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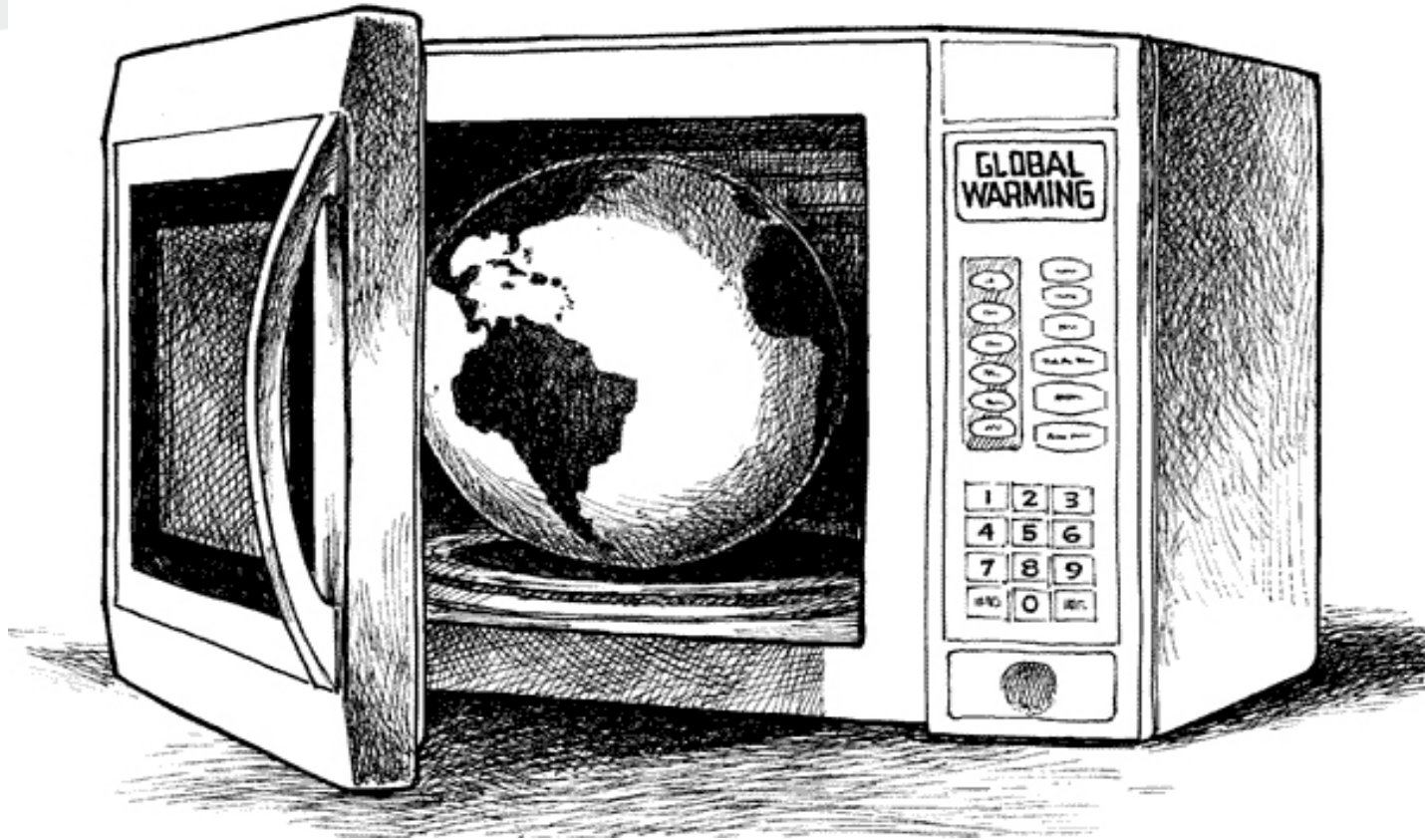
GREEN BUILDING LEGISLATION

“LEED™” ing The Construction Industry to the Promised Land
or Down the Primrose Path

2008 National Bond Claims Association Seminar

Austin, Texas

BillDay The Commercial Appeal
For Global Warming Solutions



"Brown Out"

