

# US EXPORTS, LEGALITY AND FOREIGN PROCUREMENT POLICIES

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Government procurement policies in Japan and Europe are attempting to ensure that imported wood products are derived from legal and sustainable sourcing of timber. The United States is a "low-risk" supplier to international markets in terms of illegal logging and a high performance producer in terms of sustainability. Tenure of forest land is well-established and enforced. An array of legal, voluntary and cultural institutions ensures long-term forest sustainability. The rule of law is deeply-rooted in the American culture and enforcement of laws and regulations is very effective. Forest resources are vast -- they cover one-third of the country -- and forest resources are well-monitored. The area of forest land has remained stable and has, in fact, increased slightly over the past two decades. Timber inventory has consistently increased over the past fifty years despite rising demand and production. Net growth exceeds harvesting for both softwoods and hardwoods. The use of certification systems is also increasing.

**Keywords:** legality of forest resources, wood products, certification

## INTRODUCTION

Timber production in the United States is highly regulated by federal, state and local governments although the United States does not have a single or sole national forestry law. Instead, an array of legal, voluntary and cultural institutions ensures long-term forest sustainability. Tenure of forest land is well-established and enforced. Over 70% of the forest resource is privately owned. The vast majority of private forest land is owned by over 10 million family forest landowners that own small forest tracts, typically less than 25 hectares. Data on US forest resources consistently show stable forest area, and growth in excess of harvests, but U.S. producers are increasingly becoming certified to meet the requirements of international procurement policies.

### Forest Conditions

The area of forest in the US has remained stable over the past fifty years and has even increased slightly over the past two decades. About one-third of the country is forested. Net growth exceeds removals by a substantial margin for both softwoods and hardwoods and, thus, U.S. timber inventory continues to expand despite increasing timber production.

Populations of many species of wildlife have increased even as some species are at risk. Populations of deer, wild turkey, elk and the American Bald Eagle are just a few examples of wildlife that have regained their prominence after a period of decline. Protection for endangered species is codified in the Endangered Species Act supplemented by additional laws at the state level. Species and their habitats that are identified as threatened or endangered are legally protected and usually the subject of concerted recovery efforts.

The management of US forest resources is supported by a sophisticated forest inventory and analysis system administered by the US Forest Service.

For the past five decades, every forested state has undergone periodic forest inventories to measure and monitor forest conditions. More recently, the periodic system is being transformed into an annual inventory that will enable early warnings and faster responses to changes in forest conditions.

## US LEGAL & REGULATORY ENVIRONMENT

### National Laws

Six major federal laws regulate human activities on forest land: Endangered Species Act (ESA); Clean Water Act (CWA), Clean Air Act (CAA) and Federal Insecticide, Fungicide and Rodenticide Act (FIFRA); National Environmental Policy Act (NEPA); Occupational Safety & Health Act (OSHA). As noted earlier, none of these laws is specific only to forestry, but all provide strict legal oversight of various aspects of forest practices. For example, the ESA reaches deeply into US forests. Forest landowners and managers cannot cause injury or death to a species listed under the ESA by direct harm or through habitat modification. The ESA has effectively removed large swaths of public lands from commercial exploitation and has additionally restricted forest management activity over millions of hectares of private land. Species such as the northern spotted owl, red-cockaded wood pecker, Kirtland's Warbler and gopher tortoise are just a few of the forest-dependent species protected under the ESA. Penalties for violations of the ESA are severe.

Under the federal Clean Water Act, states must have programs to control non-point source pollution, usually accomplished through Best Management Practices (BMPs), and federal regulations control activities in forested wetlands. Every forested state has a program of either mandatory or voluntary BMPs for forest lands.

Similarly, under the Clean Air Act, states must have programs to protect air quality and visibility. These

typically include controls on prescribed burning and the use of ozone-depleting chemicals.

Chemical use in forest stands, whether for insect control or for vegetation management, is regulated under FIFRA. All forest-use chemicals must be registered and forest land operators must follow application guidelines.

