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OWIC Newsletter Changes Format

Up until recently, the OWIC newsletter was distributed on a monthly basis. We had requests from several readers to provide a little more depth to the newsletter articles. As a response to these requests, we have decided to shift from a monthly format to a quarterly format, allowing us to provide more depth to the newsletter.

We are always looking for your ideas for timely topics. The article below on the Lacey Act is a direct result of requests by several readers. If you have ideas for newsletter articles please send them to us at owic@oregonstate.edu.

The New Lacey Act:

What You Can "Do" To Show "Due Care"

By Greg McCue !

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Most companies involved in bringing wood products into the United States are aware of last year's significant changes to U.S. law under the Lacey Act, especially the new requirement that importers declare the species of wood used, the country of harvest for the tree, and other data. In addition, the Lacey Act now authorizes substantial civil and criminal penalties – potentially millions of dollars if multiple shipments are affected – if wood is taken, possessed, transported, or sold in violation of any U.S. or foreign law regulating trees. However, companies can protect against these penalties if they can demonstrate the use of "due care." What does "due care" mean? What steps will prove "due care?" The Lacey Act provides no checklist or safe harbor set of actions that would guarantee that the due care standard has been met. Whether "due care" was exercised will be judged by U.S. (Continued on page 4)

The Green Structural Materials Gap Analysis Project: Preliminary Research Findings

Researchers at Oregon State University, University of Oregon and Portland State University recently completed data collection in the green structural materials gap analysis project. The project was funded by the Oregon Built Environment and Sustainable Technologies (BEST) signature research center and the Oregon Forest Resources Institute (OFRI). The purpose of this research was to discover what limits the ability of building design and construction professionals to use environmentally responsible materials in the structural systems of buildings. This research identified gaps in information as well as gaps in access to or availability of green materials for structural use that will:

- 1) help Oregon-based material producers better understand the needs of designers who are responsible for green material selection.
- 2) inform curriculum development for graduate level courses and professional continuing education.
- 3) identify future research opportunities related to the development and evaluation of green structural materials.

Data was collected in two phases: Phase I consisted of eight exploratory interviews with individuals; Phase II consisted of four group interviews (two in Portland and two in Eugene) where expert opinions about information gaps in the evaluation of green materials. Over thirty professionals in architecture, engineering, construction and development participated in the interviews.

Overview of research findings

The discussion below is a summary of the results from the four group interviews and only includes the themes that were discussed in more than one interview.

Material selection

Interview participants were asked a series of questions about what drives the selection of the structural system for a building. In all four group interviews, code and cost were indicated as the primary criteria used for the selection of a building's structural system. This point is emphasized by one Portland structural engineer, "The system for a building is usually determined by the function of the building, code and budget." Building height, size, and form were mentioned as criteria in three of the interviews and the size of the structural bay was mentioned in two interviews. Once the structural system has been selected, the design team attempts to improve the green aspects of the chosen material and system by maximizing the material efficiency within the structural system, using less materials, considering the materials' carbon footprint, using FSC wood, using steel with a high recycled content, and using a high percentage of fly ash in concrete. One other important point is that design professionals often use the structural system to serve multiple functions. Some examples include consideration of a material's ability to contribute thermal mass, ability to expose the structure to reduce interior finishes and reduce the amount of material used, acoustic properties of a material, systems integration, system synergies, and durability/longevity of a material. As was pointed out by a Portland architect, "... we are trying to get multiple kinds of performance out of every material choice that we make."

Green Structural Materials Gap Analysis cont.

Role of LEED

Meeting a LEED standard had very little impact on the selection of the structural system. As one Portland structural engineer said, "I think one of the problems with LEED is that as far as structural system selection goes you know it's pretty much just a side note." LEED does drive design teams to emphasize recycled content and use of FSC certified wood. Other green building programs, such as the Living Building Challenge (<http://ilbi.org/the-standard/lbc-v1.3.pdf>) were thought to have a larger impact on the selection of structural materials. As part of the Living Building Challenge, several materials and chemicals have been excluded from use through a materials red list. Of particular importance to the wood products industry is the inclusion of added formaldehyde, limiting the ability to use many structural engineered wood products in projects seeking certification under this program. This point is illustrated by a Eugene contractor, "And when you get into composite lumber then it brings up the whole VOC issue and there is a disconnect between the FSC - you know what people are calling green. It might be FSC, but it might still off gas".

