



Empire State Forest Products Association

The people behind New York's healthy forests and quality wood products

www.esfpa.org

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Memorandum of Opposition

A 5682/S 4859

Honorable Kenneth Zebrowski
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Honorable Elizabeth Krueger
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Dear Assemblymember Zebrowski and Senator Krueger:

The Empire State Forest Products Association has concerns with **A. 5682/S. 4859** as drafted which enacts the New York Tropical Deforestation-free Procurement Act requiring that companies contracting with the State do not contribute to tropical primary forest degradation or deforestation directly or through their supply chains. The bill also establishes the Supply Chain Transparency Assistance Program to assist small and medium-sized businesses and minority and women-owned businesses in achieving compliant supply chains.

The Empire State Forest Products Association (ESFPA) represents over 350 member businesses, industries and landowners engaged in forest resource production and stewardship of New York's 19 million acres of forest. In total, \$22.9 billion dollars in annual industry production and nearly 100,000 jobs are attributable to operations of various industries within the forest related sectors.

These bills as drafted for 2023 present significant improvements from their 2021 predecessors, the first being the removal of Boreal forests from the legislation. In addition, the removal of "recovered fiber" from the bills eliminates the need for contractors to ensure that the origin of mixed pulp or paper products did not include any tropical forest-risk commodities, something not possible to be done.

Despite these improvements in the bills, there still remain various concerns in this legislation in some of the terms/definitions included or not included potential reach to

non-tropical forest products, trickle-down effects in the supply chain, and questions on the trade-restrictive approach to forest management.

Terms and Definitions

The term “deforestation” is internationally defined by the Food and Agriculture Organization (FAO) of the United Nations. Countries use this definition to measure deforestation and report to the FAO. This FAO definition should be used in this legislation. and recognized does not currently have an internationally recognized and operational definition. Defining “deforestation” is not a simple task and should involve significant scientific and stakeholder outreach. The bill’s inclusion of a definition for “tropical deforestation” (“direct human-induced conversion of tropical forest to agriculture, a tree plantation, or other non-forest land use”) raises some concern and could be precedent setting in New York Law. For, example, the term “tree plantation” remains undefined in the bill and could cover a broad scope of sustainable forest management planting practices. What are the criteria applicable to forest conversion that is the result of a mix of human and natural causes, like some forest pests and diseases? Nor is any importance given to certain forest conversion which may be needed to address the challenges that global warming and climate adaptation now present.

The current definition of “tropical primary forest degradation” (“severe and sustained degradation of a tropical forest resulting in significant primary forest loss and/or a profound change in species composition, structure, or ecological function of that forest”) is even more problematic. Here, no “direct human-induced” limitation applies, so degradation resulting from purely natural causes would be captured. There is no internationally accepted or operational definition of “degradation”. Without an accepted definition or consistent reporting methodology, it is unclear how degradation can be consistently verified in a measurable way by New York or its contractors.

Further, contractors and subcontractors will be expected to certify that the commodity provided to state agencies was not extracted from “land where tropical deforestation or tropical primary forest degradation occurred” since January 1, 2023. In other words, forest products derived from purely innocent and perfectly legal and sustainable harvesting practices may become unsellable if, subsequent to harvesting, the land on which harvesting took place is degraded or converted by the state, third parties, or (in the case of degradation only) by natural causes.

There is no internationally agreed definition of “intact forest”, nor is the definition in the bills operational. By definition, sustainably managed forests are not intact. Yet there is no evidence that managed forests are necessarily less valuable from a climate perspective. By presenting degradation as the converse of intact, it is implied that managed forests do not provide high level of carbon sequestration and storage. In fact, the science points to the opposite that a sustainably managed forest will yield greater climate storage and sequestration than an unmanaged aging forest. It also does not account for the carbon storage advantages of timber products.

The definitions of “traceable”, “ethical” and “sustainable” as used in the supply chain transparency program differ significantly from the FAO use of the terms in agriculture and forestry. New York law is attempting to codify definitions that do not have agreed upon international acceptance or measurability. These definitions will also differ on their application to different practices (e.g. agriculture or forestry) and commodities derived from a host of raw materials. It would be impractical, if not impossible, for contractors and subcontractors to rationally apply these terms in a global context.

Reach to Non-tropical Forest Products

The main obligation imposed by the new bill (requiring certification by contractors that their products does not originate from land where tropical deforestation occurred) applies to a wide variety of “tropical forest-risk commodities” irrespective of the country from which such products are produced and imported. While North American producers may be able to certify our forest products were not derived from land where tropical deforestation occurred, this added layer of administrative certification puts our industry at a disadvantage –albeit minor – in comparison to substitute products that are not seen as involving “tropical forest risk”, such as plastic or steel for instance. An exemption for products made in certain countries involving no “tropical forest risk” could have be an easy way to mitigate this concern.

Other provisions of the new bill also apply to tropical and non-tropical forest products alike. For instance, regulations that will be adopted to implement this legislation are expected to cover tropical forest-risk commodities (including all paper, all pulp, and all lumber) and a “set of responsible sourcing guidelines and policies derived from best practices in supply chain transparency to the point-of-origin”. We do not yet know how extensive such guidelines will be, but it will be important to monitor discussions held by the stakeholder advisory group that will be held to adopt such regulations. Likewise, the Supply Chain Transparency Assistance Program (that will assist small and medium-size businesses in achieving supply chains that are “transparent”, “traceable”, “ethical” and “sustainable”) is expected to apply across all “raw materials” and industries.

Trickle-down Effects in the Supply Chain

The certification intended by this new bill would apply to contractors and subcontractors alike and can therefore be expected to have significant trickle-down effects on product traceability through the supply chain. Contractors and subcontractors must certify that any “tropical forest-risk commodity” contained in whole or in part in products procured to state agencies “was not extracted from, grown, derived, harvested, reared, or produced on land where tropical deforestation or tropical primary forest degradation occurred on or after January 1, 2023”.

Contractors would be required to ensure subcontractor compliance, but it is not clear whether subcontractors will also be required to ensure sub-subcontractor compliance, etc. Regardless, such a certification requirement will necessarily involve the practical need to ensure traceability of forest products to the point-of-origin, as required for the “tropical forest policy” of large contractors and as promoted under the Supply Chain Transparency Assistance Program. This may involve considerable changes for the industry, with increased transaction costs from the bottom to the top of the supply chain.

Questions on the Trade Restrictive Approach to Forest Management

This legislation still represents a significant outreach by the New York State Legislature into international trade and will impose restrictive measures on trade of forest products as a means of policing deforestation. Doubts may be raised as to whether the proposed legislation will be deemed as consistent with the Commerce Clause of the U.S. Constitution, which prohibits states from passing laws that burden interstate or foreign commerce. Likewise, it is unclear whether restrictions on tropical forest-risk

commodities comply with equal treatment and non-discrimination protections under the rules of the World Trade Organization and bilateral and multilateral investment treaties ratified by the United States.

For these reasons ESFPA cannot support this bill as drafted.

For More Information Contact:

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cc: Assembly Government Operations Committee Members
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