equal to or better than those of the FSC products endorsed by LEED, and should be equally recognized. The failure of the LEED standards to do so is the direct result of the USGBC’s failure to use recognized processes –

---

<sup>1</sup> Acronyms used in this letter: AF&PA (American Forest & Paper Association); ANSI (American National Standards Institute); ATFS (American Tree Farm System); CEO (Chief Executive Officer); CSA (Canadian Standards Association); FSC (Forest Stewardship Council); FTC (U.S. Federal Trade Commission); GFA (Georgia Forestry Association); ISO (International Organization for Standardization); LEED (Leadership in Energy & Environmental Design); MR (Materials and Resources); OMB (Office of Management and Budget); PEFC (Programme for the Endorsement of Forest Certification); SFI (Sustainable Forestry Initiative); SWPA (Southern Wood Producers Association); TAG (Technical Advisory Group); USGBC (U.S. Green Building Council).

<sup>2</sup> The Keystone Center, The U.S. Green Building Council’s Wood Certification Meeting, p. 18 (Sept. 27, 2005) (report dated March 2006)(“Keystone Report”).

<sup>3</sup> See, e.g., letter from Weyerhaeuser to The National Academies (October 22, 2012), submitted to USGBC in December 2012 round of comments on LEED v4; comments on LEED v4 by the Sustainable Forestry Initiative (November 9, 2012). (The documents referenced in this letter are part of the USGBC’s record on the LEED standards. For ease of reference, Appellants will provide copies of documents not otherwise in the public domain to the USGBC’s General Counsel.)

<sup>4</sup> Appellants’ arguments should not be viewed as excluding products certified to the CSA and PEFC standards, but for brevity’s sake we focus on the discriminatory impact of LEED on products from U.S. forests certified to the SFI and ATFS standards.

including those required by the USGBC's own policies and procedure – to meaningfully include all stakeholders and work to find consensus.

Appellants are directly and materially affected by the USGBC's adoption of LEED v4 without correcting the certified wood credit.<sup>5</sup> Appellants represent a cross-section of U.S. forest owners, manufacturers, producers and workers disadvantaged by LEED's exclusive recognition of FSC.

- The Alabama Forestry Association was formed in 1949 to represent the Alabama forestry community. The forest products industry is one of Alabama's largest manufacturing industries generating almost \$20 billion in economic impact and providing 10% of the total jobs. Membership includes forest products companies, wood suppliers, loggers and forest landowners, as well as others involved in the growing, harvesting, transporting and manufacturing of forest products in Alabama. Members of the Alabama Forestry Association are disadvantaged by the certified wood credit in LEED, which fails to recognize most Alabama forest products.
- The Georgia Forestry Association is the leading advocate for a healthy business and political climate for Georgia's forest environment, forest landowners and forest-based businesses. GFA has worked with landowners in protecting their property rights and adopting sound land management practices to ensure that our forests continue to provide clean air, clean water, soil conservation, wildlife habitat, recreation and products that we all use every day. Members of GFA are disadvantaged by the certified wood credit in LEED, which fails to recognize most Georgia forest products.
- The Woodworkers Department of the International Association of Machinists and Aerospace Workers, AFL-CIO is the exclusive bargaining representative for tens of thousands of forestry- and fiber-dependent workers in 23 states. These workers are disadvantaged as a result of the failure of the certified wood credit in LEED to recognize the wood fiber and wood products they produce. The resulting loss of markets promotes shorter hours, longer lay-offs and fewer jobs. Given that a significant percent of FSC-sourced fiber is procured from outside of the U.S., this economic hardship is not merely the favoring of one group of U.S. workers versus another, but rather an actual loss of employment opportunities for all U.S. fiber-based workers.
- The North Carolina Forestry Association is the state's oldest conservation organization, established in 1911. Today it is a private, nonprofit partnership of over 4,000 forest managers, landowners, mill operators, loggers, furniture manufacturers, educators and others concerned about the long-term health and productivity of the state's forest resources and the industries they support. Members of the North Carolina Forestry Association are disadvantaged by

---

<sup>5</sup> The FSC-only credits are found in numerous places in LEED v4. For example, under New Construction, Materials & Resources credit 3, Option 2, only FSC-certified products (or USGBC-defined equivalent) count towards the award of up to four points for "environmentally preferable products." And under Existing Buildings, Purchasing, Materials and Resources credit 4, only FSC-certified paper and wood products (or USGBC-defined equivalent) count towards the award of a point for the purchase of ongoing consumables, such as paper and tissue. This Appeal applies to all credits awarding preferential credits to FSC-certified products in all parts of LEED v4.

the certified wood credit in LEED, which fails to recognize most North Carolina forest products.