There is a common perception in the wood products industry that design professionals view the LEED green building program as the be all, end all green building program. An interesting result of this research was the finding that this is not the case. In fact, in all four interviews there were discussions about problems with the LEED system. This point was illustrated by one Portland architect, "I realize they are trying to write a standard that applies to lots of conditions but I think there is still room for improvement."

Information about green products

The market is being flooded with new "green" products. Consequently, design professionals are always looking for reliable and unbiased sources of information. One Portland architect summed up the challenge of evaluating information about green products, "It's really hard to compare products and figure out... I mean there is a lot of greenwashing that goes on." Environmental Building News was identified as the most reliable and unbiased source of information regarding green products. Other sources frequently used are the internet/Google, consultants, and canvassing or collaborating with other design professionals. Design professionals determine the credibility or reliability of information about green materials through several channels including asking local vendors, superintendents, sub-contractors, and other professionals about their experience, and through third party certification. Product representatives or literature are generally seen as biased and are not trusted sources of information.

Themes relevant to wood products

First, with regard to forest certification Oregon design professionals generally prefer the FSC system over the SFI system. This preference is largely based on perceptions that the SFI system was created by the forest industry and therefore is a biased system. This point is illustrated by a Portland contractor when discussing the Green Globes program, which provides credit for SFI certified wood. "Green Globes is a good example. I mean to me it's much more of an industry based standard. There are complaints against LEED saying we were using it as a standard, thereby prohibiting use of most Oregon trees and yet their Green Globe standard said that most lumber in Oregon met that standard where as with FSC certified almost nobody meets it. So there is this kind of raging debate in USGBC about whether the

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LEED standard of FSC is even a reasonable kind of measure or not and did they go too far. Clearly there was some attitude that the Green Globes standard didn't go near far enough." The LEED system only provides credit to certified wood if it is FSC certified. It was the opinion of all interview participants that the demand for FSC certified products will continue to grow.

Second, as mentioned above, design professionals are very concerned about indoor air quality and specifically discussed structural wood products with formaldehyde in the adhesives in three of the four group interviews. Interview participants believed that the demand for no added formaldehyde products will only continue to grow in the future.

Third, many design professionals believe that life cycle analysis (LCA) is a good tool for evaluation of the environmental impacts of a product. The Consortium for Research on Renewable Industrial Materials (CORRIM, <http://www.corrim.org/>) has a wealth of information comparing wood, steel, and concrete using internationally recognized LCA techniques. Material available on the CORRIM website can be useful in helping to communicate the environmental advantages of wood over concrete and steel.

Fourth, many Oregon design professionals view wood as the building material of choice. They often point to the lower levels of embodied energy, low carbon footprint, low cost, and local availability as wood's strongest selling points. As one Portland architect said, "I always assumed that homogenous lumber was by far more sustainable than concrete or steel".

Summary

This research shows that when code allows wood is generally the building material of choice in Oregon. Additionally, many design professionals are interested in using more wood, particularly locally sourced wood products. Many opportunities exist for wood to expand market share in both structural and non structural applications.

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enforcement officials on a case-by-case basis. In fact, companies that specialize in wood products will be expected to take extra care because they will be considered knowledgeable experts.

By implementing a compliance plan, including some of the strategies below, tailored to a specific wood product and sourcing pattern, companies can use "due care" as a shield to protect against these potentially devastating penalties. This is especially important now, when the changes to the Lacey Act are relatively new, and U.S. enforcement agencies may intend to make a few examples in order to demonstrate to Congress and the public that the new law is being enforced in full.

