

EXHIBIT 4

MEMORANDUM OF LAW & FACT

**DUE PROCESS VIOLATIONS INCLUDING THOSE VERY LIKELY CAUSED
BY SECRET INDUSTRY AGREEMENTS, FROM UNILATERAL
NON-DEMOCRATIC STANDARD AMENDMENTS AUTOMATICALLY
CONTROLLING GOVERNMENT GREEN BUILDING REQUIREMENTS &
CAPITAL MARKETS' ACCESS**

November 16, 2016

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1. Introduction & Summary

This Memorandum was requested to identify and the basis for resolving likely due process violations adversely affecting the building industry and government requirements automatically, the nature of the violations, and capital markets access, and reviewed by the following parties (Nov. 1 and 14, 2016 conference calls of California, New York and DC Attorneys General Offices, Sierra Club Legal Department, Stand (formerly Forest Ethics), Ballard Spahr Law Firm, California Treasurer General Counsel & Capital Markets Partnership).

Inconsistent with longstanding market / government requirements, three unilateral non-democratic LEED national green building standard amendments automatically became effective for most US government and private sector buildings in 2015-2016 with no required due process vote and well reported adverse impacts.

The evidence shows that two of these amendments were caused by confidential agreements with the chemical / oil and wood industries based on appeals to the consensus member vote for LEED V4, and the third non-democratic unilateral resilience amendment was likely a competitive response to the National Consensus Resilience Standard developed and unanimously approved in a 30 day democratic National Ballot Vote in an American National Standards Institute (ANSI) Accredited Consensus Process protecting due process rights of interested and affected parties.

The building industry is the world's largest and causes the greatest release of carbon pollution.

This green building standard has a monopoly effect and durable market power with over 90% market share, over 50% of US new building construction and retrofits, and a \$1 trillion / yr. of construction (See *Green Bond Business Case* released at NYSE in 2009, updated 2015). The Standard has been adopted by 34 States, over 200 cities, 12 federal agencies, investors, with projects in over 150 countries.

The Standard also has been the basis of about \$10 billion in green use bonds issued, and Green + Resilient Building Bonds are the top US priority for rapidly accessing the much needed \$70 trillion in assets by investors that want to buy these bonds (*Id.* see appendix 4). Immediately accessing the \$70 trillion is key to:

- Paying for the needed near term 18 gigaton / \$2 trillion carbon pollution reduction needed to keep dangerous climate change manageable as documented by California, IPCC Scientists, NASA, JPMorgan, and leading economists (*Id.*).
- Paying for an estimated near term \$100 trillion in US resilience costs, stopping planned S&P climate credit rating downgrades required by law to warn investors of accelerating systemic damages well documented by the investor and insurance communities, government and S&P. Downgrades are recognized as triggering financial contagion by former Treasury Secretary Hank Paulson announced in the NYTimes / WSJ, and raising national security implications as recognized by the Defense Department (*Id.*)

A simple and effective solution would be to have the non-democratic unilateral amendments voluntarily rescinded and cause the reinstatement of required due process protections. It is believed that transparency in the public release of these agreements is abhorrent to the standards developer since the unilateral amendments with no required due process are controversial, reported to adversely impact global public health / environment, and the public does not know the secret agreements are causing the amendments. Thus, a request for these agreements and a meeting is in the public interest, and expected to have this positive outcome.

2. What's at Stake?

Building industry is the world's largest causing the greatest carbon pollution as recognized for many years by numerous studies.

Building industry is by far the most advanced for sustainability way beyond the tipping point, thus control of its standards in the required democratic process is paramount, as opposed to current control by secret chemical / oil and wood industry agreements and resulting unilateral, non-democratic, nonconsensus amendments. The longstanding operative principle and practice the building industry has followed are democratically approved standards advancing global public health and welfare.

Government sovereignty is required for much needed public health & environment protection and enhancement, however, that role has been eroded by the industry controlled unilateral, non-democratic amendments impacting public health and environment and automatically changing government requirements with no required due process.

Standards for much needed capital market access and carbon reduction and resilience financing are key to allow required Green + Resilient Building Bond underwriting. It is contrary to the public interest if these standards are secretly controlled by industry jeopardizing global public health and environment, and effected in a non-democratic, nonconsensus manner violating required due process. Green + Resilient Building Bonds are identified as the top priority for quickly and effectively accessing the capital markets' \$70 trillion in investor assets available for much needed carbon pollution reduction and resilient financing. See summary in Appendix 4.

In contrast, bonds using *greenwashed* standards destroy economic value, harm investors, and are misleading and unlawful in violation of Federal Trade Commission Environmental Marketing Guides with concurrent Attorneys General enforcement.

Urgent, substantial carbon pollution reductions are needed to keep dangerous climate change manageable. See figures below on S&P planned climate downgrades & Defense Department conclusions on the significance of the downgrades in triggering financial contagion.

US near term resilience costs are enormous but available in the capital markets with almost all of this needed for the built environment. As reported to Standard & Poor's (S&P) in a June 30, 2015 meeting at S&P NYC headquarters with leading investors, investment banks, and nonprofits, US near term resilience costs for accelerating rising seas and intensified storms, droughts, disease, and precipitation are estimated at \$100 trillion. S&P is the world's largest credit rating agency rating \$ trillions of assets annually.

Miami Beach Near Term Resilience Costs Alone for Rising Seas are Estimated at \$1 Trillion by the City's outside engineering firm (Re:Focus 2015) whereby seas are rising at about one inch per year both at the tidal surface level, and up below the ground through porous bedrock causing widespread reporting on this "sunny day flooding" problem including the NYTimes, National Geographic, The Guardian, New Yorker, and South Miami Mayor Dr. Phil Stoddard. The Re:Focus study states that in order for the ongoing \$400 million in groundwater pumping to remove rising seas, sea walls need to be heightened, and impervious

vertical and horizontal subsurface barriers need to be constructed. This would essentially engineer Miami Beach into a leaky bathtub.

Costs for other South Florida Coastal Cities are Comparable to Miami Beach due to porous bedrock.

New York State Near Term Resilience Costs are Estimated at \$10 Trillion with existing 71% more intense precipitation, 9% increased non-coastal flood magnitude, 9%+ increased coastal flood magnitude and storm surge, and accelerating rising seas of 2' – 6' affecting the New York Harbor and Long Island as conservatively documented by the *US Climate Assessment Report* (2014). The Ballard Spahr law firm October 29, 2015 Resilience Conference in Philadelphia, included leading bond issuers, underwriters, and governments and displayed the *Surging Seas* map showing expected sea level rise inundating the Philadelphia Airport, Wastewater Treatment Plant, and drinking water intake with brackish water. Conference participants concluded that even with resilience bond incentives of cheaper capital, more proceeds, and competitive pricing and yields, that debt service will be too expensive for the public.

California Near Term Resilience Costs are Estimated at \$20 Trillion from near term 2' – 6' rising seas, continuing more intense droughts, intensified wildfires, increasing agriculture costs and water supply needs including desalinization, more intense storms with 5% less very heavy precipitation as documented in the *US Climate Assessment Report*. Southern and Central California are experiencing:

"Increased heat, drought, and insect outbreaks, all linked to climate change, have increased wildfires. Declining water supplies, reduced agricultural yields, health impacts in cities due to heat, and flooding and erosion in coastal areas are additional concerns." (Id.)

S&P Downgrades Can Trigger Financial Contagion / Market Crash. Wall Street's peer-reviewed *Green Bond Business Case* released at a New York Stock Exchange Press Conference, documents that S&P downgrades or litigation from South Florida coastal property owners over rising seas, could trigger the Climate Bubble / Contagion / Market Crash as announced in 2014 based on the *Green Bond Business Case* by former Republican Treasury Secretary Hank Paulson in the *New York Times* and *Wall Street Journal*. Since this announcement, resilience damages have accelerated. The *Business Case* was updated by leading economists including this Chart on this adverse impact:

Solving Climate Credit Rating Downgrades

Challenge: Near Term Climate Bubble / Crash Can Be Triggered by

- Pending climate credit downgrades, and / or
- Imminent litigation over collapse of coastal property values from faster rising seas.