- The Oregon Forest Industries Council is a trade association representing more than 50 Oregon forestland owners and forest products manufacturing-related firms. OFIC and its members strongly support Oregon's first-in-the-nation Forest Practices Act to protect Oregon forest resources – clean water, fish and wildlife habitat, recreation and quality wood products – and ensure private forestlands will continue to be productive, healthy and sustainable. Oregon is the #1 producer of softwood lumber in the nation, with output in 2011 accounting for nearly 16 percent of total U.S. production. Members of the Oregon Forest Industries Council are disadvantaged by the certified wood credit in LEED, which fails to recognize most Oregon forest products.
- The Oregon Small Woodlands Association is a 501(c)(5) membership trade association that represents the interests of family forest owners in Oregon. Founded in 1960, OSWA is the recognized leader of family forest issues in Oregon. It has 3,000 members, 14 active county chapters, and a professional staff in Salem, Oregon. Members of the Oregon Small Woodlands Association are disadvantaged by the certified wood credit in LEED, which fails to recognize most Oregon forest products.
- The Southeastern Wood Producers Association is a non-profit entity that represents the concerns and issues of the logging and transportation companies in Georgia and Florida. Formed in 1990 by loggers for loggers, the SWPA is a well-recognized and influential organization in affairs relating to the forest products industry. The SWPA position is that no one forest certification be allowed to dominate the forest products industry in Georgia or Florida. Members of SWPA are disadvantaged by the certified wood credit in LEED, which threatens the already weakened logging and trucking capacity that exists today.
- Weyerhaeuser is one of the world's largest forest owners and producers of wood products. The company manages forests and operates mills in four countries and has operations certified to all of the major global forestry standards (FSC, PEFC and SFI). All of Weyerhaeuser's North American timberlands are certified to SFI and thus disadvantaged by the certified wood credit in LEED, which fails to recognize most Weyerhaeuser products. Weyerhaeuser is a member of the USGBC, with corporate ID #3844629178105357.
- Amelia Wright is a private forest owner with forestlands in Delaware and Maryland. In 1999, Wright was named the American Tree Farm System's Delaware Tree Farmer of the Year, and she was the Northeast regional winner in 2002. Amelia Wright is disadvantaged by the certified wood credit in LEED, which fails to recognize wood from her beautifully managed forests.

**I. The USGBC failed to use recognized principles of due process and consensus standards development called for by its policies and procedures and applicable law and policy**

The USGBC has systematically excluded the interests of SFI- and ATFS-certified producers from meaningful participation in resolving the certified wood issue, contrary to its policies and procedures, established practices for developers of voluntary standards, and governing policy and law.

**A. The USGBC’s policies and procedures call for fair and balanced committees reflecting multiple viewpoints**

The USGBC Bylaws are the “ruling documents” of the organization.<sup>6</sup> The Bylaws include the following requirements for work performed by committees:

**Section 3 – Balance:** The USGBC shall seek to create and maintain its committees in a fair and balanced manner, appropriately representing multiple viewpoints, without dominance by a single member category. The Board, or any committee designated by the Board, shall review the composition and leadership of committees. Criteria for balanced committee makeup shall be set forth in Board-approved committee policy.

This mandate for fair and balanced committees is further explained in the USGBC’s Policies and Procedures for Committees and Working Groups (the Committee Policy), which applies to *all* USGBC committees and working groups with limited exceptions. To remove any doubt about the meaning of “balanced,” Section 2.1 of the Committee Policy provides:

Balanced is the process by which a Committee or Working Group’s makeup is adjusted in an effort to avoid dominance by a single member category and to allow representation by multiple viewpoints in accordance with the Bylaws.