NEPA mandates that federal agencies assess and minimize the environmental impacts of their activities on government-owned forest land. NEPA has resulted in detailed assessments of impacts from federal activities on forests and associated wildlife, and has frequently necessitated changes in management or has resulted in eliminating activities altogether.

Finally, in terms of the major federal laws that affect forestry, the Occupational Safety and Health Act (OSHA) prescribes that very specific safety measures be taken and safety equipment used while engaged in commercial activity in forest areas. Detailed records of accidents, injuries, and corrective measures must be maintained. Penalties for violations are severe.

### **State & Local Laws**

Each of the fifty US states has various laws that affect forests. In total, over 1,000 full time employees with a payroll of over \$57 million are engaged in state level regulatory activities. Some 276 different state agencies have some kind of regulatory authority over forest practices. A recent study characterized over half of these as extensively or moderately engaged in forest practice regulatory activity [1]. At least 15 states have extensive regulatory programs specific to forestry. Most require some form of harvesting plan, notification or permit and most require a reforestation plan. Of the fifteen states with extensive forestry regulation, those with the most rigorous forest practice laws tend to be located in the western region – in states such as California, Oregon and Washington – where, as a practical matter, most of the exports to Japan originate.

Enhancement of water quality is the primary objective in regulating forest practices in most states. In 37 states, regulatory agencies provide oversight of non-point forest sources of water pollutants.

### **Timber Theft & Logging**

Timber theft occurs in the United States. However, while there are no data on the extent of the problem, it is not believed to be of major significance in terms of total production, neither nationally, nor locally.

Virtually every jurisdiction in America has strict laws against trespass and theft. Any theft of timber or logs, or the cutting of timber in parks, reserves, or other similar areas where it is precluded by law, is vigorously prosecuted. Law enforcement is stringent and provides an effective deterrent against timber theft. Landowners are protective of their private property and local law enforcement responds to complaints. Consequently, illegal harvesting is not a significant national problem in the U.S.

Moreover, most transactions are subject to the Uniform Commercial Code which governs the sale of goods, their transportation and delivery, financing, storage, payments, and various other aspects of commercial transactions. All commercial transactions, including timber sales, carry with them an explicit or implied warranty of title. Any breach of this warranty incurs serious civil or criminal penalties.

Landowners are always advised to clearly mark boundaries, obtain bids for timber sales, always have written contracts and have a professional forester oversee harvesting. Written contracts are always enforceable in courts of law.

## **VOLUNTARY STEWARDSHIP & SUSTAINABILITY PROGRAMS**

### **Sustainability Defined**

The definition of sustainable forestry as used by forest industry is an adaptation of the more general approach to sustainability adopted in 1987 by the World Commission on Sustainable Development. That is: "to meet the needs of the present without compromising the ability of future generations to meet their own needs by practicing a land stewardship ethic that integrates reforestation and the managing, growing, nurturing, and harvesting of trees for useful products with the conservation of soil, air and water quality, biological diversity, wildlife and aquatic habitat, recreation and aesthetics." [2]

### **Sustainability Programs & Certification**

To foster forest sustainability, voluntary forest certification programs have increased dramatically over the past decade in the United States. More than 35 million hectares have been voluntarily certified to leading sustainable forest management certification systems. These include the Sustainable Forestry Initiative (SFI), Forest Stewardship Council (FSC) and the American Tree Farm System (ATFS). SFI has over 22 million certified hectares; FSC has over 9 million certified hectares; Tree Farm has over 8 million certified hectares.

Tree Farm and SFI are members of the Programme for the Endorsement of Forest Certification (PEFC). SFI is an endorsed PEFC scheme while the PEFC Tree Farm endorsement is pending. The American Tree Farm System was formed in 1941 primarily for small forest growers in the U.S. FSC was formed in 1993 primarily by WWF and other environmental organizations to curtail tropical deforestation in the developing countries. The SFI was originally formed by the American Forest & Paper Association (AF&PA) as a code of conduct for the industry. It has since evolved into a completely independent system and as of January 1, 2007 has severed all organizational links with AF&PA.