Accelerating Forces

- Lack of insurance for climate damages / resilience
- Several trillion dollars must be spent on near term solutions.
- JPMorgan predicts unmanageable dangerous climate change is a near term high probability *Black Swan* statistical event.
- Time is of the essence: triggers can happen now.

Solution:

Rating Agencies Use Consensus Criteria Entities Can Achieve to Avoid Downgrades BEFORE They are Issued.

Accelerating Forces

- S&P criteria use can serve as underwriting for new insurance products, brand improvement, 30 yr. profitable business models.
- Government action not required.
- Capital markets have more than enough investor funds to pay for solution including through green + resilient bonds.
- Green bond growth is explosive.
- Rating agencies acknowledge higher ratings for energy efficiency.
- Improves public health & environment.
- Rebuilds / protects built environment.
- Creates estimated \$800B in new wages / 400,000 new jobs.
- Consensus criteria rating agencies helped initiate are available & similar to existing bond criteria.



Data From Capital Markets Partnership (CMP) Green Bond / Sustainable Investment Business Case & RELI Consensus Underwriting Standards Supported by U.S. Conference of Mayors (2008), Peer-reviewed & Released at NYSE (2009), Updated by Leading Economists (2013), & Used by Former Republican Treasury Secretary Hank Paulson Announcing Climate Bubble (NYTimes, WSJ 2014). Slide Developed With US Senate Staff and CMP as a Result of US Senate Staff Briefing on Climate Credit Rating Downgrades (Feb. 6, 2015).

At the August 14, 2014 Assistant Secretary and Defense Department Climate Officers' Briefing at the Pentagon, it was Decided to Publish a Blog Article on This Contagion Threat due to national security implications. However, the Pentagon Comptroller thereafter decided the following article should not be published because it could trigger contagion.

American Security Project Blog Article

Wanted Alive: Private Sector Solutions to the Climate Bubble / Crash Protecting the Global Economy & National Security

Developed at recommendation of Pentagon Climate Officers Briefing (Aug.12, 2014), & decided not to be published by DoD Comptroller's Office due to potential to trigger financial contagion since there is no climate solution in place

Connecting the dots on recent public announcements raises likely near term unacceptable national and economic security risks:

Pending Climate Bubble, Crash, Contagion (economic panic) warning by Former Republican Treasury Secretary Hank Paulson (using Wall Street *Green Bond Business Case* released at NYSE & updated by leading economists 2013)

Planned Climate Credit Downgrades by Standard & Poor's credit rating agency (May 15, 2014)

Lack of Insurance for climate change damages (*Green Bond Business*, Fireman's Fund Allianz July 1014, National Association of Insurance Commissioner Survey, Aug. 2014)

Accelerating Systemic Climate Damages in all economic sectors (*Green Bond Business Case*)

Rising Seas' Systemic Damages including Miami Beach sunny day flooding (July 2014 NYTimes & Guardian) with no solution due to porous limestone bedrock that can permanently undermine the City's credit rating. Miami and all other South Florida coastal cities have similar risks.

Lack of Needed Market Confidence in Solutions Stopping the Bubble by reducing 18 gigatons of carbon pollution in the near term costing \$2 trillion and preventing *unmanageable* dangerous climate change (*Green Bond Business Case*)

The Climate Bubble is Permanent unlike all prior bubbles going back to the 11th Century where there was economic recovery (See *This Time is Different* 2011)

Military Sea Level Base Ongoing Relocations Hampered by lack of appropriations adversely affecting military readiness since Congress doesn't recognize climate change (GAO July 2014)

JPMorgan Calling *Unmanageable* Dangerous Climate Change a High Probability Near

Term Black Swan Statistical Event (*Green Bond Business Case*)

Accelerating Dangerous Climate Change Positive Feedback Loops including -

- methane permafrost and ocean hydrates releases
- ocean limit exceedance of CO2 absorption
- Greenland glacial melt moulins & tsunamis
- West Antarctic Ice Sheet collapse
- greater warming from loss of albedo reflective capacity from decreased sea and glacial ice
- rising sea and land surface temperatures intensifying climate and weather events
- unknown positive feedback loops due to paramount climate system complexity

"Climate Change ... May Act as an Accelerant of Instability or Conflict. ... Managing the National Security Effects of Climate Change Will Require DoD to Work Collaboratively, Through a Whole-of-Government Approach, with Both Traditional Allies and New Partners.

... Climate change, energy security, and economic stability are inextricably linked" (Defense Department Quadrennial Reviews Mar. 4, 2014 & 2010).

These preceding factors raise serious unacceptable near term domestic national and economic security risks from planned US climate credit downgrades required by law to warn investors due to accelerating systemic climate damages. Without a climate solution in place, downgrades can trigger contagion.

Fortunately, institutional investors with over \$70 trillion in assets under management are starting to deploy funds that can stop the Bubble (*Green Bond Business Case*).

Are there private sector announcements that can be made on solutions to the Bubble / Crash to boost market confidence as the necessary antidote to contagion?

3. Nature of Voluntary Democratic Consensus Standards Adopted by Government

Voluntary democratic consensus standards have regulated the building industry for over 175 years. Democratic, consensus standards protect 5th Amendment due process rights codified by:

- Federal statutes
- OMB A-119 guides
- American National Standard Institute (ANSI) Essential Consensus Democratic Requirements for due process protection for private standards
- Legal evaluation and resulting ANSI due process improvements conducted by the Commerce Department, leading private Standards' entities, ANSI, and ANSI attorneys in response to Supreme Court decisions holding standard setting entities liable

These democratic consensus requirements are not now being followed for US / global green building standards.

Since the 1850s, there is no dominant federal / state building industry regulatory role, instead, voluntary democratic consensus standards are adopted by government.

ANSI Essential Due Process Requirements are the democratic private sector analog to State / Federal Administrative Procedure Act due process requirements required by the 5th Amendment.

Democracy / consensus also increases peer review, reduces risk and uncertainty, prevents litigation by affected parties and industries with market share that want a seat at the table, and thus are widely recognized as important to commercialize new technology.

Most Standards are Voluntary Democratic Consensus Standards according to the Federal Trade Commission and Federal law:

"Most standards developed and used in the United States are voluntary consensus standards created through private sector leadership.¹⁶ In some instances, United States Government (USG) agencies need standards to achieve their own regulatory and procurement objectives. In these situations, the USG prefers that the federal agencies rely on voluntary consensus standards instead of government standards."(Intellectual Property and Standard Setting, Federal Trade Commission at 4, Dec. 8, 2014).

"While in most countries standards are promulgated by government agencies, the United States has shifted toward a model whereby standard development organizations develop voluntary consensus standards for use by industry and various levels of government." Legislative History, Standards Development Act of 2004, House Report 108-125 at 3 (May 22, 2003).

4. Government Ratification of Voluntary Standards' Democratic Due Process Protections

In response to the Supreme Court's *Hydrolevel & Allied Tube* decisions, Commerce Department / National Institute of Standards & Technology (NIST) Report documented due process enhancements to the American National Standards Institute (ANSI) *Due Process Essential Requirements* for accredited standard setting entities: <http://mts.sustainableproducts.com/NIST>. The national green building standard in question admittedly does not follow these ANSI democratic requirements set forth at this link (hit cancel if password requested):

https://share.ansi.org/shared%20documents/Standards%20Activities/American%20National%20Standards/Procedures,%20Guides,%20and%20Forms/2016_ANSI_Essential_Requirements.pdf

In summary, ANSI requires notice and an opportunity to participate to interested and affected parties, a balance of party type participating without dominance by any one group, voting, resolution of negative votes, and re-voting to provide due process notice on substantive changes as a result of prior votes.

Federal Government Policy & Market Requirements State That Voluntary Standards Like LEED Amendments, Should Be Democratic / Consensus. In response to Supreme Court decisions *Allied Tube* and *Hydrolevel* the Commerce department / NIST Legal Report concluded due process requires providing notice and opportunity to be heard and resolving any negative votes (*How Due Process in the Development of Voluntary Standards Can Reduce the Risk of Antitrust Liability*, NIST-GCR-90-571, 1990):

"In a recent article published in ASTM's "Standardization News" (Jan. 1990 p.46), Ms. Judy Whally, Deputy Assistant Attorney General in the Antitrust Division of the United States Department of Justice, wrote:

'The U.S. Supreme Court's two most recent antitrust decisions relating to standards – Hydrolevel and Allied Tube – have created substantial concern in the standards making community about the risks of exposure to antitrust liability, and concomitant treble damages, for standards making.