(Emphasis added.)<sup>7</sup> USGBC’s Bylaws and Committee Policy thus unequivocally require that committees and working groups be represented by a balance of interests, and that no one interest be allowed to dominate. These requirements also extend to LEED committees and subcommittees.<sup>8</sup> Unfortunately, as discussed below, key work on the certified wood credit has been done behind closed doors by committees and work groups dominated by one interest, without including multiple viewpoints.

Furthermore, the requirement of fairness and balance does not extend to the Executive Committee or other board committees. Per Section 5.2 of the Committee Policy, “The Executive Committee, Board Committees and Panels are exempt from the balance and membership requirements, though where practicable these should be taken into account.” This exception swallows the rule of “fairness and balance” inasmuch as any substantive changes to LEED must be reviewed and approved by the LEED Steering Committee and Board of Directors – both exempt from balance – before they can be submitted for a membership vote.<sup>9</sup> This “veto” power does not conform to established principles of due process

---

<sup>6</sup> See <http://www.usgbc.org/resources/usgbc-bylaws>.

<sup>7</sup> Committee Policy, Section 5.2 goes on to reinforce the point: “In conformance with the bylaws, USGBC will strive to involve multiple viewpoints and different types of members in its Committees and Working Groups. No single member group shall dominate a Committee or Working Group.”

<sup>8</sup> Foundations of LEED, Section IV.2.

<sup>9</sup> Foundations of LEED, Section VII.1 -2.

and consensus standard-setting, and as a practical matter has prevented reasonable approaches to the wood credit from ever reaching the membership. Contrary to the USGBC's assertions, membership votes cannot cure defects in due process, including unbalanced and unrepresentative committees, content determined by exempt committees rather than technical experts using consensus processes, and non-responsiveness to member comments and negative votes.

**B. Fair, inclusive processes and consensus decisions are required to avoid anticompetitive behavior and deceptive marketing claims**

The USGBC's standard-setting practices are governed by two powerful bodies of law protecting the interests of consumers: the antitrust laws protecting competition and the consumer protection laws prohibiting false and deceptive advertising. It is well settled that non-profit organizations such as the USGBC are subject to antitrust liability when they engage in standard-setting,<sup>10</sup> and that the risk of anticompetitive behavior is inherent in the development of private sector standards.<sup>11</sup> And the FTC recently adopted revisions to its Guides for the Use of Environmental Marketing Claims (the Green Guides), making clear that the claims made through standards and seals such as LEED are advertising, subject to the FTC Act.<sup>12</sup>

Both antitrust and consumer protection law and policy reinforce the importance of inclusive, technically sound, consensus processes in developing environmental standards. The Green Guides added a new subsection, 16 CFR §260.2, Certification and Seals of Approval, making this point. To avoid misleading consumers, Example 2 says that marketers must meet standards that have been "developed and maintained by a voluntary consensus standard body." Footnote 2 references OMB Circular A-119 for the definition of voluntary, consensus standards: those produced through: i) openness; ii) a balance of interests; iii) due process; iv) an appeals process; and v) consensus decisions.<sup>13</sup>

Congress explicitly tied consensus standard-setting processes to the antitrust laws in the Standards Development Organization Advancement Act of 2004, which provides a limited antitrust "safe harbor" for standards development organizations that register under the Act and follow voluntary, consensus processes, which the Act defines as:

- Notice to all parties of the standards development activity;
- Providing "all parties known to be affected" by a standard with the opportunity to participate in its development or modification;
- Balancing interests so that standards development activities are not dominated by any single group of interested persons;

---

<sup>10</sup> See, e.g., *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 100-101 (1984).

<sup>11</sup> See Darren Prum, Robert Aalberts, and Stephen Del Percio. "In Third Parties We Trust? The Growing Antitrust Impact of Third-Party Green Building Certification Systems for State and Local Governments" *Journal of Environmental Law & Litigation* 27.1 (2012): 191-236. Available at: [http://works.bepress.com/darren\\_prum/10](http://works.bepress.com/darren_prum/10).

<sup>12</sup> 15 U.S.C. §§ 41-58, as amended.