- Last two decades were warmest in 400 years;
11 of last 12 years were warmest since 1850
- Arctic with ice-free summer before 2040;
Glacier National Park down from 150
glaciers in 1910 to 27 today
- Sea levels projected to rise up to 23" by 2100;
imperiling 100 million globally, and swamping
Louisiana and Florida
- One Million species face extinction

➤ *National Geographic News, Global Warming Fast Facts, 6/14/07*

Construction's "Brown" Footprint

- Buildings represent 39% of U.S. primary energy use; coincidentally, also account for 39% of all CO₂ emissions;
- Buildings represent 70% of U.S. electricity consumption;
- Buildings use 12.2% of all potable water in U.S.;
- Construction annually consumes 40% of all raw materials globally;
- Construction generates 136 million tons of building-related and demolition debris annually.

➤ USGBC, "Green Building By The Numbers," 9/08

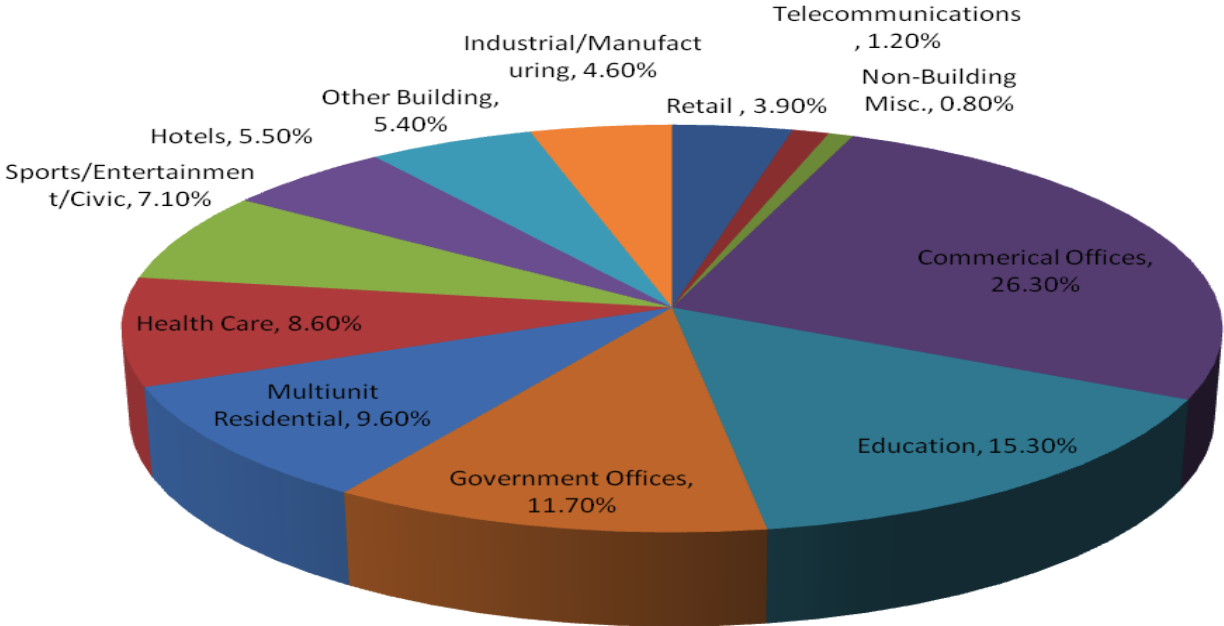
Economic “Green” Machine

- Construction = 8-10% of Global GDP; 14.2% of \$10 trillion U.S. GDP;
- “Green” projects will account for 10% of all new construction by as early as 2010;
- Value of green construction is projected to increase to \$60 billion by 2010;
- 20% of corporate entities will be engaged in green operations 60% of the time by 2010;
- Green building products market is projected to be worth an estimated \$30-40 billion annually by 2010.

➤ *USGBC, “Green Building By The Numbers,” 9/08*

How Green Are the Markets?