A standards making body's attention to procedural due process is important not only because it suggests fairness, but because fair procedures are more likely to produce a correct decision, one that courts need not review. The fairer the decision making process appears, the less inclined the courts will be to question the merits of the standards making decision.' (*Id.* at i).

* * *

To quote the Supreme Court [in *Hydrolevel* at 1]:

'ASME can be said to be in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce ... When it cloaks its subcommittee officials with the authority of its reputation, ASME permits those agents to affect the destinies of business and thus gives them the power to frustrate competition in the marketplace.' (*Id.* at 3-4).

* * *

[I]n a November 1988 memorandum to the ANSI Board of Directors from its Counsel, Caldwellader, Wickersham & Taft ... ANSI's lawyers said:

'A major objective of the ANSI Procedures has been to minimize the possibility of antitrust liability resulting from participating in voluntary standards activities. By stressing due process, balanced participation, and other appropriate standards development criteria, the ANSI Procedures provide a road map for those who seek to pursue legitimate standards development. At the same time, the ANSI Procedures reflect a system designed to expose potential antitrust problems before they evolve into an actual violation.' (*Id.* at 8).

The American National Standards Institute, in its publication Procedures for the Development and Coordination of American National Standards, provides an excellent list and rationale for each of the elements of due process. ANSI states (p. 7 Procedures):

‘1.2 Due Process Requirements. Due process means that any person (organization, company, government agency, individual, etc.) with a direct and material interest has a right to participate by: (1) expressing a position and its basis, (2) having that position considered, and (3) having the right to appeal. Due process allows for equity and fair play.’ (Id. at 14-15. This identical due process requirement language is still today part of ANSI’s Essential Requirements for accredited standards developers, at 4, Jan. 2016).

* * *

Whether identified as ‘minority views,’ ‘negative votes,’ ‘unfavorable comments,’ ‘dissents,’ ‘objections,’ or by some similar term, no due process protection is more important to fairness than the assurance that all viewpoints are considered and appropriately dealt with.’ (Id. at 28).

* * *

V. Summary

This report has explained, in lay terms, how good due process protections can help reduce the risk of antitrust liability faced by all standards developers, and in some instances their volunteer standards writers. In brief, the rule of thumb is: the better the procedural protections, the less the less the liability.

After identifying the key elements of due process that collectively constitute fairness, the study presents the actual language used by a number of different standards developers. The eleven organizations represent a mix that is representative of the wide range of groups that develop voluntary standards.” (Id. at 46).

Pursuant to the Standards Development Act of 2004, By Registering With the Justice Department, Standard Setting Entities Were Shielded From Antitrust Treble Damages. The Justice Department States the US Green Building Council (USGBC & LEED owner) Did Not So Register (Aug. 16, 2016 email from the DOJ Antitrust Division). The Standards Development Act provides this protection for standard setting registrants based on required adherence to consensus democratic procedures:

“Standards development organizations develop technical standards that are essential to the efficient functioning of our national economy. Congress has determined that the threat of treble damages pressures SDOs to restrict their standards development activities at a great cost to the United States. The Standards Development Organization Advancement Act of 2004 relieves SDOs from certain antitrust concerns and facilitates the development of pro-competitive standards.” DOJ Press Release June 24, 2004.

Federal law provides democratic, consensus standard setting entities limited antitrust protection if the standard setting entity registers with the Justice Department, because these entities are “unlikely to engage in anti-competitive conduct creating market dominance, ... Potential anticompetitive conduct is also mitigated by the manner in which the voluntary consensus standards are developed and implemented” through openness, balance, cooperation, transparency, consensus and due process (Id. and as codified in §102, PL 108-237, 15 USC 4301):

“Antitrust challenges to standard-setting activities are currently evaluated under the “rule of reason”—a judicially-created doctrine that seeks to balance the pro-competitive and anti-competitive market effects of a challenged practice before determining whether a violation of the antitrust laws has occurred (See Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Company, 472 U.S. 284 (1985)). The rationale for this antitrust standard is that SDOs, as non-profits serving a cross-section of an industry, are unlikely to engage in anti-competitive conduct creating market dominance. Potential anti-competitive conduct is also mitigated by the manner in which voluntary consensus standards are developed and implemented. In order to be used by Federal agencies, the process of developing voluntary standards must adhere to principles of openness, voluntariness, balance, cooperation, transparency, consensus, and due process. These requirements were most recently articulated in OMB Circular A-119 (February 19, 1998). Legislative History, Standards Development Act of 2004, House Report 108-125 at 3-4 (May 22, 2003).

OMB A-119 (2016) on Federal Guidance on use of voluntary, democratic consensus

standards:

<https://www.federalregister.gov/documents/2016/01/27/2016-01606/revision-of-omb-circular-no-a-119-federal-participation-in-the-development-and-use-of-voluntary>

A-119 at p. 16 identifies the following requirements for voluntary standard setting bodies which codifies the ANSI Essential Due Process, Democratic, Consensus Requirements:

“Voluntary consensus standards body” is a type of association, organization, or technical society that plans, develops, establishes, or coordinates voluntary consensus standards using a voluntary consensus standards development process that includes the following attributes or elements:

Openness: The procedures or processes used are open to interested parties. Such parties are provided meaningful opportunities to participate in standards development on a non-discriminatory basis. The procedures or processes for participating in standards development and for developing the standard are transparent.

Balance: The standards development process should be balanced. Specifically, there should be meaningful involvement from a broad range of parties, with no single interest dominating the decision-making.

Due process: Due process shall include documented and publically available policies and procedures, adequate notice of meetings and standards development, sufficient time to review drafts and prepare views and objections, access to views and objections of other participants, and a fair and impartial process for resolving conflicting views.

Appeals process: An appeals process shall be available for the impartial handling of procedural appeals.

Consensus: Consensus is defined as general agreement, but not necessarily unanimity. During the development of consensus, comments and objections are considered using fair, impartial, open, and transparent processes.”

National Technology Transfer Act §12(d) specifies that federal agencies shall use voluntary democratic consensus standards where there is no government standard, and codifies OMB A-119: http://www.astm.org/SNEWS/APRIL_2006/overman_apr06.html
<https://www.nist.gov/standardsgov/national-technology-transfer-and-advancement-act-1995>

5. Monopoly Power of the Green Building Standard

The US green building standard LEED has been adopted and automatically sets public health and environmental requirements for:

- 34 States (USGBC 2016)
- Over 200 cities (*Id.*)
- 12 Federal agencies (*Id.*)
- Over 50% of all new and retrofit US private sector building construction (*Green Bond Business Case.*)
- Projects in over 150 other countries (USGBC 2016)
- A \$1 trillion / yr. global industry (*Green Bond Business Case*)
- Investors and access to and capital markets standards for near term US estimated climate resilience costs of \$100 trillion to prevent planned Standard & Poor's (S&P) climate credit rating downgrades required by law to warn investors of well-documented accelerating systemic damages. Accessing these available capital markets funds is a top US priority. See preceding slide on the need to prevent S&P downgrades (*Id.*)

There are no competing standards with even 1% of this national standard's market share.

The following are example government requirements that have adopted the standard and are automatically changed when LEED is amended:

- Requirements of the General Services Administration that builds and manages most Federal buildings: <http://www.gsa.gov/portal/category/25999>
- San Francisco Green Building Code requiring government and private sector LEED green buildings *"to promote the health, safety and welfare of San Francisco residents, workers, and visitors."*
- Los Angeles Green Building Ordinance 179820 requiring LEED government and private sector LEED green buildings
- DC's Green Building Act and Construction Code for private and public sector buildings
- Boston City Code Article 37 requiring LEED for all new private sector buildings
- New York State rules require LEED green building construction for State, NYC, and other city funded buildings at this link: <http://mts.sustainableproducts.com/NewYorkState>
- Further, there are over 4000 private sector LEED buildings constructed by a wide variety of building owners in all aspects of New York's economy:
http://www.gbig.org/search/advanced?search%5Bflat_rating_program_ids%5D=Certification&search%5Bplace_ids%5D=4723

6. Secret Industry Agreements Very Likely Cause Most Due Process Violations

LEED was a consensus standard following ANSI when first adopted in 1997 with all negative votes resolved by the LEED Consensus Committee and interested and affected parties in the national democratic, consensus vote. The negatives called for smoking in LEED buildings and were withdrawn when the negative voters declined to defend their negative votes before the LEED Consensus Committee. LEED 1.0 was then launched in 2000. Around 2007, USGBC stopped following this consensus process instead using Member votes. USGBC became ANSI Accredited and tried using this ANSI process for LEED Neighborhood Development (ND), but never completed this LEED ND approval in the ANSI process, experiencing great opposition by interested and affected parties.