Prohibited Acts and Penalties

Under the 2008 amendments to the Lacey Act, it is unlawful to "import, export, transport, sell, receive, acquire, or purchase" in interstate or foreign commerce any plants that have been taken, possessed, transported, or sold in violation of any U.S. or non-U.S. laws. There are broad exceptions to what qualifies as a covered "plant", however, the Lacey Act specifically states that it applies to trees. These amendments were passed by the U.S. Congress as a way to support efforts to combat illegal logging.

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A penalty (civil) of up to \$10,000 per shipment may be imposed on any person who, in the exercise of “due care,” should have known the illegal nature of the imported wood. Criminal penalties (misdemeanor) of up to \$100,000 per shipment for individuals or \$200,000 per shipment for organizations, or imprisonment for up to a year, or both, also may be imposed on any person who, in the exercise of due care, should have known the illegal nature of the imported wood. Under these standards, if a company can demonstrate that it exercised “due care,” and still had no reason to know the illegal nature of the wood, then these penalties should not apply.

Heavier criminal penalties (felony) can be imposed if those involved knew or were generally aware of the illegal nature of the plant in question. Moreover, even if the government finds that the importer exercised “due care,” any imported product may be seized if it is contrary to the provisions of the Lacey Act (except for certain provisions related to inaccurate marking).

What is “Due Care?”

The Lacey Act does not list any required steps for a company to demonstrate that it has used due care. There is no checklist or explicit “safe harbor” provision in the Lacey Act that would guarantee safety from penalties. “Due care” is a standard used in other areas of U.S. law to require persons or companies to take precautions that are reasonable to their particular situation. The discussions in Congress leading up to passage of the Lacey Act amendments made this clear, saying that “due care” would mean “that degree of care which a reasonably prudent person would exercise under the same or similar circumstances.” In other words, the level of care that is “due” will depend on the particular circumstances, including the specific product, the source and the sophistication of the company involved.

The discussions in Congress also made clear that taking all the facts into consideration means that the level of care required will be “applied differently to different categories of persons with varying degrees of knowledge and responsibility.” In other words, a first time importer, new to the forest products industry, likely would be held to a relatively low standard of care. However, a long-standing importer, expert in the forest product industry, would be expected to know, ask and do more in the exercise of due care.

How to Show Due Care

Because “due care” is a flexible standard that depends on all the circumstances, there is no single step or even combination of steps that will completely guarantee safety from penalties. However, companies can and should assemble a file of materials, based on their specific situation, in order to show that the company complied with U.S. law and to provide ready evidence in the event a due care argument needs to be made against a proposed penalty. Assembling such documents after a penalty is proposed is almost always much more difficult and much less effective. Below are several suggestions on how to build such a file.

Research the specific situation. Companies should research U.S. government and environmental group websites, industry publications, newspapers and similar sources to create a file on whether the species, region or product relevant to them is mentioned in connection with illegal logging. Wood harvested in a country (or region) that has been the subject of illegal logging reports likely has a somewhat higher risk of being noncompliant and a higher risk of Lacey Act enforcement. Companies involved with these products should consider extra steps to demonstrate due care.

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Collect certifications

Many companies may choose to collect certifications from the supplier asserting that the wood products were harvested and transported in accordance with relevant local laws. The Lacey Act does not discuss such certifications and, thus, there is no guarantee under the Lacey Act that such a certification will be considered due care. Clearly, a certification from the supplier can be a useful part of an overall compliance approach. However, most companies should consider supplementing with at least some additional research on the supplier, facility, region or product in order to confirm that the information certified seems plausible. Since the Lacey Act does not call for any such certification, the U.S. government is unlikely to issue a certification form. Companies should consult an expert on the Lacey Act when drafting a form or accepting a certification from a supplier.

Consider participating in sustainable forestry programs

Many companies participate in or purchase wood that was harvested as part of a sustainable forestry program. These programs often include legal harvesting as one of the requirements. Companies can leverage these existing programs by collecting information from the program administrators on how legality of harvest is verified and documented.