<sup>13</sup> OMB Circular A-119 is also important because it provides direction for federal procurement and regulation. The Circular directs federal agencies to use voluntary, consensus standards in lieu of government-unique standards. OMB Circular A-119 implements Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (Public Law 104-113), which provides that "all Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies," unless use of such a standard is inconsistent with applicable law or otherwise impractical.

- Readily available access to essential information regarding proposed and final standards;
- The requirement that substantial agreement be reached on all material points after the consideration of all views and objections; and
- The right to express a position, to have it considered, and to appeal an adverse decision.<sup>14</sup>

Good standard-setting practices scrupulously avoid creating sole source requirements and endorsing brand-name products and services. The *ANSI Essential Requirements: Due Process Requirements for American National Standards* includes two normative requirements to avoid anticompetitive behavior in standard setting. The first is subsection 3.1, which prevents “patent hold-ups.” The second is subsection 3.2, Commercial Terms and Conditions. Both reflect the fundamental requirement that standards bodies use the least restrictive means to accomplish pro-competitive purposes.<sup>15</sup> Subsection 3.2 prohibits an ANSI-designated standard from endorsing particular products, services or companies and requires explicit safeguards if a standard must reference a sole source. It provides:

Provisions involving business relations between buyer and seller such as guarantees, warranties, and other commercial terms and conditions shall not be included in an American National Standard. The appearance that a standard endorses any particular products, services or companies must be avoided. Therefore, it is generally not acceptable to include manufacturer lists, service provider lists, or similar material in the text of a standard or in an annex (or the equivalent). Where a sole source exists for essential equipment, materials or services necessary to determine compliance with the standard, it is permissible to supply the name and address of the source in a footnote or informative annex as long as the words “or the equivalent” are added to the reference.

The USGBC’s exclusive endorsement of the commercial FSC brand violates subsection 3.2. Although LEED v4 adds “or USGBC-approved equivalent” to the FSC references, this is inadequate, especially without the safeguards of clear, objective criteria and transparent, unbiased procedures ensuring full and open competition.

The USGBC’s anti-trust policy also calls for approaches that support competition. It states on page 1:

USGBC’s long insistence upon full compliance with all legal requirements in the antitrust area has not been based solely on the desire to stay within the bounds of the law, but also on our conviction that the preservation of a free competitive economy is essential to the welfare of USGBC’s members and the country.

As discussed below, however, the USGBC did not put the safeguards in place to avoid creating an unfair competitive advantage for a single brand of products, nor did it use the inclusive, consensus processes necessary to prevent the beneficiaries from blocking change.

The USGBC’s review of the certified wood credit was sometimes like a scene out of *Indian Head, Inc. v. Allied Tube & Conduit Corp.*<sup>16</sup> the leading antitrust case on voluntary standards. In *Allied Tube* the manufacturers of steel pipe used as electrical conduits stacked the votes and engaged in other egregious

---

<sup>14</sup> Standards Development Organization Advancement Act of 2004, Pub. L. No. 108-237, §102(5).

<sup>15</sup> *Wilk v. American Medical Assn.*, 895 F.2d 352, 364 (7th Cir. 1990).

<sup>16</sup> 817 F.2d 938, 940-41 (2d Cir. 1987), *aff’d* 486 U.S. 492 (1988).

conduct to prevent the National Fire Protection Association from approving the use of competitors' plastic pipe. The walkie-talkies and hand signals famously used to orchestrate the negative vote in *Allied Tube* may have been replaced with Twitter, e-mail and internet blogs in the USGBC's process, but the effect on competition is the same. The USGBC's professed commitment to a "free competitive economy" requires that it eliminate the unfair preference for FSC in LEEDv4.

## **II. The USGBC has systematically excluded stakeholders supporting SFI and ATFS when considering the certified wood credit**

The commercial and allied interests advantaged by LEED's grant of an FSC-only credit have an obvious interest in blocking change. Given the level of controversy over the certified wood credit and the risks to the USGBC under antitrust and consumer protection laws, the USGBC's highest priority *should* have been to use technically rigorous, transparent, inclusive and objective standardization procedures to prevent its processes from being unduly influenced by FSC-advantaged interests.