Secret appeal settlement agreements are the likely cause of unilateral, non-democratic, nonconsensus amendments impacting public health & environment, with no required due process. The quoted Venable memo below states that three secret settlement agreements were executed. The secret wood industry appeal likely caused the non-democratic, nonconsensus, unilateral wood standard amendment, suggesting there is very likely a fourth secret settlement agreement.

Venable Memo documents secret industry settlement agreements resolving due process / antitrust violations quoted as follows:

RFCI BOARD OF DIRECTORS MEETING - OCTOBER 2014

Key Initiative: US Green Building Council LEED v4 Appeal

Overview: On July 2, 2013, USGBC announced that LEED v4 had been approved by its membership. This final version contains MR Credit 4 which, under Option 2 “Material Ingredient Optimization,” provides one point if 25 percent, by costs, of the total value of permanently installed products in the project: (1) do not contain GreenScreen Benchmark 1 hazards greater than 100 ppm after fully identifying chemical ingredients in the product above 100 ppm; (2) are certified under the Cradle to Cradle system; (3) do not contain Substances of Very High Concern (SVHC) under the European REACH candidate or authorization lists; or (4) comply with future USGBC approved building product optimization criteria.

Many flexible vinyl products do not qualify for MR Credit 4 Option 2. PVC is likely to be considered a GreenScreen Benchmark 1 hazard because of “transformation components” (e.g., dioxin created when PVC burned) and is not certifiable under Cradle to Cradle. In addition, many phthalates are listed on the REACH list (e.g., DEHP, BBP) so that many flexible vinyl products containing these phthalates would not qualify under the REACH compliance path.

On August 1, 2013, the American Chemistry Council (ACC), the American High-Performance Building Coalition (AHPBC), The Vinyl Institute (VI) and RFCI filed appeals challenging USGBC's issuance of MR Credit 4 Option 2. The RFCI appeal is based on: (1) the credit being a material avoidance credit developed contrary to the 2007 USGBC TSAC Report and LEED Steering Committee policy decisions; (2) the credit not being developed pursuant to consensus-based decision-making using transparency and balance of interest procedures; and (3) USGBC not providing an adequate comment response process by simply ignoring many substantive comments without explanation.

On August 30, 2013, USGBC informed RFCI that it would respond to the appeals no later than February 1, 2014 and that it was open to dialogue with the appellants. At the October 2013 RFCI Board meeting, the Board appointed a LEED v4 Appeal Committee (Committee), consisting of Amy Costello (Armstrong), Dave Kitts (Mannington), and Diane Martel (Tarket), to assist Dean Thompson, Bill Hall, and Bill Freeman in responding to USGBC's offer to engage in dialogue and the appeal in general.

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Current Situation: In response to RFCI's letter accepting USGBC's offer to engage in dialogue and with direction from the Committee, Dean Thompson, Bill Hall, and Bill Freeman met with high-level USGBC representatives on February 6, 2014 to discuss the appeal and a path forward

to resolve RFCI's concerns about MR Credit 4 Option 2. After a very productive and cordial exchange about RFCI's concerns, the RFCI representatives requested that: (1) USGBC establish a Task Force to review the findings of the TSAC Report to determine whether there is a scientific justification for MR Credit 4 Option 2 being inconsistent with the TSAC Report; (2) USGBC issue a stay of the credit until the Task Force's work is complete; and (3) USGBC respond to RFCI's requests to add NSF 332 to Pilot Credit 80 and add the RFCI Product Transparency Declaration (PTD) as a USGBC Approved Program under MR Credit 4 Option 1 (a point would be provided for products completing the reduce accentuating "RFCI" PTD). We also discussed using the REACH criteria as a compliance path so that qualifying flexible vinyl products receive a point under Option 2 for U.S. projects.

On March 4, 2014, USGBC sent a letter inviting RFCI to join a Working Group that would review the technical basis for Option 2, along with Options 1 and 3, of MR Credit 4. USGBC estimated that the Working Group would take six months to complete its mission. In exchange, USGBC asked that RFCI hold its appeal in abeyance and cease any efforts to oppose the use of LEED during the pendency of the Working Group process. USGBC did not offer to stay the effective date of MR Credit 4.

At the RFCI Board meeting on May 15, 2014, with input from the LEED Committee, the Board agreed that RFCI would suspend its appeal provided an acceptable agreement was reached with USGBC regarding MR Credit 4 Option 2 and the PTD and NSF 332 issues. One potentially acceptable approach was negotiating an acceptable REACH compliance path that would allow vinyl flooring products meeting specific REACH criteria to obtain a point under Option 2. Dean Thompson and Bill Hall agreed to meet with ACC and VI to explain RFCI's position.

Since the Board meeting, ACC has engaged in extensive negotiations with USGBC about pursuing the Working Group approach offered by USGBC and seeking a conceptually different approach to Option 2 (use of risk and exposure v. "red list" hazard approach; incorporate LCA). Because the outcome of the ACC approach could eliminate the problematic aspects of Option 2 and does not preclude the REACH compliance path approach if Option 2 is not significantly changed, RFCI has not pursued the REACH approach with USGBC to date.

On August 27, 2014, USGBC and ACC announced a new initiative to ensure the use of sustainable and environmentally protective products in buildings by applying technical and science based approaches to LEED. In particular, USGBC agreed to establish a Working Group to review and evaluate the technical basis and marketing feasibility for Options 1, 2, and 3 of MR Credit 4, and ACC agreed to suspend its appeal of LEED v4. On August 29, 2014, Mahesh Ramanujam, USGBC COO, by telephone conference and e-mail, asked Dean Thompson, Bill Hall, and Bill Freeman if RFCI would accept the same agreement as set forth in a draft letter. On September 19, the RFCI LEED Committee convened a conference call to formulate a recommended response to USGBC's proposal and draft letter.

Recommendation: The LEED Committee recommends that RFCI accept the attached letter from USGBC, or one substantially similar to it, to memorialize an agreement by RFCI to suspend its appeal of LEED v4.

Prepared by: Bill Hall
October 1, 2014

It alleged due process / antitrust violations:

“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, and that the risk of anticompetitive behavior is inherent in the development of private sector standards.

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. 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;*
- *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.”*

7. ANSI Essential Due Process Requirements are the Democratic Private Sector Analog to Administrative Procedure Acts (APA). Failure to Follow These Nationally Recognized and Codified Democratic Procedures for Standards is a Due Process Violation to Damaged Parties Subject to Liability and Enforcement.

USGBC as a Monopoly Developer of US / Global Green Building Standards, Conforms to the Supreme Court's Definition as an "*Extra-governmental Agency Prescribing Rules for the Regulation and Restraint of Interstate Commerce.*" Like Government, Such Extra-governmental Agencies are Required to Provide Procedural Due Process Protections.

Federal agencies are immune from antitrust (*Allied Tube v. Indian Head, Inc.*, 486 U.S. 492 (1988)), but required to protect due process rights of interested and affected parties in rulemaking and standard setting by the Administrative Procedure Act (APA) and a substantive body of case law interpreting the APA for over 60 years, that originates from Constitutionally protected procedural due process rights.

Federal agencies are also controlled by the elected President, agency leaders confirmed by the elected Senate, with elected Congressional and Presidentially appointed Judicial oversight, with substantive Constitutional requirements for due process and separation of powers, and subject to challenges by the States' constitutional powers. Similar democratic requirements exist for all States.