Traceability or chain-of-custody programs can be of assistance

These programs usually generate records confirming the legality of harvesting, including harvesting permits, load slips and supply contracts. The same records would be strong evidence of due care to confirm the legality of harvested wood. Companies in such programs should be sure that these records are reviewed, organized and regularly updated to be ready with a swift and strong response to any proposed penalty under the Lacey Act.

Consider a site visit

Personal visits by an official of the company, with notes and digital photos maintained in the compliance file can be powerful evidence of due care, especially when combined with some of the other actions described above. These visits should be used to collect documents and notes confirming the other evidence in the file. Frequent site visits may not be possible, so companies should make the most of these visits and collect hard evidence that could be used in a hypothetical enforcement action by a U.S. government agency. Visits for just a handshake and tea may be good for the business relationship but will not advance a claim that "due care" was exercised.

Periodically test your products

Companies periodically should pull physical samples of merchandise and subject them to testing to determine the wood species and any other physical characteristics that would confirm that the reported origin of the shipment is accurate – or alert the company if it may not be accurate. All testing results should be maintained in a compliance file and updated periodically or whenever products and sourcing change.

Assemble sample document packages

Companies periodically should conduct a self-test. Imagine the U.S. Government has sent notice of a Lacey Act penalty under consideration for certain specific shipments. The company should assemble the documents that would be used to show the care that had been exercised as to those particular shipments, or how those shipments were covered by an overall program of due care. To be most effective, the company should physically pull the documents, assemble them in a file and have them

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reviewed by a senior company official or outside expert to provide an objective opinion on whether the argument seems strong and persuasive.

Request a legal opinion

The Lacey Act requires that wood be in compliance with the laws of the United States and other countries for taking, possessing, transporting or selling the wood. The Lacey Act does not detail or list the laws in the United States or other countries that could apply. Companies, groups of companies or trade associations could commission a report by an expert in the relevant laws of the United States and certain countries of interest to describe what those laws are. Individual companies could use such reports to make their compliance files highly specific and create a strong showing that there was no reason to think that their particular products ran afoul of the specific laws of the relevant countries.

Review and add detail to your commercial documents

The first exposure U.S. government officials have to a product line or shipment likely will be the commercial documents such as the invoice, packing list and the bill of lading. Companies should review these documents to see whether they can be improved or clarified to tell a complete story. If products are certified or produced pursuant to a sustainable forestry or other program, the documents should say so clearly and prominently. Also, it would be best if the documents clearly explain the nature of the products, the wood content, the species of wood and the country of harvest. Researching and confirming this data so it can be placed directly on the documents may turn up inconsistencies that need to be addressed in order to ensure compliance with the Lacey Act. Failure to address any such apparent inconsistencies could be considered a failure of due care, based on the circumstances. At a minimum, documents that appear complete, comprehensive and internally consistent are less likely to be chosen by U.S. enforcement officials for examination and questions.

Negotiate insurance or letter of credit agreements

If a supplier confidently asserts that its products comply with the Lacey Act standards, purchasers should consider asking the supplier to provide an insurance policy or letter of credit to the benefit of the purchaser if Lacey Act penalties are applied. Purchasers may not often have the negotiating power to accomplish this, but it would constitute real financial security if achieved.

This list does not contain every step that could be taken, nor is it necessary (likely impossible!) to take every one of these steps. Company personnel should assess each specific product and shipment pattern and make a judgment about the right combination of compliance steps for that situation. A Lacey Act compliance file should be updated at least once per year and revised as necessary to capture new suppliers, products and shipment scenarios. Finally, the companies should consider working with an expert in this area who will review the compliance file and give an objective analysis of the file's strength and weaknesses under the legal standard in the Lacey Act and other "due care" cases.

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²For STEPTOE & JOHNSON'S description of these requirements, please see <http://www.step toe.com/publications-5608.html> and <http://www.step toe.com/publications-5955.html>.

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