First in the Nation

California's Mandatory Green Building Standards

By Ian A. Stewart, William K. Enger and Gregory K. Lee

What will the CALGREEN Code mean for construction and design claims?

As green building requirements become more commonplace, everyone connected with the construction industry will feel the effects: insurers, owners, developers, architects, engineers, contractors, and even manufacturers and suppliers of green technology and products. Understanding emerging developments in green building is fast becoming a necessity for all of these groups.

In the absence of a uniform federal strategy on climate change, the states, led by California, are taking action. On January 12, 2010, Governor Arnold Schwarzenegger announced that the California Building Standards Commission unanimously adopted the first-in-the-nation, mandatory, green building standards, the CALGREEN Code. These mandatory building regulations will apply to all new construction in California including, but not limited to, all residential and commercial buildings. The CALGREEN Code will take effect on January 1, 2011, and will become the baseline for regulating green construction statewide. Other states and local governments have started to evaluate the CALGREEN model as they develop their own green construction standards.

Goals

Green building, which promotes environmentally responsible construction, could potentially transform the construction industry and construction's impact on the natural environment. Recently, the U.S. Green Building Council estimated that buildings in the United States are responsible for 39 percent of energy and 72 percent of electricity use and 35 percent of carbon dioxide (CO_2) emissions. "With this first-in-the nation mandatory green building standards code," Governor Schwarzenegger stated, "California continues to pave the way in energy efficiency and environmental protection. Today's action lays the foundation for the move to greener buildings constructed with environmentally



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advanced building practices that decrease waste, reduce energy use and conserve resources." The California Air Resources Board has estimated that the state's new mandatory provisions will reduce greenhouse gas emissions by three million metric tons in 2020. As the demand increases in the United States for construction that minimizes harm to our environment, green building will eventually become a way of life for us all.

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Requirements

Generally, the CALGREEN Code's requirements are divided into two chapters of mandatory measures—a residential chapter and a nonresidential chapter. These two chapters are further subdivided into a number of divisions, including: planning and design; energy efficiency; water efficiency and conservation; material conservation and resource efficiency; and environmental quality.

Each of the divisions establishes mandatory means and methods to achieve minimal environmental impact within that particular division. The planning and design division, for example, establishes methods for environmentally responsible site selection, building design, and development. The water efficiency and conservation division establishes means for conserving water that is used indoors, outdoors, and in wastewater conveyance. The material conservation and resource efficiency division establishes means for materials conservation and resource efficiency, including construction waste reduction and disposal and recycling requirements. The environmental quality division establishes means for reducing air contaminants that are odorous, irritating, or harmful. The energy efficiency division is unique in that, as with residential buildings, for example, the code does not establish minimum energy efficiency requirements beyond those required by the California Energy Commission.

The code's specific requirements under each of the divisions are varied and numerous, but are nevertheless relatively straightforward. Among other things, the code requires that every new building in California

- Reduce water consumption by 20 percent
- Divert 50 percent of construction waste from landfills
- Install low pollutant-emitting materials
- Install separate water meters for nonresidential buildings' indoor and outdoor water use
- Install moisture-sensing irrigation systems for large landscape projects, and
- Ensure mandatory inspections of energy systems for nonresidential buildings over 10,000 square feet to ensure that they work at maximum capacity and according to design efficiencies.

Notably, in addition to the mandatory regulations, the CALGREEN initiative also includes strong *voluntary* provisions designed to encourage local communities to take further actions considered "green."

For the time being, the CALGREEN Code applies only to "every newly constructed building or structure" in California. Excluded from the code are "additions, alterations or repairs." Of course, building codes are evolving documents. There are numerous "reserved" sections in the code that are clearly intended for new provisions that will expand the scope and strength of the building standards in the future. The state will undoubtedly adjust the code as new technologies, materials, and practices are developed, and as we discover that some provisions are unworkable. For example, California's seismic code has gone through numerous revisions with general industry acceptance.

Comparing CALGREEN Standards with Private Standards

As state and local governments outside California begin to evaluate the CALGREEN Code as a possible model for their own codes and regulations, the differences between CALGREEN and private, third-party, certification standards, such as the Leadership in Energy and Environmental Design (LEED) and ANSI's National Green Building Standard (NGBS), become important. These private, "point-based" standards have been incorporated in building codes by a number of other state and local governments.

The CALGREEN Code's standards were developed publicly and transparently. Conversely, point-based systems generally have been developed by private entities through membership-driven commentary and without public hearings. The incorporation of private standards into public building codes has resulted in constitutional, due process objections. Others have argued that incorporating private standards has removed power from state and local building inspectors and placed it in the hands of unregulated third parties.

State and local building departments will enforce the mandatory CALGREEN provisions using the preexisting enforcement infrastructure that currently enforces health, safety, fire, energy, and structural building codes in California. It is predicted, therefore, that verifying compliance with the CALGREEN Code through inspection will entail a relatively simple transition. Although some private standards have post-certification inspection provisions, such as the new version of LEED announced in June 2009, many others do not.

The commissioning and certifying process of a private standard can be costly. LEED certification for some buildings can cost as much as $30,000 to $50,000. CALGREEN Code compliance, while mandatory, will not require property owners to pay additional fees. Moreover, the instructional materials for the CALGREEN standards will be found in the existing state building code, while private programs can require builders and businesses to purchase additional educational materials during construction. Further, the CALGREEN system uses one code for all building types, regardless of intended occupancy, while third-party certification programs can use various point-rated systems and different sets of guidelines, which vary by building and occupancy type.