(Total 2007 Revenue= \$22.77 Billion)



➤ ENR, *The Top Green Contractors*, 9/22/08



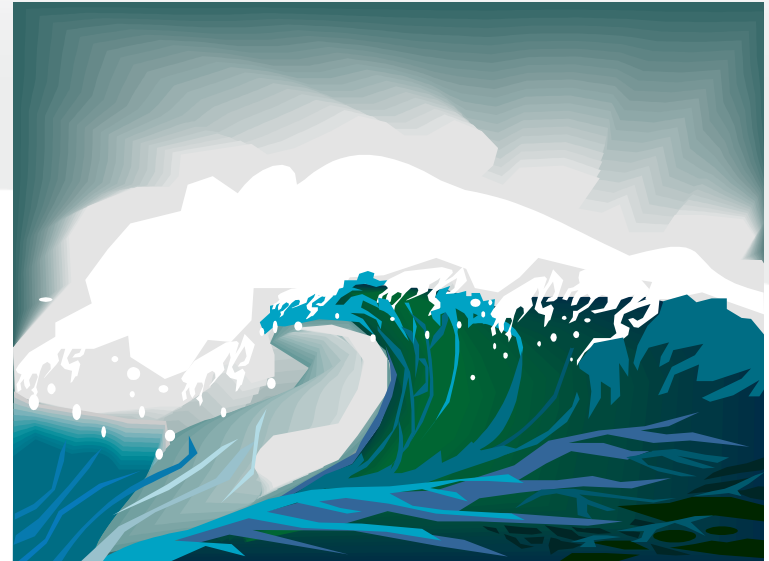
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The “Green” Tide

- 12 federal agencies
- 44 states/31 state governments
- 163 local government entities
- 15 public school systems/
39 colleges/universities
- 50 states/69 countries



Becoming “Evergreen”

- Survey of existing green legislation;
- Sustainability requirements in general, e.g., LEED™ certification criteria;
- Risks/responsibilities placed upon project participants by green projects;
- Pre-project risk management on green projects; and
- “Default” investigation and loss containment on green projects.



Show Me the “Green” - Types of Legislation

- Incentive-Based:
 - Tax Credits = New York /Maryland
 - Rebates = North Carolina
- Mandatory:
 - California/Florida
- Streamlined Permitting
- Zoning Exceptions



Shades of “Green”

- U.S. Green Building Council’s “Leadership in Energy and Environmental Design” (“LEED”)™ rating system

www.usgbc.org



- Green Building Initiatives “Green Globes™” rating system

www.thegbi.org





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The "LEED™"ing Pace

- Over 3.6 billion square feet of commercial building space involved with the LEED™ system
- \$464 million worth of construction registers with LEED™ every business day
- LEED™ projects currently exist in all 50 states and 69 different countries
- 10% of commercial construction starts will be "green" by 2010

➤ USGBC, "Green Building By The Numbers," 9/08



LEED'S REACH

A compilation of the number of certified and registered Leadership in Energy and Environmental Design projects in the United States as of Aug. 27, 2008. Certified projects are those that passed through the U.S. Green Building Council's certification process to achieve certified, silver, gold or platinum status. Registered projects are those that are at some stage in the certification process but have not yet been certified.

State	Certified	Registered
California	215	1,498
Pennsylvania	99	384
Washington	94	413
Oregon	89	264
Michigan	74	265
Massachusetts	72	289
Illinois	71	406
Colorado	65	333
Texas	64	604
New York	61	673
Georgia	57	320
Virginia	54	359
Arizona	44	226
Florida	38	612
Ohio	38	300
Wisconsin	37	163
North Carolina	36	298
New Jersey	33	183
Maryland	32	289
District of Columbia	31	219
Missouri	27	130
South Carolina	20	131
Maine	18	60
Minnesota	15	159
Utah	15	93
Arkansas	14	56
Iowa	14	91
Connecticut	13	97
New Hampshire	12	41
New Mexico	12	129
Nevada	12	108
Tennessee	12	111
Indiana	10	117
Vermont	10	47
Hawaii	9	66
Idaho	9	62
Kentucky	9	46
Kansas	8	52
Alabama	6	34
Montana	4	38
Nebraska	3	28
Oklahoma	3	32
Rhode Island	3	32
Wyoming	3	18
Alaska	2	28
Louisiana	2	46
Mississippi	2	43
Delaware	1	23
North Dakota	1	11
West Virginia	1	10
South Dakota	0	21