Unfortunately the USGBC has done the opposite, excluding multiple viewpoints to the point of excluding not only affected interests, but everyone with the technical expertise necessary to understand and manage the complex issues involved. Its processes and decisions have taken place behind closed doors and the results have been biased and ultimately unjust.

### **A. The USGBC entirely blocked consideration of the position of affected interests in LEED v4 and LEED for Homes**

The USGBC has entirely blocked consideration of the certified wood credit in the two reviews of LEED in which it should have been addressed: LEED v4 and LEED for Homes. Rather than demonstrate thoughtful consideration of the input received, the USGBC issued the following boilerplate response to the numerous comments received from affected stakeholders on LEED v4:

Thank you for your comment. USGBC conducted a ballot process that concluded in 2010 with the intent to allow for the recognition of forest certification systems meeting or exceeding benchmarks associated with supply chain and extraction related practices. The USGBC membership – the final arbiter on substantive changes to the LEED rating system – voted down that initiative in favor of recognizing only the Forest Stewardship Council certification for new wood products. Our consensus process demonstrated that, at this time, our membership views FSC certification as the only appropriate standard to recognize within LEED for new wood products.<sup>17</sup>

The USGBC similarly foreclosed consideration of the positions expressed by affected stakeholders in LEED for Homes, again with a boilerplate response:

The issue of wood certification is being researched by the U.S. Green Building Council's Materials and Resources Technical Advisory Group (MR TAG), with technical assistance from experts at the Yale School of Forestry. Following this period of research, the MR TAG will issue a series of recommendations on addressing this issue in all the LEED Green Building Rating Systems, including LEED for Homes. Any changes that the LEED

---

<sup>17</sup> See, e.g., LEED v4 6<sup>th</sup> Public Comment Responses, Materials & Resources tab, cell 31E (June 1, 2013).

product and technical committees propose will undergo the USGBC approval process, including public comment period and member ballot, so members of the public will have a chance to participate in this process at that time.<sup>18</sup>

**B. The former MR TAG process on certified wood did not satisfy due process or consensus principles**

The USGBC’s position is that the former MR TAG process foreclosed consideration of stakeholder input on the certified wood credit in LEED v4. That process, however, after a hopeful beginning, excluded affected stakeholders and ultimately failed. The lesson was certainly not that USGBC members viewed FSC as “the only appropriate standard,” because a majority of voters supported a brand-neutral alternative. The lesson was, however, that the non-inclusive processes the USGBC used were inadequate to address the complex and controversial subject.

The original 1998 version of LEED established the FSC-only wood credit, through processes that excluded experts representing the U.S. forest products industry, who worked for the American Wood Council and AF&PA and were not allowed to join the USGBC. By 2004, in the face of growing controversy over LEED’s failure to recognize competing forestry standards, the USGBC convened a Wood Sub-TAG under the MR TAG.<sup>19</sup> Nine of the 12 Wood Sub-TAG members were closely associated with FSC, in direct violation of the USGBC’s own policies<sup>20</sup>, but nevertheless they managed to produce a matrix of brand-neutral criteria to enable LEED to move away from an FSC-only credit.

The USGBC then hired the Keystone Center, experienced environmental mediators who interviewed interested parties and helped the USGBC convene a “Wood Summit” on September 27, 2005. The meeting was not open, but representatives of each forest certification system were allowed to attend as observers. The participants agreed on the need for change and that the best path was for USGBC to develop its own brand-neutral criteria. They universally emphasized, however, that proceeding through a fair and inclusive process was essential:

Developing its own rating system is a good idea as long as stakeholders are involved in developing the system.

...

If USGBC chooses an assessment consultant, it should do so in consultation with the involved stakeholders, particularly with the forest certification systems to be assessed. USGBC should take a leadership role through a fair and transparent process or risk having its reputation undermined.

Because the major players are advocacy groups, any resolution developed is likely to be rejected by whoever may be perceived as the “loser.” Therefore, a major challenge will be ensuring that people feel the process was just, even if it did not result in their desired outcome.

...

---

<sup>18</sup> See LEED for Homes, First and Second Public Comment Period Responses (2007).

<sup>19</sup> For this and other facts about the Wood Summit, see Keystone Report, referenced in footnote 2.

<sup>20</sup> Foundations of Leed, Section IV.2.