7.1. Voluntary standard setting organizations that regulate commerce as extra-governmental agencies are strictly controlled by due process requirements, because in contrast to government agencies, they have **NO**:

- Inherent grant of government authority
- Power from the people
- Governmental legal immunity
- Separation of powers
- Constitutional democratic provisions including public elections and governmental appointment of officials
- Exemption from antitrust
- Detailed statutory regulatory scheme like the Administrative Procedure Act with a substantive body of case law prescribing due process protections and requirements

For these preceding reasons, ANSI due process democratic consensus essential requirements are followed by voluntary standard setting entities, were enhanced by NIST, ANSI, and leading standard setting entities and their attorneys following adverse Supreme Court rulings, and have been codified by Federal government policy and statutes.

In holding the American Society of Mechanical Engineers (ASME) liable for antitrust violations from voluntary standards, the Supreme Court emphasized that ASME, like USGBC, wields great power in the US economy. According to USGBC's own estimate it controls \$550 billion / yr. in US construction activity which comprises over 50% of new commercial building construction and retrofits, and roughly a similar dollar amount outside the US (*Green Bond Business Case 2015*). Like ASME, as described by the Supreme Court, USGBC is a private nonprofit "extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce."

ASME wields great power in the Nation's economy. Its codes and standards influence the policies of numerous States and cities, and, as has been said about "so-called voluntary standards" generally, its interpretations of its guidelines "may result in economic prosperity or economic failure, for a number of businesses of all sizes throughout the country," as well as entire segments of an industry. H. R. Rep. No. 1981, 90th Cong., 2d Sess., 75 (1968). ASME can be said to be "in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce." Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457, 465 (1941)." American Soc'y of Mech. Eng'rs v. Hydrolevel 456 U.S. 556 (1982) at 570.

"Thus, a rule that imposes liability on the standard-setting organization -- which is best situated to prevent antitrust violations through the abuse of its reputation -- is most faithful to the congressional intent that the private right of action deter antitrust violations." Id. at 573.

Six years later the Supreme Court confirmed *Hyrdolevel*, holding that nonprofit entities like USGBC have no antitrust immunity for their standard activities, and found similar liability for the nonprofit National Fire Protection Association's standards activity. *Allied Tube v. Indian Head, Inc.*, 486 U.S. 492 (1988).

As extra-governmental agencies regulating commerce, voluntary standard setting organizations in effect achieve a license to develop standards within the bounds of the law by using a democratic consensus process that provides the procedural due process protections as recognized by federal statutes and OMB A-119, as well as following an ANSI accredited process. In this way, they achieve the constitutional protections inherent in government standards, and additional due process protections afforded by the APA and its long-term body of case law.

Using a democratic consensus process providing due process protections, allows voluntary standard setting entities to function as if they are government AND have an APA.

7.2. Without following democratic consensus procedures, voluntary standard setting bodies as extra-governmental agencies, violate required due process.

This is why after the Supreme Court Cases of *Hydrolevel* and *Allied Tube*, the Federal government led by NIST in the Commerce Department, and in conjunction with the Standards Community, conducted a legal analysis of standards development activities to avoid further liability, by protecting due process rights of interested and affected parties and providing fundamental fairness. This analysis concluded that resolution of negative votes was most important and the ANSI Essential Requirements were modified to provide these protections as recognized by ANSI's attorney Cadwalader. (*How Due Process in the Development of Voluntary Standards Can Reduce the Risk of Antitrust Liability*, NIST-GCR-90-571, 1990)

Based on this upgraded protection for standards ensuring heightened due process, the fact that the voluntary standards community embraced these requirements as noted by NIST, subsequently reduced the risk of litigation against standard setting entities including reported cases.

7.3. Voluntary standards setting entities like USGBC, have a much higher burden than government, to protect procedural due process. Although immune from antitrust liability and representative of the people, Federal agencies are still required to protect procedural due process through the APA. With no immunity and no grant of powers from the people, private standard setting entities as extra-governmental agencies prescribing rules for the regulation and restraint of commerce like USGBC, have a much greater burden than government to protect procedural due process.

This is why voluntary standard setting entities follow a rigorous democratic consensus process through ANSI Essential Due Process Requirements recognized by the Federal Government by OMB A-119 and Federal Statutes PL 104-113, and why the National Technology Transfer Act of 1995 (effective 1996) provides that Federal Agencies should use voluntary democratic consensus standards where there is no Federal Standard.

Further, the Standards Development Act of 2004, PL 108-237, provides for voluntary democratic consensus standard setting agencies following due process procedures to be immune from antitrust treble damages if they register with the Justice Department or FTC.

The privilege for nonprofits like USGBC to act as an extra-governmental agency and issue standards regulating commerce, is only where required procedural due process is protected by developing democratic consensus standards recognized by OMB A-119 and PL 104-113 and 108-327, that provide safeguards by requiring democratic consensus approval.

Standard setting entities that ignore these due process requirements do so at their peril of violating the Constitutionally protected rights of interested and affected parties, and thus engendering liability for damages.

7.4. The procedural due process requirement of the Constitution and extensive Supreme Court decisions interpreting the due process clause, are the underlying legal authority requirement for USGBC's and other private sector standards in addition to OMB A-119, PL 104-113 and 108-327, and NIST's strengthening of ANSI voluntary standards consensus requirements after *Hydrolevel* and *Allied Tube*. Such procedural due process must be provided to interested and affected parties by extra-governmental entities like USGBC since USGBC monopoly power regulates commerce and property with substantial effects on the economy and affected market participants.

This due process requirement for extra-governmental entities regulating commerce originates from the Fifth Amendment to the Constitution: *"No person shall ... be deprived of life, liberty, or property, without due process of law"* (Article V of the Bill of Rights Amendment to the Constitution, Dec. 5, 1791).

The Supreme Court has interpreted the meaning of this Due Process Clause as requiring fundamentally fair procedures when regulating property such as USGBC's regulation of commerce, and that such procedures not be arbitrary or capricious. *"Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property."* *Carey v. Piphus*, 435 U.S. 247, 259 (1978). Due process must *"minimize substantively unfair or mistaken deprivations"* by enabling persons to contest the basis upon which it is proposed to deprive them of protected interests. *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972). *"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated,*

under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950). This may include an obligation, upon learning that an attempt at notice has failed, to take "reasonable followup measures" that may be available. *Jones v. Flowers*, 547 U.S. 220, 235 (2006). The notice must be sufficient to enable the recipient to determine what is being proposed and what he or she must do to prevent the deprivation of his interest. *Goldberg v. Kelly*, 397 US 254, 267-268 (1970). Ordinarily, service of the notice must be reasonably structured to assure that the person to whom it is directed receives it. *Armstrong v. Manzo*, 380 US 545,550 (1965); *Robinson v. Hanrahan*, 409 US 38 (1974); *Greene v. Lindsey*, 456 US 444 (1982). "[S]ome form of hearing is required before an individual is finally deprived of a property [or liberty] interest." *Mathews v. Eldridge*, 424 US 319 (1976). "Parties whose rights are to be affected are entitled to be heard." *Baldwin v. Hale*, 68 US 223, 233 (1863). "The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment ...". *Fuentes v. Shevin*, 407 US 67, 80-81 (1972). See *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 US 123, 17071 (1951) (Justice Frankfurter concurring). Thus, the notice of hearing and the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 US 545, 552 (1965). The hearing must be a fair one, held before a tribunal which meets currently prevailing standards of impartiality. *Wong Yang Sung v. McGrath*, 339 US 33, 50 (1950). "[T]he decisionmaker's conclusion . . . must rest solely on the legal rules and evidence adduced at the hearing... To demonstrate compliance with this elementary requirement, the decisionmaker should state the reasons for his determination and indicate the evidence he relied on . . . though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law." *Goldberg v. Kelly*, 397 US 254, 271 (1970).

7.5. USGBC and the benefiting chemical / oil and wood industries have inappropriately kept secret, the 2013 LEED V4 appeals threatening liability that were very likely the reason for USGBC's unilateral, non-democratic, nonconsensus amendments without due process, automatically changing US and global building requirements. USGBC neither informed its many thousands of Members nor the public that USGBC substantially regulates, that the appeals were multiple, lengthy, substantially affecting public health and environment, and caused the 2015 and 2016 180 degree industry driven substantive changes in LEED materials credits with no required due process.