The "LEED™"ing Pace, con't

	New <u>Constr.</u>	Comm. <u>Int.</u>	Existing <u>Bldgs</u>	Core/ <u>Shell</u>	Neighborhood <u>Dvlpmt</u>	<u>Schools</u>	<u>Retail</u>	<u>Res.</u>
Reg.	8088	1390	1775	1763	234	367	94	12,951
Cert.	1212	294	102	91			6	892

➤ USGBC, "Green Building By The Numbers," 9/08

“LEED™”ing Examples

- New Construction and Major Renovation
- Existing Buildings
- Commercial Interiors
- Core & Shell
- Schools and Homes
- Pilots = Neighborhood Development, Retail and Healthcare



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Point “LEED™”ers

- ❑ Projects earn LEED™ points for satisfying specific green building criteria,
- ❑ Six credit categories:
 - Sustainable Sites – 14 pts;
 - Water Efficiency – 5 pts;
 - Energy & Atmosphere – 17 pts;
 - Materials & Resources – 13 pts;
 - Indoor Environmental Quality – 15 pts; and
 - Innovation in Design – 5 pts.

➤ *LEED, New Construction, Registered Project Checklist*



LEED for New Construction v 2.2 Registered Project Checklist

Project Name: _____

Project Address: _____

Yes	?	No	
			Project Totals (Pre-Certification Estimates) 69 Points
Certified: 26-32 points Silver: 33-38 points Gold: 39-51 points Platinum: 52-69 points			

Yes	?	No	
			Sustainable Sites 14 Points
Yes			Prereq 1 Construction Activity Pollution Prevention Required
			Credit 1 Site Selection 1
			Credit 2 Development Density & Community Connectivity 1
			Credit 3 Brownfield Redevelopment 1
			Credit 4.1 Alternative Transportation , Public Transportation 1
			Credit 4.2 Alternative Transportation , Bicycle Storage & Changing Rooms 1
			Credit 4.3 Alternative Transportation , Low-Emitting & Fuel Efficient Vehicles 1
			Credit 4.4 Alternative Transportation , Parking Capacity 1
			Credit 5.1 Site Development , Protect or Restore Habitat 1
			Credit 5.2 Site Development , Maximize Open Space 1
			Credit 6.1 Stormwater Design , Quantity Control 1
			Credit 6.2 Stormwater Design , Quality Control 1
			Credit 7.1 Heat Island Effect , Non-Roof 1
			Credit 7.2 Heat Island Effect , Roof 1
			Credit 8 Light Pollution Reduction 1

Yes	?	No	
			Water Efficiency 5 Points
			Credit 1.1 Water Efficient Landscaping , Reduce by 50% 1
			Credit 1.2 Water Efficient Landscaping , No Potable Use or No Irrigation 1
			Credit 2 Innovative Wastewater Technologies 1
			Credit 3.1 Water Use Reduction , 20% Reduction 1
			Credit 3.2 Water Use Reduction , 30% Reduction 1

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LEED for New Construction v 2.2 Registered Project Checklist

Yes	?	No	
			Energy & Atmosphere 17 Points
Yes			Prereq 1 Fundamental Commissioning of the Building Energy Systems Required
Yes			Prereq 1 Minimum Energy Performance Required
Yes			Prereq 1 Fundamental Refrigerant Management Required
*Note for EAc1: All LEED for New Construction projects registered after June 26, 2007 are required to achieve at least two (2) points.			
			Credit 1 Optimize Energy Performance 1 to 10
			Credit 1.1 10.5% New Buildings / 3.5% Existing Building Renovations 1
			Credit 1.2 14% New Buildings / 7% Existing Building Renovations 2
			Credit 1.3 17.5% New Buildings / 10.5% Existing Building Renovations 3
			Credit 1.4 21% New Buildings / 14% Existing Building Renovations 4
			Credit 1.5 24.5% New Buildings / 17.5% Existing Building Renovations 5
			Credit 1.6 28% New Buildings / 21% Existing Building Renovations 6
			Credit 1.7 31.5% New Buildings / 24.5% Existing Building Renovations 7
			Credit 1.8 35% New Buildings / 28% Existing Building Renovations 8
			Credit 1.9 38.5% New Buildings / 31.5% Existing Building Renovations 9
			Credit 1.10 42% New Buildings / 35% Existing Building Renovations 10
			Credit 2 On-Site Renewable Energy 1 to 3
			Credit 2.1 2.5% Renewable Energy 1
			Credit 2.2 7.5% Renewable Energy 2
			Credit 2.3 12.5% Renewable Energy 3
			Credit 3 Enhanced Commissioning 1
			Credit 4 Enhanced Refrigerant Management 1
			Credit 5 Measurement & Verification 1
			Credit 6 Green Power 1