Any body within USGBC that makes final decisions on qualifying standards for LEED must be balanced and transparent.<sup>21</sup>

In January 2006 the USGBC Board of Directors commissioned a white paper from Alex Wilson of BuildingGreen, presented to the Board in May 2006. Among other things Mr. Wilson reviewed the findings of the Wood Summit and recommended that the USGBC develop criteria for the existing wood credit that all certification standards could qualify for.<sup>22</sup> He also recommended developing criteria for a second, “tier 2” credit that would automatically grandfather all FSC products, but which could include other qualifying standards. Importantly, Mr. Wilson assumed a continuing role for the Wood Sub-TAG and recognized the need to include the other certification systems: “The expectation is that participants of the Wood Certification meeting held in September 2005 will continue to assist USGBC in its efforts to define a set of minimum criteria that any certification system would meet...”<sup>23</sup> Based on the Wilson paper the USGBC Steering Committee asked the MR TAG to recommend a path forward by June 19<sup>th</sup>.

On June 16<sup>th</sup> the USGBC received a letter from 44 FSC-related businesses, along with 19 environmental groups. Despite the pro-FSC bias in the Wilson paper, the letter condemned its recommendations and argued essentially against allowing competition to FSC. The letter used two tactics that would become consistent and troubling patterns in the wood credit debate: first, the authors made false claims and exaggerated the risks associated with products certified to SFI and other non-FSC standards, while “cherry picking” among the various FSC standards to give the misleading impression that all FSC-certified products come from the most restrictive, rather than the more lenient, FSC standards.<sup>24</sup> Second, the authors disparaged the viewpoints of affected interests, denigrating the expertise of trade association staff and urging the USGBC not to seek consensus, but instead to avoid “caving in to pressure.”

In response to the June 16<sup>th</sup> letter and other criticism, the USGBC seemed to retreat into a bunker and the process to address the wood credit slowed to a crawl. The MR TAG took up the issue, but ignored the Keystone recommendations for stakeholder engagement. The Wood Sub-TAG, the only entity with any representation from interests competing with FSC, faded away. AF&PA members nominated Roger Rutan, a Wood Sub-TAG member, to the MR TAG, but he was not accepted. Only one member of the MR TAG, Wayne Trusty, had wood products expertise, and no member had expertise on forestry or forest certification. Even Mr. Trusty was gone by the time the MR TAG finalized its proposal almost five years later. The USGBC would not even follow the recognized practice of allowing observers: after first agreeing to open the MR TAG meetings, USGBC staff backtracked, saying it would require system-wide policies.<sup>25</sup>

---

<sup>21</sup> Keystone Report, pp 13-15 (emphasis added).

<sup>22</sup> Alex Wilson, dealing with Wood and Biobased Materials in the LEED Rating System, A White Paper to the USGBC Board (May 2006).

<sup>23</sup> Id., p.7.

<sup>24</sup> Among the most common “urban legends” are the false claims that SFI doesn’t have chain of custody; that FSC products don’t come from clearcutting; and that SFI- and FSC-certified products come from significantly different practices relative to old-growth forests, conversion of natural forests, or the use of chemicals or genetically modified organisms. Because SFI- and ATFS supporters were not allowed to participate in the MR TAG process, they had no way of knowing what false or misleading information was given to MR TAG members, whether they were influenced by it, or whether or how to counter it. The problem would have been addressed in an inclusive process.

<sup>25</sup> E-mail from Brendan Owens to AF&PA, among others (February 22, 2008).

The MR TAG hired the Yale Program on Forest Policy and Governance to advise it on certification standards. Yale started with research from the “ground up,” looking at the words in the standards with the goal of identifying the “most prescriptive” language on every topic. From the outset the work suffered from the problems caused by FSC’s multiple and unharmonized standards. The research started with the FSC Pacific standard, which to this day has almost no commercial forest acreage certified outside of California,<sup>26</sup> putting the USGBC on a path of adopting criteria that few products, FSC or otherwise, could satisfy. After adding the more flexible FSC Canadian boreal standard, the research nevertheless assumed that the criteria and indicators were all binding and enforced as written, which is not the case.<sup>27</sup> Finally, the research assumed that the Pacific and Canadian boreal standards “bookended” the range of FSC standards producing products earning LEED credits. This underestimated the impact on markets of the far more lenient and therefore faster-growing FSC standards in Sweden, the UK, New Zealand, Australia, Russia, and Eastern Europe, and the products from non-consensus proprietary standards used by FSC auditors in places without adopted standards, most notably Brazilian plantations, but also the Canadian Lake States.