This is a breach of the public trust and required transparency in violation of USGBC's IRC §501(c)(3) public charity status to serve the public interest.

Due process scrutiny of LEED by industry was greatly heightened after LEED ceased to be a consensus standard in 2007, culminating in the 2013 chemical and wood industry due process and antitrust appeals to LEED V4. The appeals and their written settlements were not publicly released, but resulted in chemical and wood industry leadership helping rewrite LEED materials credits that the industry deemed offensive. However, these 2015 and 2016 substantive changes in LEED caused by the secret industry agreements:

- Were unilateral, non-democratic and nonconsensus
- Provided no due process protections to interested and affected parties for this 180 degree change in LEED materials credits
- Substantially impacted public health and environment

- Were effectuated without even a vote of USGBC Members which was USGBC's policy and practice, let alone more rigorous due process required by ANSI
- Were not complained of but in contrast applauded by the now benefitting industries that forced and helped develop the changes because the changes were in favor of these industries
- Were not disclosed as much worse due process violations compared to those violations causing the 2013 industry appeals

Despite this clear history and experience of USGBC and status with durable monopoly power as an extra-governmental agency regulating and restraining interstate commerce with about \$1 trillion / yr. in global LEED construction (*Green Bond Business Case 2015*), USGBC also unilaterally issued the 2015 non-democratic, nonconsensus LEED resilience standard with no required due process protections or safeguards.

7.6. USGBC clearly and unequivocally violated Constitutionally protected due process rights of States, US Cities, federal agencies, investors and their constituents. In contrast to these due process requirements, USGBC issued non-democratic, nonconsensus, unilateral amendments with no notice or rights provided to interested and affected parties. The preceding 13 Supreme Court cases defining the constitutionally required procedural due process rights required for USGBC, are conveniently codified in the OMB A-119 and federal statutory recognition and definition of required voluntary consensus processes. However, USGBC decided to also ignore these procedures and practice even after agreeing in written settlements with industry about such flawed practices.

Accordingly, USGBC clearly, unequivocally, and very likely intentionally violated Constitutionally protected due process rights codified by the federal government and accredited voluntary consensus procedures. Importantly, these violations occurred while USGBC was acting as an extra-governmental agency regulating commerce, wielding great monopoly power affecting the economy as detailed in §6 of this Memorandum.

Moreover, as an IRC §501(c)(3) public charity required to act in the public interest and like government regulation, USGBC must respect due process rights of interested and affected parties, which is the required market norm for private, voluntary standard setting organizations like USGBC.

However, USGBC has declined to so act for the unilateral amendments covered in this Memorandum: healthy products, resilience, and SFI Wood.

The question of the public interest governing these amendments is very important including its critical effect on maintaining the economic and societal norms currently enjoyed by keeping dangerous climate change manageable in the near term through needed capital markets expenditures governed by green building standards.

It is important to recognize that the industries now controlling this US building standard are on the record opposing urgently needed substantial carbon pollution reductions.

The public interest is best served by an approach protecting due process and property rights of interested and affected parties, thus providing an opportunity to ensure resilience is successfully commercialized and can ameliorate the accelerating, systemic, and unprecedented damages to society.

By not adhering to this public interest principle, the non-democratic, nonconsensus unilateral amendments undermine the fabric of society and the law and should be corrected immediately before causing irreparable harm.

8. Non-Democratic, Nonconsensus Unilateral Amendments Violated Government and Other Interested & Affected Parties' Due Process Rights.

There are three substantive, non-democratic, nonconsensus, unilateral LEED amendments that were issued in 2015 and 2016: Supply chain optimization, resilience, and Sustainable Forestry Initiative (SFI) Wood.

BACKGROUND: Four Industries Filed Confidential Appeals Against USGBC LEED V4 For Its Failure to be a Consensus Standard, its Anticompetitive Effect and Due Process Violations. Then After Forcing Written Secret Settlements with USGBC, Industry Helped USGBC Unilaterally Issue Weakened, Non-Democratic, Nonconsensus Standard Amendments Violating Due Process. As a result of a well funded industry Campaign, the Federal Government adopted a competing consensus standard to LEED, and LEED placed these industries in leadership roles in writing unilateral non-democratic, nonconsensus new LEED credit amendments as publicly announced by USGBC and the chemical industry (*U.S. Green Building Council and the American Chemistry Council to Work Together to Advance LEED*, American Chemistry Council Press Release, Aug. 27, 2014).

Industry representatives documented the secret appeals and subsequent secret settlements:

"On August 1, 2013, the American Chemistry Council (ACC), American High-Performance Building Coalition, The Vinyl Institute, and Resilient Floor Covering Institute (RFCI) filed appeals challenging USGBC's issuance of MR Credit 4 Option 2. The RFCI appeal is based on: ... (2) the credit not being developed pursuant to consensus-based decision-making using transparency and a balance of interests procedures. ...

On August 27, 2014, USGBC and ACC announced a new initiative. In particular, USGBC agreed to establish a Working Group to review and evaluate the technical basis and marketing feasibility for Options 1, 2, and 3 of MR Credit 4, and ACC agreed to suspend its appeal of LEED V4. On August 29, 2014, Mahesh Ramianujam, USGBC COO, by telephone conference and email, asked ... if RFCI would accept the same agreement. ...

Recommendation: *RFCI accept the attached letter from USGBC ... to suspend its appeal of LEED V4" (Venable LLP recommendation for the RFCI Board of Directors Meeting – Oct. 2014).*

* * *

"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, and that the risk of anticompetitive behavior is inherent in the development of private sector standards" Wood Industry Representatives' Appeal of LEED V4 (Aug. 1, 2013) concluding that LEED V4 lack of consensus process violates antitrust.

These lengthy appeals have not been publicly released by USGBC, but key USGBC Members have been critical of the new chemical industry leadership role in LEED (*Truce or Surrender at USGBC*, Healthy Building Network's (HBN) *Healthy Building News* (Sept. 3, 2014):

"In an interview with [citation] a USGBC spokesperson identified a "supply chain optimization working group" as the heart of the new program [with the chemical industry]. The supply chain optimization working group is not a new initiative, however. It was announced previously in Spring 2013 in a published call for working group members [1], and has been under discussion since the USGBC's last minute insertion of the "supply chain optimization" credit pathway in LEED v.4 at the behest of the chemical industry. [2] The working group never achieved liftoff, it appears, because the ACC [American Chemistry Council] left the table to wage its war on LEED.

According to Environmental Building News, what is new is that the ACC has returned with the prediction that "risk assessment" will now receive "greater consideration throughout USGBC's process." If so, the result will be unequivocally negative for LEED, which currently favors "hazard-based" approaches to reducing unhealthy chemicals in the built environment.

To understand what will be lost if the ACC risk-assessment paradigm is embedded in LEED, one does not need to become expert on the finer distinctions between risk-based and hazard-based approaches. Just consider formaldehyde [a known carcinogen according to the International Agency for Research on Cancer].

LEED's most transformative material credit to date used a hazard-based approach to encourage the use of no added formaldehyde products. [3] This credit incentivized green chemistry research, spurred the creation of new businesses, and gave established manufacturers a means to differentiate their products from overseas competition. Most importantly, it is driving dramatically reduced formaldehyde emissions across the board: for building occupants, construction workers, manufacturing workers and the communities where engineered wood products are made."

Further, the prior aggressive healthy products LEED campaign to reduce building materials' toxicity publicly embraced in the Greenbuild presentation by USGBC's CEO, and funded by a \$3 million Google grant to USGBC before the Healthy Building Network (HBN) detailed "surrender," has been set aside and marginalized by the new partnership with the chemical industry (U.S. Green Building Council Announces Grant from Google to Catalyze Transformation of Building Materials Industry and Indoor Health, Nov. 14, 2012). USGBC praised the Google grant and USGBC's healthy product Campaign:

"Fostering awareness of the materials we put into our buildings is of paramount importance, since many materials can link to a host of environmental and health issues. Working with Google enables us to broaden our efforts in the materials industry as we prepare for the next version of the LEED green building program, LEED v4. This updated rating system will paint a more complete picture of materials and products, enabling project teams to make more informed decisions." (Id.).