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LEED for New Construction v 2.2 Registered Project Checklist

Yes	?	No	Materials & Resources		13 Points
Yes			Prereq 1	Storage & Collection of Recyclables	Required
			Credit 1.1	Building Reuse , Maintain 75% of Existing Walls, Floors & Roof	1
			Credit 1.2	Building Reuse , Maintain 95% of Existing Walls, Floors & Roof	1
			Credit 1.3	Building Reuse , Maintain 50% of Interior Non-Structural Elements	1
			Credit 2.1	Construction Waste Management , Divert 50% from Disposal	1
			Credit 2.2	Construction Waste Management , Divert 75% from Disposal	1
			Credit 3.1	Materials Reuse , 5%	1
			Credit 3.2	Materials Reuse , 10%	1
			Credit 4.1	Recycled Content , 10% (post-consumer + 1/2 pre-consumer)	1
			Credit 4.2	Recycled Content , 20% (post-consumer + 1/2 pre-consumer)	1
			Credit 5.1	Regional Materials , 10% Extracted, Processed & Manufactured	1
			Credit 5.2	Regional Materials , 20% Extracted, Processed & Manufactured	1
			Credit 6	Rapidly Renewable Materials	1
			Credit 7	Certified Wood	1

Yes	?	No	Indoor Environmental Quality		15 Points
Yes			Prereq 1	Minimum IAQ Performance	Required
Yes			Prereq 2	Environmental Tobacco Smoke (ETS) Control	Required
			Credit 1	Outdoor Air Delivery Monitoring	1
			Credit 2	Increased Ventilation	1
			Credit 3.1	Construction IAQ Management Plan , During Construction	1
			Credit 3.2	Construction IAQ Management Plan , Before Occupancy	1
			Credit 4.1	Low-Emitting Materials , Adhesives & Sealants	1
			Credit 4.2	Low-Emitting Materials , Paints & Coatings	1
			Credit 4.3	Low-Emitting Materials , Carpet Systems	1
			Credit 4.4	Low-Emitting Materials , Composite Wood & Agrifiber Products	1
			Credit 5	Indoor Chemical & Pollutant Source Control	1
			Credit 6.1	Controllability of Systems , Lighting	1
			Credit 6.2	Controllability of Systems , Thermal Comfort	1
			Credit 7.1	Thermal Comfort , Design	1
			Credit 7.2	Thermal Comfort , Verification	1
			Credit 8.1	Daylight & Views , Daylight 75% of Spaces	1
			Credit 8.2	Daylight & Views , Views for 90% of Spaces	1



LEED for New Construction v 2.2 Registered Project Checklist

Yes	?	No	Innovation & Design Process		5 Points
			Credit 1.1	Innovation in Design : Provide Specific Title	1
			Credit 1.2	Innovation in Design : Provide Specific Title	1
			Credit 1.3	Innovation in Design : Provide Specific Title	1
			Credit 1.4	Innovation in Design : Provide Specific Title	1
			Credit 2	LEED® Accredited Professional	1

"Green Globes™" Rating Protocol

Assessment Category	Points	Description
Energy	360	Performance, efficiency, demand reduction, energy efficient features, use of renewable energy, transportation
Indoor Environment	200	Ventilation, lighting, thermal & acoustical comfort, ventilation system
Site	115	Ecological impact, development area, watershed features, enhancement
Resources	100	Low impact materials (LCA), re-use, demolition, durability, recycling
Water	100	Performance, conservation, treatment
Emissions& Effluents	75	Air emissions (boilers), ozone depletion, water & sewer protection, pollution controls
Project Management	50	Design process, environmental purchasing, commissioning
Total	1000	