Despite (or perhaps having learned from) the challenges facing the Yale research, the MR TAG released a reasonably unbiased and straight-forward draft Forest Certification System Benchmark in September 2008. The first draft avoided proprietary terms and approaches unique to a single system and proposed clear and measurable criteria. If adopted with some clarification and minor adjustments, it would have set a high, but not prohibitive, bar that FSC, SFI and ATFS could have met, albeit with some system changes for SFI and ATFS.

As occurred with the Wilson paper, the draft Benchmark was met with a wave of opposition from FSC interests. A year went by before the MR TAG released a second draft Benchmark, in September 2009. It was a completely rewritten version, much longer and more complex, and adopting proprietary terms, unique processes, and governance requirements that only FSC standards could meet, and then only by insulating their multiple interpretations and exceptions from scrutiny. SFI and ATFS supporters were profoundly discouraged by the process, which already lacked transparency, engagement and expertise, now compounded by what looked like bad faith. The Benchmark went through three more rounds of public comment during which it moved incrementally towards more balanced criteria, but the damage was done. SFI supporters recommended a vote against what was still a vague and ultimately unauditible set of biased criteria. FSC called for opposition: its supporters had no reason to support the Benchmark because if it failed, all FSC products would continue to earn the LEED credit, even if they would not have met the criteria, and all competing products would be blocked. The process limped to a close in November 2010: a simple majority voted for change, but not the supermajority needed to amend the standards.

The MR TAG process was widely understood to be a failure, but the certified wood problem remained unsolved. Participants expected the USGBC to start over with a more objective approach and a broader, more inclusive process, and the USGBC announcement of the vote seemed to support that perspective:

---

<sup>26</sup> For a study of the prohibitive nature of the FSC Pacific standard (now variation) see Brooks Mendell, Ph.D., and Amanda Hamsley Lang, “Comparing Forest Certification Standards in the U.S.: Economic Analysis and Practical Considerations,” prepared for EconoSTATS at George Mason University (June 2013).

<sup>27</sup> The research excluded CSA entirely, arguing its transparent process of setting targets through local advisory groups was too complex to analyze, frustrating CSA supporters who knew in practice the FSC standards were similarly variable.

The proposed Forest Certification Benchmark that would have provided a guidance path for any wood certification program that wanted to be recognized in LEED did not pass the USGBC member ballot. As a result, LEED will retain the status quo of the existing Certified Wood credits in LEED.

There will be many who are not satisfied with this decision, but it was the decision that our membership reached using our clearly outlined consensus process. Future discussion of this issue will now be carried out in the public comment process that is underway for the next development cycle of LEED.<sup>28</sup>

As we have seen, however, this was not the case. The USGBC foreclosed consideration of the certified wood credit in LEED for Homes and LEED v4.

### **III. The Alternative Compliance Path cannot substitute for a solution without legally sound, objective criteria and a transparent, fair process**

LEED v4 made one change to the certified wood credit, which was the addition of “or USGBC-approved equivalent” to the FSC references. This is a potentially positive step, but inadequate given the USGBC’s lack of objective criteria and transparent, inclusive decision-making processes. Especially troubling is the USGBC’s response to comments on LEED v4, which seems to imply that an “equivalence” process was available all along for certified wood, which is clearly not the case.<sup>29</sup>

The USGBC’s response to comments includes:

With regard to USGBC-approved equivalent: A USGBC-approved equivalent is an Alternative Compliance Path to a credit (a mechanism that has existed for years as part of the LEED maintenance process). Alternative compliance paths are considered by a variety of LEED technical committees then reviewed by the LEED Steering Committee, who ultimately has the discretion to approve them. . . . USGBC-approved equivalent is used in several places within the rating system to demonstrate that the use of alternative standards (whether in the global project context or otherwise) may be used to meet the intention of the credit and are shown to bring about value similar to or better than the references in question. The USGBC Approved Equivalent (Alternative Compliance Path) allows LEED to be more nimble and flexible to accommodate a rapidly evolving market. Please read more about alternative compliance paths within the LEED Foundations

---

<sup>28</sup> E-mail from Brendan Owens to Kenneth Bland of AF&PA sharing media announcement (December 6, 2010) (emphasis added).