The grant will focus on three areas that will spur the creation of healthier indoor environments and encourage market transformation in the building materials industry: supporting research on building materials and health, developing new transparency tools and engaging stakeholders from across the industry.

Improving the indoor environment, increasing materials transparency and advancing the understanding of materials' impact on health are critical targets for the LEED program as it continues to evolve." (Id.)

Greenbuild is USGBC's annual conference of about 25,000 professionals.

In contrast to USGBC's preceding Nov. 14, 2012 quoted public statements on advancing healthy products including through greater transparency, USGBC's top management 2014 private statements to the chemical industry were a 180° turnaround that moved away from transparency and hazard assessment (red lists) advancing public health protection, to protocols weakening public health protection:

"[T]o bring it back to Greenbuild, this year's conference marked a significant shift in the conversation around material ingredients.

While previous conversations have focused on red lists (3- 4 years ago) and transparency (2-3 years ago) as the most active lines of evolution, discussions about materials at Greenbuild 2014 really centered on trade-offs and optimization." USGBC top management presentation to the Vinyl Institute at 10-11 (Nov. 14, 2014).

This USGBC Vinyl Institute presentation is also illuminating by showing a USGBC commitment to the chemical industry, to now use an ANSI accredited consensus standard setting process:

“You may have heard about the agreement between ASHRAE, International Code Council (ICC), the American Institute of Architects (AIA), the Illuminating Engineering Society of North America (IES) and the U.S. Green Building Council (USGBC) to develop the International Green Construction Code (IgCC).

* * *

From a LEED perspective, our hope is that the result of the ANSI process used to develop IGCC will result in a broadly adoptable code and serve as the basis for many of the prerequisite requirements in LEED.” (Id. at 6-7).

Toxic Products Specification / “Supply Chain Optimization.” USGBC changed its LEED standard’s material credits, to resolve concerns of these industries over due process violations, but did so in a totally non-democratic, nonconsensus unilateral process, ironically with no due process, much worse than what industry complained of in their appeals. Not surprisingly, this did not prevent industry from launching comprehensive media Campaigns publicly embracing the procedurally flawed amendments.

This non-democratic, nonconsensus Standard Amendment was announced in 2014 and officially issued in 2016: <http://www.usgbc.org/articles/usgbc-and-american-chemistry-council-work-together-advance-lead>
<http://www.gbci.org/us-green-building-council-announces-lead-pilot-credit-building-material-human-hazard-and-exposure>

Resilience. With no prior public announcement, the LEED resilience standard was unilaterally issued in October 2015. It was not developed through a democratic consensus process, but through an appointed committee. No interested and affected parties were provided an opportunity to be heard. This included the National Resilience Standard (RELi) Consensus Committee Chairman who is a leading USGBC Member, a recognized national resilience expert, and provided a 90 minute briefing on RELi to USGBC resilience standard leaders who requested it, many months before the LEED resilience standard was announced.

The LEED and RELi Standards are at the links in the Appendix below.

RELi achieved two national democratic consensus votes of approval with no negative votes, in an American National Standards Institute Accredited Process, thus providing important due process and consensus protections to facilitate commercialization of resilience, including a democratic process providing notice and an opportunity to be heard to interested and affected parties. For example, see National Public Meeting Notice in Appendix 1 sent to over 7,000 interested and affected parties including USGBC, and announced in numerous trade publications as required by ANSI.

The LEED resilience pilot is a non-democratic, non-consensus standard, there was no notice and opportunity to be heard for affected and interested parties, and the standard, announced about one year after RELi Resilience Standard approval, is substantially similar to RELi. RELi is protected by copyright. The LEED resilience standard was simply issued by an appointed USGBC committee.

Federal policy discourages competing standards because they impair commerce, and for this reason for example, there is just one Federal Clean Water and Clean Air Act with similar State statutes that can be more stringent.

RELi Democratic Consensus Development and Approval. RELi was initially unanimously approved in a 30 day National Democratic Ballot Vote on September 7, 2009 as National

Consensus Green Building and Home Underwriting Standards after a National Public Meeting at JPMorgan's Wall Street Office, and a subsequent National Consensus Committee Meeting at Wells Fargo's Wall Street Office. USGBC participated in the JPMorgan meeting and obtained the draft copy of RELi. RELi development and approval was in an ANSI Accredited Standards Process.

RELi Resilience Amendments National Public Meeting for buildings, homes, and infrastructure was conducted on September 16, 2014 in Washington, DC at Perkins+Will. USGBC leaders were notified and many thousands of other interested and affected parties.

RELi Resilience Amendments were Unanimously Approved December 1, 2014 in a 30 day democratic consensus Ballot Vote of interested and affected parties with no negative votes.

RELi Developed and Launched its Education Program Critical to Commercializing Resilience especially in this highly confused resilience market. It was launched through Resilient Buildings Workshops in May 2015 with the Minnesota Pollution Control Agency and Minnesota Department of Industry and Labor. Many outreach RELi education events were also conducted including in 2015 with the American Institute of Architects Washington DC Chapter, before several hundred corporate building owners in 2015 in the Twin Cities, and at the American Institute of Architect's (AIA) May 2016 Annual Conference in Philadelphia.

The RELi National Consensus Committee Chairman delivered a presentation at the October 16, 2015 Resilience Summit hosted by AIA at the National Building Museum (AIA, *Reframing Resilience, Proceedings of the AIA 2015 Resilience Summit*).

LEED Resilience Standard Leaders Unique Access to RELi in August 2015. LEED resilience standard committee chairman and an additional resilience committee leader requested and conducted a conference call with RELi Resilience National Consensus Committee Chairman on August 13, 2015. The stated purpose of the call by these LEED leaders in a communication to RELi leaders, was for LEED resilience standard leaders to understand the nature of and talk about "*coordination*" with RELi. RELi Action List and Credits were sent to the LEED leaders and questions about RELi were answered in a roughly 90 minute call. In an August 3, 2015 email to the RELi Standard Chairman, the LEED resilience standard chairman and another leader wrote:

"[W]e were excited to learn recently about your RELi Action List. Congrats on that effort. I'm writing to let you know that Alex Wilson and I are part of a core team working on a draft LEED Resilient Design Pilot credit suite. We'd love to have a chance to talk with you about RELi, its goals and status, and talk about potential coordination of these efforts."

The "*coordination*" referred to in this email never occurred. There was no further communication between the parties, and none with the public before the LEED non-democratic, nonconsensus resilience standard was unilaterally issued in October 2015.

LEED resilience standard Issuance in October 2015 With No Opportunity for Due Process for Interested and Affected Parties. LEED representatives were given the opportunity to participate in RELi, whereas, interested and affected parties were not given an opportunity to participate in the LEED resilience standard, which was developed and issued completely inconsistent with ANSI Essential Democratic Due Process Requirements.

SFI Wood. Similarly with no prior public announcement, the unilateral SFI, non-democratic, nonconsensus amendment with no voting was issued in April 2016: <http://www.usgbc.org/articles/usgbc-announces-new-leed-pilot-acp-designed-help-eliminate-irresponsibly-sourced-materials%E2%80%94>

Numerous objections to this amendment were filed with USGBC by leading national environmental groups: <http://mts.sustainableproducts.com/SFI>

With wood industry support, on April 5, 2016 USGBC announced that the SFI wood standard that the environmental community (ENGOS) has opposed for 15 years as greenwash, was approved in LEED. Eight leading ENGOS wrote to Defendant about this unilateral, non-democratic, nonconsensus change in LEED:

"[I]n 2010, a proposed re-write of the certified wood policy that would have created a pathway for the inclusion of SFI in LEED failed to obtain sufficient support from the USGBC membership.

Given the history, it's deeply troubling that the new acp accepting SFI appears to have been developed and pushed through by USGBC upper management without any meaningful consultation of external stakeholders (e.g. sustainable design leaders, experts in forest legality, environmental groups) – with the possible exception of the logging industry and its affiliates. (Does the US Green Building Council Consider this Responsible Forest Management? [showing photo of SFI clearcut on steep slopes] April 2016 letter to the USGBC Board.)

These groups are the Sierra Club, National Wildlife Federation, Natural Resources Defense Council, Stand / Forest Ethics, Greenpeace, Rainforest Action Network, Healthy Building Network, Dogwood Alliance.