Green Building Initiative, New Construction Tool, 10/08

Point “LEED™”ers, con’t





69 Maximum Points:

- Certified, 26-32;
- Silver, 33-38;
- Gold, 39-51; and
- Platinum, 52-69



➤ *USGBC, “LEED™” Ratings for New Construction*

"Green Globes™" Certifications

Globes™ Ratings		
85-100%		Reserved for select building design and delivery processes which serve as national or world leaders in design and delivery focused on reducing environmental impacts.
70-84%		Demonstrates leadership in design and delivery of energy and environmentally sensitive buildings and a commitment to continual improvement.
55-69%		Demonstrates excellent progress in reducing environmental impacts by applying best practices in energy and environmental design and delivery.
35-54%		Demonstrates movement beyond awareness and a commitment to good energy and environmental design and delivery practices.

➤ *Green Building Initiative, New Construction Tool, 10/08*

LEED changes

The U.S. Green Building Council plans to enact a new version of its Leadership in Energy and Environmental Design certification system next year. While not a major overhaul of the current LEED 2.2 system, the new version, LEED 2009, increases emphasis on conserving energy and water and lets different geographic regions offer different credits. LEED has rating systems for new construction, core and shell, commercial interiors, existing buildings, schools, retail, health care and homes. Here's a sampling comparing 2.2's new construction standards with those of 2009.

	LEED 2.2	LEED 2009
Points	69 total points; certified 26-32, silver 33-38, gold 39-51; platinum 52-69	110 total points; certified 40-49, silver 50-59, gold 60-79, platinum 80-110
Sustainable sites	Two available points	11 available points and increases emphasis on easily accessible urban projects
Water conservation	20 percent reduction in water use earned one point	20 percent reduction is required; extra points for 30 percent and 40 percent reductions
Bonus credits	Not available	10 bonus credits for features important to specific regions are available; credits can be targeted at ZIP codes
Weighting	The old system divided credits over 69 points and arguably was not based on scientific data.	The new system is based on a 100-point scale with greater emphasis on energy use (35 percent of available points), water use (10 percent) and transportation (17 percent). There is less emphasis on indoor environmental quality (from 23 percent of all points to 15 percent) and waste management.
Shared points	There are no shared credits across all systems.	Ten points are shared by all systems — five points for innovation, four points for regionalization and one point for using a LEED accredited professional.
LEED online	Online documentation is available.	A significant upgrade to the online software is planned with the new certification system.
Energy savings	All LEED projects required to reduce energy use to 14 percent less than a 1999 national standard	All LEED projects required to reduce energy use to 30 percent less than the American Society of Heating, Refrigerating and Air-Conditioning Engineers' 1999 standard