<sup>29</sup> Up until this comment USGBC officials consistently represented to SFI and ATFS supporters, including Members of Congress, that the MR TAG wood credit review was the only process available for consideration of non-FSC wood. The USGBC received a number of requests for interpretations over the years, for example to allow credit for PEFC wood in Portugal, for CSA-certified wood in Canada, for SFI-certified wood in general and for engineered wood in a documented case of no FSC-certified alternative. In every case the USGBC has rejected the option and stated that the credit is available only to FSC-certified wood, in at least one case, for example, directing a homeowner to rip out newly installed cabinets made from PEFC-certified, plantation-grown eucalyptus to qualify for LEED for Homes.

Documents, available at <http://www.usgbc.org/sites/default/files/Foundations-of-LEED.pdf> [Appendix 3: Changes]

Appendix 3 of Foundations of LEED has no criteria for an alternative compliance path for certified wood. This leaves the alternative as vague and ambiguous, offering no clear path to fair treatment for wood and fiber from U.S. forests certified to the SFI and ATFS standards.

#### IV. Closing

The laws and due process principles governing voluntary standards contain two fundamental requirements applicable to LEED v4: 1) that claims of environmental certification be tied to objective, enforceable standards developed by legitimate consensus bodies; and 2) that certification standards not be based on anti-competitive interests, including preference for a particular brand or product. The USGBC and LEED's procedures and policies pay lip service, at least, to these requirements. Unfortunately, these procedures and policies have proved inadequate for establishing a true consensus standard, especially for the complex topic of certified wood. Furthermore, the USGBC's own procedures and policies have not been adequately followed. These inadequacies have deprived the Appellants of due process, and have led to a vague and ambiguous wood credit that materially affects their interests.

Appellants ask the Executive Committee to strike the FSC certified wood credit in each place it occurs in the applicable LEED v4 standards, and convene a truly inclusive, consensus process to develop an objective, brand-neutral replacement that is legally and technically sound. We recommend the USGBC ask a third-party, ANSI-designated standards developer to convene the process, following the *ANSI Essential Requirements: Due Process Requirements for American National Standards*. We believe such a process can produce a credit that fairly recognizes exemplary practices and provides the economic incentives for U.S. landowners to continue to practice forestry for generations to come.

Very truly yours,



Chris Isaacson  
Executive Vice-President  
Alabama Forestry Association  
555 Alabama Street  
Montgomery, AL 36104



Steve McWilliams  
President  
Georgia Forestry Association  
PO Box 1217  
Forsyth, GA 31029



William V. Street, Jr.  
Chief of Staff  
International Association of Machinists and  
Aerospace Workers

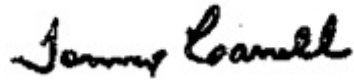


Bob Schaefer  
Executive Vice President  
North Carolina Forestry Association  
1600 Glenwood Avenue

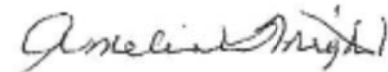
9000 Machinists Place  
Upper Marlboro, MD 20772



Kristina McNitt  
President  
Oregon Forest Industries Council  
PO Box 12826  
Salem, OR 97309



Tommy Carroll  
Executive Director  
Southeastern Wood Producers Association  
PO Box 326  
Forsyth, GA 31029



Amelia Wright  
Private Forest Owner  
PO Box 144  
Church Creek, MD 21622

Raleigh, NC 27608



Jim James  
Executive Director  
Oregon Small Woodlands Association  
187 High Street NE, Suite 208  
Salem, OR 97301



Cassie Phillips  
Vice President, Sustainable Forests & Products  
Weyerhaeuser Company  
PO Box 9777, CH 2D23  
Federal Way, WA 98063-9777