On passing state building inspection, property owners will have the ability to label their facilities as "CALGREEN compliant." A "CALGREEN compliant" building will be comparable to a current LEED

Silver rating. Opponents maintain that the new label will result in market confusion and "green washing," while others argue that the "CALGREEN compliant" label will inadvertently set a new ceiling for green building standards. In fact, the intent of the CALGREEN Code is to set a baseline standard for new construction, and local governments are encouraged to establish higher standards. Indeed, over 40 cities in California currently have green building ordinances.

The CALGREEN Code will likely pressure private certification programs to increase their standards; however, the new code should make private ratings, even those which increase standards, more easily achievable and cost effective than at present by first boosting demand for and then supply of green building techniques and materials.

Risks

Relatively few lawsuits have been reported to date arising from green construction. However, green building is still new. As state and local governments continue to enact green statutes and regulations and as green building projects proliferate, the number of disputes, claims, and lawsuits will rise.

The risks due to green building can vary greatly depending on a party's role. For owners and developers, high buyer expectations may lead to claims of fraud, breach of warranty, or even claims of unfair or deceptive trade practices when buildings marketed with green attributes fail to live up to expectations. Landlords, property managers, and real estate brokers and agents also need to be careful in describing the benefits of green buildings.

For design professionals, liability may result from misrepresentations in interactions with owners, or from failure to meet assurances regarding certification or certain attributes of a building's design, leading to allegations of breach of contract, breach of warranty, or fraud. Design professionals may face negligence actions alleging that buildings failed to meet certification or design standards due to design defects. Design professionals should be careful not to overstate experience with green building. They should also understand that they may be held to higher standards of care than in traditional projects when they become involved in green projects. Additionally, design professionals should carefully review construction contracts that may contain warranties and guarantees related to green certification or performance levels because contractually assumed liabilities are often excluded from professional liability insurance policies.

The risks that contractors and subcontractors face include breach of contract claims, breach of warranty claims, including implied warranty of fitness and suitability of construction materials, workmanship, and purpose, and torts, including fraud or negligence. These claims may result from failing to deliver promises in project contracts, as well as construction-related defects, such as improper installation or construction. They may also result from alleged misrepresentations regarding the origin or the nature of materials that contractors and subcontractors have supplied for projects. Using green products that have not been tested or proved reliable can result in specific claims related to product durability or reliability. Additionally, high demand and low supply of green products may result in lawsuits for delays against contractors. As with design professionals, others may hold contractors to higher standards of care than for traditional projects when working on green projects.

Minimizing Risks

Much of the risks of green building can be mitigated during the contracting process. A well-drafted contract will precisely define otherwise vague terms, including construction terms of art that may take on new meanings when applied to green building projects. A contract should also set forth the specifications and responsibility for certification, sustainability standards, and green products, as well as explicitly allocate the related risks, including identifying which parties will bear responsibility in the event of a failure or defect. A good contract should increase the parties' ability to identify and correct product defects or building technique errors early. Carefully conceived contract documents should also clarify and define the parties' expectations and obligations, serving as an essential risk management tool.

In particular, owners, contractors, and design professionals can mitigate risks through contracts with indemnification provisions, liquidated damages clauses, and waivers of consequential damages. For example, contractors can include clauses that cap potential exposure for various types of green damages, limit an owner's right to corrective work to that work necessary to achieve certification, or ensure that appropriate risk transfers to subcontractors.

New insurance products will likely enter the market as the demand for green building develops.

Ideally, contractors and design professionals should avoid guarantees related to green building certification. A contractor should only promise to construct a building in accordance with an approved design and with approved materials. Design professionals may want to limit an owner's right to make design changes during the project to prevent construction delays and unforeseen costs.

Another way that all parties can mitigate risks in green building is through insurance. Currently, policies do not commonly insure specifically against risks associated with using green products, design, or construction techniques. New insurance products will likely enter the market as the demand for green building develops. In the meantime, parties should seek relevant insurance exclusions, such as the common exclusion for warranties and guarantees assumed by design professionals.

As mentioned above, parties should pay careful attention to the way that green building designs and performance are described to shield themselves from misrepresentation, fraud, and other "green washing" claims. With green products or services, parties should only describe benefits that they can substantiate, stating them clearly. Do not overstate environmentally

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friendly qualifications or green attributes either expressly or implicitly.

Good construction supervision and management practices can also minimize risk through field inspections, testing, and manuals. It is important for all parties involved to focus on clearly communicating throughout the green building process. Disputes and lawsuits often develop because parties have unrealistic, unclear, or conflicting expectations. In short, the construction industry can manage the legal risks of green building in much the same was that it has always managed risk in the industry, using a combination of preexisting tools.

What's Next for CALGREEN?

The California Building Standards Commission CALGREEN Code implementation process will include stakeholder workshops, which began in March 2010, followed by technical review and public comment later in the year. The effective implementation date of the code is January 1, 2011.

The ultimate fate of the CALGREEN Code will depend on the attitude toward climate change in California. The recession has lessened many voters' appetites for expensive social programs, and California's budget deficit will exceed $20 billion in 2010. In addition, efforts are underway to introduce a state ballot initiative in November 2010 to suspend California's Global Warming Solutions Act, AB 32, which would likely preclude enforcement of the CALGREEN Code. The ballot initiative would "suspend air pollution control laws requiring major polluters to report and reduce greenhouse gas emissions that cause global warming until unemployment drops below specified level for full year." If the measure qualifies for the ballot, the California fall campaign could become the environmental battle of the year. The construction industry in California meanwhile waits to find out how fast change will arrive. FD