In LEED 1.0 in effect from 1997 to 2007 in a unanimous national democratic consensus vote consistent with ANSI, the Forest Stewardship Council (FSC) Wood Standard was approved as part of LEED prior to SFI Standard development.

In the 2012 USGBC vote of thousands of Members, the SFI Standard was rejected.

Similarly, SFI was also rejected in the LEED Sustainable Product ANSI Accredited Standard Credit in a national consensus vote of approval in 2006. Weyerhaeuser was the sole negative vote and the National Consensus Committee ruled the negative vote nonpersuasive since SFI was determined not to protect climate. Weyerhaeuser opted to defend its negative vote before the Committee and the Committee unanimously affirmed its nonpersuasive ruling. Weyerhaeuser appealed and the appeal went into the dispute resolution process, however, Weyerhaeuser dropped the appeal, the appeal was dismissed with prejudice, and the Standard was unanimously approved without SFI, and with the FSC Wood Standard as a prerequisite.

Environmental Group Reports document likely Lacey Act strict criminal liability illegal logging violations from unilateral LEED non-democratic, nonconsensus standard amendment with no due process, apparently as a result of the secret settlement agreement:

<http://mts.sustainableproducts.com/SFI>. Lacey Act enforcement is led by

DOJ: <https://www.justice.gov/opa/pr/lumber-liquidators-inc-sentenced-illegal-importation-hardwood-and-related-environmental>

These Three Unilateral Non-Democratic, Nonconsensus Amendments to LEED are Standards Even Though They are Labeled as “pilots,” and meet OMB Circular A-119 definition of a “Standard:”

“2. What is a Standard?

a. The term “standard,” or “technical standard,” (hereinafter “standard”) as cited in the NTTAA, includes all of the following:

- (i) common and repeated use of rules, conditions, guidelines or characteristics for products or related processes and production methods, and related management systems practices;*
- (ii) the definition of terms; classification of components; delineation of procedures; specification of dimensions, materials, performance, designs, or operations; measurement of quality and quantity in describing materials, processes, products, systems, services, or practices; test methods and sampling procedures; formats for information and communication exchange; or descriptions of fit and measurements of size or strength; and*
- (iii) terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process, or production method.” (Id. Revised OMB Circular A-119, Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities at 15 (Jan 22, 2016).*

These LEED non-democratic, nonconsensus “pilot” standard amendments are similar to the former ANSI Draft Standards for Trial Use option that was terminated in response to numerous public inquiries and comments, since it was deemed to violate due process.

9. Possible Simple & Effective Solution

Possible preferred outcome would be to have the unilateral non-democratic, nonconsensus amendments voluntarily rescinded and cause the reinstatement of required due process protections. It is believed that transparency in the public release of the secret agreements is abhorrent to the standards developer since the non-democratic, nonconsensus unilateral amendments with no required due process are controversial, are reported by national environmental groups to adversely impact global public health and environment, and the public does not know the secret agreements are causing the amendments. Thus, a request for these agreements and a meeting is very much in the public interest, and is expected to have this positive outcome.

APPENDICES

1. **RELI September 16, 2014 National Public Meeting Flyer Sent to 7,000 Interested & Affected Parties and Published by Leading Trade Publications as Required by MTS' American National Standards Institute Accredited Consensus Process**

Underwriting for Green + Resilient Buildings, Homes & Infrastructure Bonds 

Call for Public Comments + Request for Your Expertise

We are seeking written and in-person comments for the Resilient Infrastructure Underwriting Standard Amendments and Green + Resilient Underwriting Checklist. More information on the review and comment process is available at: <http://mts.sustainableproducts.com/resiliency>

Sequoias are a good example of resiliency, withstanding storms, fire, drought, and disease—living over 3000 years.

The National Consensus Green Property Underwriting Standards are being amended to include Resiliency. Along with carbon mitigation and reduction, they will now include climate adaptation + infrastructure for communities.

A National Public Meeting for interested and affected parties is being held 9am-Noon on September 16

at Perkins + Will
(located in the World Wildlife Fund Headquarters)
1250 24th Street NW, Suite 800,
Washington, DC 20037
More info: <http://mts.sustainableproducts.com/resiliency>

What are the benefits of Consensus-based Underwriting Standards? What is the need?
Green Properties are a \$450B/yr. US industry with explosive growth. The Consensus-based Underwriting Standards' Green Value Score covers homes, buildings, community infrastructure, & manufacturing. They identify important Green + Resilient property attributes that increase economic value and mobilize funding for sustainability and adaptation at multiple scales. The Standards are being used for Green Property Bonds being issued in 2014 and Green + Resilient Bonds in 2015. The standards also support higher credit ratings for cities by reducing cost and risk through sustainability + resiliency. They cover 90% of global economic activity throughout the supply chain.

Key Resiliency Attributes for Property, Infrastructure + Communities:
Reduced Economic Risk to Property Value from exposure to acute Natural Disasters, Climate Change + Social Stress

- Extreme weather, rain, drought, wildfire, earthquakes, sea level rise, terrorism + more

Increased Property Value + Recognition through Sustainability, Ecological Well-being + Long-term Resiliency

- Energy & water efficiency, renewable power, improved indoor air, commissioning, proximity to transit, productivity, integrative process
- Human + Ecological Health, vitality, diversity + productivity, community connectivity, local & regional economic vitality + more

Underwriting Standards are used to raise capital for debt + equity, including bonds. Consensus standards are developed through a national vote of approval in a democratic process, and are required by regulators and rating agencies to reduce legal, technical, political and business risk and uncertainty.



2. **RELi National Consensus Standards:** <http://mts.sustainableproducts.com/RELi>
 - RELi Resilience Action List (amendment)
 - RELi Green + Resilient Building & Homes Standard (amendment)
 - RELi Green + Resilient Infrastructure Standard (amendment)
 - RELi Green Building & Homes Underwriting Standards
 - RELi Sustainable Manufacturing Underwriting Standard
3. **LEED nonconsensus resilience standard:** <http://mts.sustainableproducts.com/USGBC>

4. **\$70 Trillion in Investor Assets are Available for Climate**

\$70 Trillion in Resilience Financing is Available for Accelerating Systemic Damages

WE HAVE VERY EXPENSIVE & RISKY FINANCING CHALLENGES

Near Term US Resilience Costs are Most Expensive in History in many, many \$ trillions, e.g., published Miami Beach resilience engineering costs are ~ \$1 trillion, with similar costs throughout South Florida and globally.

S&P Announced Planned Climate Credit Rating Downgrades required by law to warn investors, due to well-documented accelerating systemic damages in all market segments that can trigger contagion / a permanent financial crisis, and according to the Defense Department, unacceptable national security risks.

TIME IS OF THE ESSENCE TO ACT

It is well-documented by State of California, IPCC Scientists, NASA, JPMorgan, Leading Economists led by Dr. Gary Yohe, IPCC, Vice Chairman, US Climate Assessment Report, & former Republican Treasury Secretary Hank Paulson, that a **NEAR TERM \$2 trillion / 18 gigaton carbon pollution reduction is required to:**

- Stop dangerous climate change from going out of control
- Allow resilience financing to be manageable and thus feasible. For this reason, the national consensus resilience underwriting standard requires both carbon pollution reductions + adaptation.

OVER \$70 TRILLION IN PRIVATE SECTOR CAPITAL IS AVAILABLE NOW

It's well-documented that:

- **investors with over \$70 trillion in assets want to buy green + resilient bonds**, causing all green bonds to sell out 3x + with cheaper capital, more proceeds, highly competitive pricing & yields, and a \$1.5 trillion / yr. industry including underlying assets.
- **Higher-rated Green + Resilient Building and Home Bonds are a solution with higher credit ratings, added financial value, reduced risk, and unique very rapid scalability that are a well documented, peer-reviewed business case released at the NYSE that can easily be issued now to secure:**
 - Needed near term \$2 trillion in carbon pollution reductions
 - Needed near term \$ multi-trillion costs of resilience
 - A \$ multi-trillion private sector economic stimulus
 - Added substantial economic value since these are the most valuable, least risky properties based on 10 yrs. of statistically valid peer-reviewed data.