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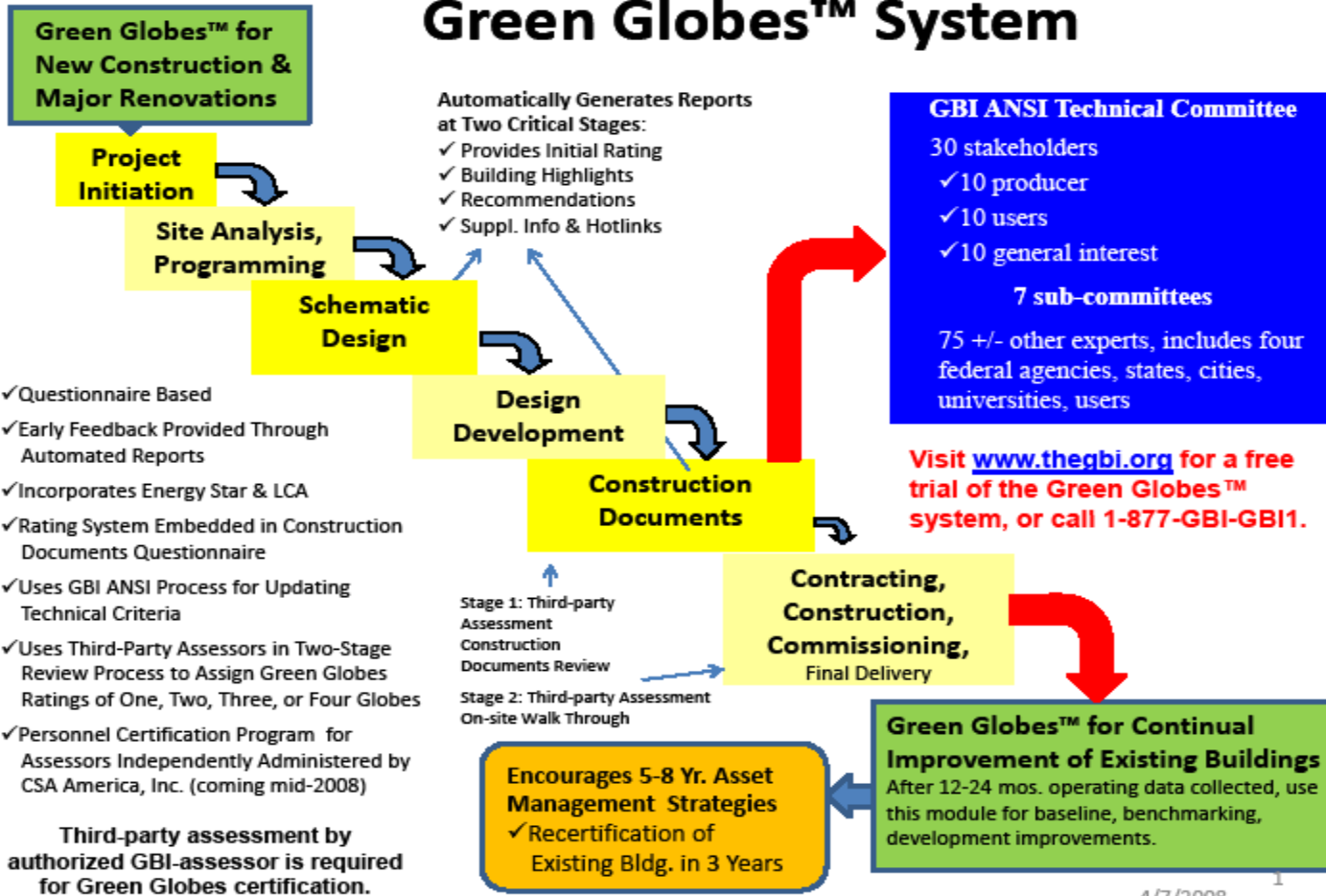


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Following the “LEED™”

- Registration via www.usgbc.org;
- Identification and implementation of operational improvements and equipment upgrades necessary to obtain certification;
- Preparation of the application by documenting building performance data and operational procedures;
- Submission of certification application to the USGBC for review;
- Receipt of final LEED™ certification from the USGBC.

Green Globes™ System



➤ Green Building Initiative, New Construction Process, 10/08

Grass Always “Greener” On Other Side.....

Owners/Developers

- Loss of tax or other financial incentive benefits due to certification, documentation, performance, schedule or other glitches;
- Failure of promised efficiency performance due to exaggerated preconstruction representations or construction, design and/or product defects;
- Increased soft and hard costs at front-end of project without corresponding reduction of operational and maintenance costs upon completion; and
- Loss of revenue or increased liability exposure due to failure of project to perform as warranted or frustration of tenant and/or investor expectations.

Contractors/Subcontractors

- Increased exposure to contractual breach claims for requirements not wholly within their control (e.g., design defects, commissioning requirements and product delays);
- Increased exposure to defective workmanship/ product defect through failure to achieve designed efficiency or performance;
- Increased exposure to warranty and repair issues caused by unproven systems and products; and
- Increased insurance, bonding and administrative costs produced by increased loss exposure and/or burdensome contract administration requirements.

Design Professionals

- Potential increased standard of care;
- Increased exposure to design defects claims if the project fails to obtain certification or meet to anticipated performance requirements;
- Tail liability for failures in the project's performance; and
- Increased insurance costs and out-of-pocket liability exposure arising out of a failed performance or missed requirements.