### **Forest Certification & Legality**

All certification systems in the U.S. have recognized standards for sustainable forestry management and chain-of-custody. In addition, all certification systems in use in the U.S. require compliance with U.S. law as a

condition of certification and the certification bodies have procedures in place which determine compliance with the standards. Beyond legal compliance, each of the three systems used in the U.S. have extensive performance measures and indicators on sustainability that also must be met. Thus, certified U.S. producers meet all international procurement requirements for legality and sustainability.

Third-party auditing provides credible assurance that sustainability indicators are being addressed. In all cases, the accreditation and certification bodies have detailed remediation procedures to correct non-conformances or identify opportunities for improvements. All systems are continuously scrutinized, reviewed and criticized by ENGO's, governments, customers and other stakeholders. This, along with competition among the systems, drives the continuous improvement process for all systems.

### Chain of Custody

SFI and FSC have provisions for Chain of Custody (CoC) tracking and certification. Given the complex supply situation in the US involving millions of landowners, CoC is a more challenging task than it might be in other countries. Nevertheless, 42 mills/facilities are using SFI CoC certification and FSC lists 622 CoC certificates issued in the United States

## MEASURES OF GOVERNANCE

The World Bank has compiled a series of indicators that are a useful tool to assess the effectiveness of governance in over 200 countries. The World Bank Worldwide Governance Indicators measure six components of good governance: (1) voice and accountability; (2) political stability and absence of violence; (3) government effectiveness; (4) regulatory quality; (5) the rule of law; and (6) control of corruption.

In terms of Rule of Law, the most relevant of the World Bank indicators with respect to the risk of illegal timber production, the US ranks in the 92nd percentile amongst 208 countries, indicating a very high confidence in enforcement of laws and regulations. This compares favorably against Japan in the 89th percentile, Malaysia in the 66th percentile, Brazil in the 43rd percentile, China in the 41st percentile, Russia in the 22nd percentile, and Indonesia in the 20th percentile.

## MARKET CONSIDERATIONS

### Green Purchasing

U.S. producers are increasingly becoming certified to meet the requirements of international procurement policies or those of major domestic customers. Major retailers have instituted policies giving preferences to certified material and/or not trading in timber products from "endangered forests."

U.S. consumers who are aware of these issues encourage all producers and markets to procure only legally harvested timber. This is a general trend in North America and Europe but awareness will vary. While

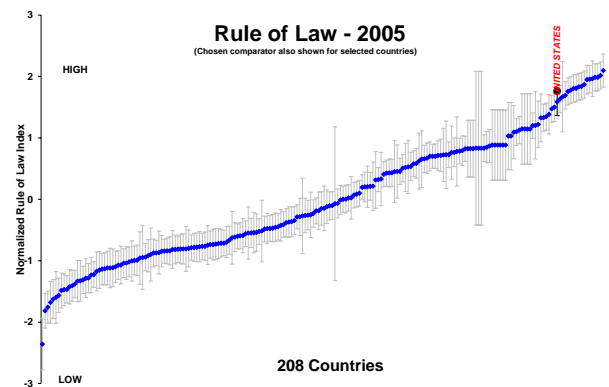


Fig. 1. World Bank Rule of Law Indicator, 2005 [3]

increasing, there is currently little domestic demand pressure directly from consumers for assurances about legality and sustainability. Generally, the US market does not demonstrate a premium being paid for certified forest products although some producers are beginning to see some market differentiation.

### Government Procurement Policies in the US

Federal, state and local governments in the US have various procurement policies related to environmentally preferable products. The most common have to do with recycled content in paper. The federal government and other government jurisdictions have guidelines that encourage the purchase of paper with various acceptable thresholds of recovered paper content depending on the paper grade.

To date, US government procurement policies are not dictating that wood products be purchased from verifiably legal and sustainable sources. In general, the U.S. government is "certification neutral," leaving decisions about certification systems to the marketplace. Instead, government procurement is moving towards recognizing "green building" standards that typically include preferences for certified wood products. Not all of the available and referenced green building standards provide equal treatment of the three certification schemes. The most prevalent of the green building systems – Leadership in Energy and Environmental Design (LEED®) – discriminates against wood products by providing more favorable treatment to other building materials. It also recognizes only FSC certification for wood products. In contrast, the Green Globes™ System and the NAHB's Residential Green Homebuilding Guidelines recognize all three certification schemes.