McHUMOR.com by T. McCracken



“I want to talk to my liability lawyer about suing the company that built this wall.”

Contractual “Gray” Areas

- Performance Time
- Liquidated/Consequential Damages
- Termination for Default
- Warranties



“Green Penciling”: Pre-Project Risk Management

CONTRACT ANALYSIS/NEGOTIATION

Risk “Red” Flags

- Novel system designs, unproven means and/or untested materials;
- Design errors and/or omissions;
- Increased contract administration and documentation requirements necessary to satisfy and achieve LEED™ or Green Globes™ certification;
- Delays caused by long lead times/excessive demand for “green” products, inspection, scheduling and/or commissioning protocols;
- Implied or express warranties on LEED™ or Green Globes™ certification levels or performance efficiency criteria;
- Broad indemnity liability for third-party claims arising from unintended consequences of novel systems or design errors, e.g., mold contamination and tenant expense claims.

“Green Penciling”: Pre-Project Risk Management, con’t

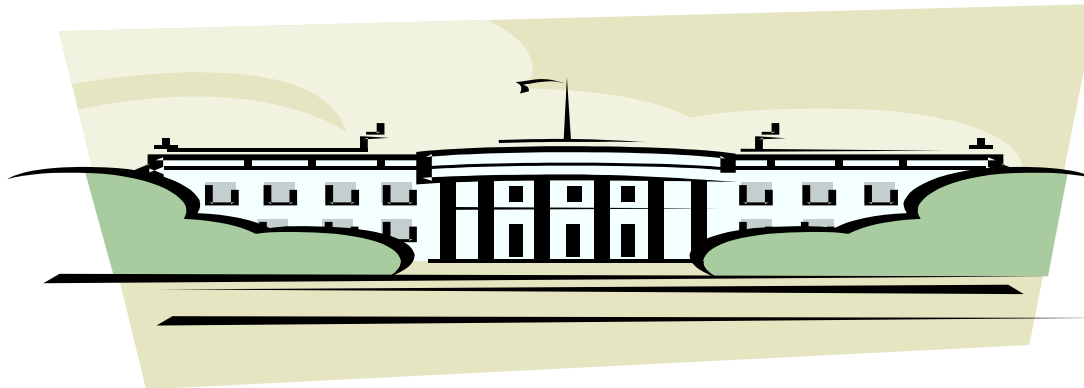
PROJECT DUE DILLIGENCE

- “Pre-qualifying” the principal;
- Review of the owner’s and designer’s experience on green projects;
- Feasibility of specified designs and the availability of specified products;
- Consultant/Attorney?

“Green Penciling”: Pre-Project Management, con’t

REVIEW APPLICABLE LEGISLATION/CERTIFICATION REQUIREMENTS

- Washington D.C.’s recent enactment of its “Green Building Act of 2006”;
- “Compliance” bond in performance bond clothing





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“Green Washing”: Default Investigation/Loss Containment

GOOD FAITH

- Design/Performance Deficiencies
- Commissioning/Certification Delay
- Product Delays

SUBSTANTIAL PERFORMANCE

- Hostage to Commissioning
- Paper Pushing

“Green Washing:” Default Investigation/Risk Management

OWNER’S DESIGN DUTIES

- Implied warranty of design adequacy;
- Warranty of commercial availability of material;
- Implied duty of disclosure;
- Responsibility for latent design ambiguities
- “Means/Methods”

“Green Washing:” Default Investigation/Risk Management

CONTRACT ADMINISTRATION

- Commissioning/Certification
- Project Documentation
- Definitive Responsibilities/Incremental Submissions

ECONOMIC WASTE

- Complexity
- “Close Is Good Enough”

CONSULTANTS

- LEED™ AP Professional

Resources

- LEED™ Initiatives in Governments & Schools
- LEED™ Rating System Manual
- ENR, "Top 100 Green Contractors," 9/22/08
- www.usgbc.org
 - Green Building Links
- www.thegbi.org
 - Eco Calculator
- www.buildinggreen.com
- www.greenbuildinglawupdate.com
- www.greenbuildingsnyc.com

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"Build it, and they will sue."