The U.S. government also has laws that prohibit government procurement of stolen property. National Stolen Property Act (NSPA) makes it a federal crime to transport stolen goods across state lines or in interstate commerce.

In a few localities, local governments have imposed restrictions or outright bans on the use of certain timber products (particularly, tropical timber products) in public procurement, but they are few in number and highly controversial.

## **EFFORTS TO COMBAT ILLEGAL LOGGING**

In 2003, the U.S. Administration launched the President's Initiative Against Illegal Logging (PIAIL) whose goal is to assist developing countries to combat illegal logging, the sale, (including for export) of illegally harvested timber products, and fight corruption in the forest sector. More recently, in November 2006, the U.S. signed a Memorandum of Understanding with Indonesia, a legally binding document that commits the two countries to work together to address the problem.

In 2004, AF&PA sponsored what is widely considered to be the one of the most credible and informative reports on illegal logging. The study measured the economic impact on timber production and trade that results from illegally harvested wood products. The report concluded that many of the estimates on the extent of illegal logging are likely exaggerated, but the problem is nevertheless significant and depresses world prices by between 7 and 16%. [4]

AF&PA is also in partnership with Conservation International in the Alliance to Combat Illegal Logging. The Alliance is working with local law enforcement in selected countries in using remote sensing technologies to identify illegal logging in protected areas. The American Hardwood Export Council (AHEC) will soon be commissioning a study to assess the risk of illegal wood entering the supply chain for American hardwood products. The study will be independently peer reviewed and any significant issues with illegal wood supply will be addressed

## **FINAL NOTES**

### **Future Steps**

While US forest resources are sustainably managed, there remain many challenges. One of the goals should be to expand the area under forest certification which now represents just 17% of US timberland. Another goal should be to increase the number of chain-of-custody certificates in the U.S. while accommodating our own unique tenure system whereby the majority of timber is supplied by 10 million +/- small private family forest owners.

Having an assortment of competing systems – SFI, FSC, PEFC, ATFS -- tailored to specific situations should be encouraged because the competition will by itself foster improvements in the certification schemes. Healthy competition among forest certification systems helps ensure market-responsive changes and adaptation to different wood supply situations. All systems also need to be continuously improved. The SFI will be undergoing its 5 year review in 2008. The American Tree Farm is currently seeking to be endorsed by the PEFC.

Certification is a useful tool but will not in and of itself be the cure for illegal logging or the deeper, underlying causes of illegal logging (corruption, absence of rule of law and good governance, lack of effective enforcement, poverty, etc). We need to be shifting resources towards the underlying core causes of illegal logging.

## **Potential Policy Pitfalls**

Policy-makers should be aware that policies that affect the trade and use of wood products can have inadvertent and sometimes counter-productive consequences. One the major concerns is that demand side measures can increase costs for legitimate, legal producers while not increasing the risks associated with illegal production. Thus, the gap between illegitimate and legitimate production costs widens. That, in turn, provides an even greater incentive to illegal operators.

Second, in the US, Chain of Custody tracking and control is much more challenging because of the large number of landowners and complex supply situation. That the US has a very high rule of law quotient, strict environmental laws and demonstrably effective law enforcement should be sufficient to establish all US wood products as low risk for illegal sourcing. Indeed, the problem of illegal logging is not known or alleged to be nationally significant in the US.

Third, even from countries where the risk of illegal activity is high, markets and shipments are easily fungible. Thus, verified legal product may be shipped to markets with procurement restrictions while all other product is shifted elsewhere.

Finally, demand side measures if mandatory or discriminatory may violate WTO rules. While governments are making efforts to institute policies they believe are in conformance with WTO rules, measures that result in trade distortions may well be challenged by an affected country.

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