

Part III - Administrative, Procedural, and Miscellaneous

Brownfields Demonstration Program for Qualified Green Building and Sustainable Design Projects

Notice 2005-48

PURPOSE

This Notice solicits applications for designation of a project as a qualified green building and sustainable design project under section 142(l) of the Internal Revenue Code (the Code). This Notice also provides guidance on the requirements a project must meet in order to be eligible for designation as a qualified green building and sustainable design project. Applications must be submitted in accordance with this Notice.

INTRODUCTION

Section 701 of the American Jobs Creation Act of 2004, Pub. L. No. 108-357 (the Act) added sections 142(a)(14) and 142(l) to the Code. In general, sections 142(a)(14) and 142(l) authorize up to \$2,000,000,000 of tax-exempt private activity bonds to be issued by State or local governments for qualified green building and sustainable design projects. Section 142(l)(1) defines “qualified green building and sustainable design project” as any project meeting certain requirements, as described below, that is designated by the Secretary of the Treasury Department (the Treasury Secretary), after

consultation with the Administrator of the Environmental Protection Agency (the EPA Administrator), as a qualified green building and sustainable design project. With certain exceptions, sections 142(a)(14) and 142(l) apply to bonds issued after December 31, 2004, and before October 1, 2009.

BACKGROUND

Section 103(a) provides that, except as provided in section 103(b), gross income does not include interest on any State or local bond.

Section 103(b)(1) provides that the exclusion under section 103(a) does not apply to any private activity bond that is not a qualified bond (within the meaning of section 141).

Section 141(e) provides that the term “qualified bond” includes an exempt facility bond that meets certain requirements.

Section 142(a)(14) provides that the term “exempt facility bond” includes any bond issued as part of an issue 95 percent or more of the net proceeds of which are to be used to provide qualified green building and sustainable design projects.

Section 142(l)(1) defines “qualified green building and sustainable design project,” in general, as any project that is designated by the Treasury Secretary, after consultation with the EPA Administrator, as a qualified green building and sustainable design project and that meets the following requirements: (1) at least 75 percent of the square footage of commercial buildings that are part of the project is registered for United States Green Building Council's Leadership in Energy and Environmental Design (LEED) certification and is reasonably expected (at the time of the designation) to

receive such certification; (2) the project includes a brownfield site as defined by section 101(39) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601) (CERCLA), including a site described in subparagraph (D)(ii)(II)(aa) thereof; (3) the project receives specific State or local government resources of at least \$5,000,000; and (4) the project includes at least (a) 1,000,000 square feet of building or (b) 20 acres.

Under sections 142(l)(3) and (4), a project may not be designated as a qualified green building and sustainable design project unless the project is nominated by a State or local government within 180 days of the enactment of the Act. The application for designation must describe the energy efficiency, renewable energy, and sustainable design features of the project. The application also must demonstrate, and provide written assurances, that: (1) the project will satisfy the requirements described above relating to LEED certification, brownfield sites, State or local government resources, and square feet (or acres) of building (or land); (2) the net benefit of the tax-exempt financing will be allocated to (a) the purchase, construction, integration, or other use of energy efficiency, renewable energy, and sustainable design features of the project, (b) compliance with LEED certification standards cited under section 142(l)(4)(A)(i), or (c) the purchase, remediation, and foundation construction and preparation of the brownfields site; (3) no proceeds of the issue will be used to provide a facility the principal business of which is the sale of food or alcoholic beverages for consumption on the premises; and (4) the project is projected to provide permanent employment of at least 1,500 full time equivalents (150 full time equivalents in rural States) when

completed and construction employment of at least 1,000 full time equivalents (100 full time equivalents in rural States).

Furthermore, under section 142(l)(4)(B), each application must contain for each project a description of (1) the amount of electric consumption reduced as compared to conventional construction, (2) the amount of sulfur dioxide daily emissions reduced compared to coal generation, (3) the amount of the gross installed capacity of the project's solar photovoltaic capacity measured in megawatts, and (4) the amount, in megawatts, of the project's fuel cell energy generation.

Section 142(l)(2)(A) provides that the Treasury Secretary, after consultation with the EPA Administrator, shall designate qualified green building and sustainable design projects within 60 days after the end of the application period under section 142(l)(3)(A).

Section 142(l)(2)(A) also provides that: (1) at least one of the designated projects must be located in, or within a ten-mile radius of, an empowerment zone under section 1391; (2) at least one of the designated projects must be located in a rural State (as defined in section 142(l)(6)(A)); (3) no more than one project may be designated in any State; and (4) a project may not be designated if the project includes a stadium or arena for professional sports exhibitions or games.

Section 142(l)(6)(A) defines "rural State" as any State that has (1) a population of less than 4,500,000 according to the 2000 census, (2) a population density of less than 150 people per square mile according to the 2000 census, and (3) increased in population by less than half the rate of the national increase between the 1990 and 2000 censuses.

Section 142(l)(2)(B) provides that the Treasury Secretary, after consultation with the EPA Administrator, shall ensure that, in the aggregate, the projects designated shall (1) reduce electric consumption by more than 150 megawatts annually as compared to conventional generation, (2) reduce daily sulfur dioxide emissions by at least 10 tons compared to coal generation power, (3) expand by 75 percent the domestic solar photovoltaic market in the United States (measured in megawatts) as compared to the expansion of that market from 2001 to 2002, and (4) use at least 25 megawatts of fuel cell energy generation.

Under section 142(l)(7)(B), the Treasury Secretary may allocate authority to issue qualified green building and sustainable design project bonds in an aggregate face amount not exceeding \$2,000,000,000.

Section 142(l)(7)(B) provides that an issue shall not be treated as an issue described in section 142(a)(14) if the aggregate face amount of bonds issued by the State or local government pursuant thereto for a project (when added to the aggregate face amount of bonds previously so issued for such project) exceeds an amount designated by the Secretary as part of the designation.

Section 142(l)(5) provides that no later than 30 days after the completion of each designated project, the project must certify to the Treasury Secretary that the net benefit of the tax-exempt financing was used for the purposes described in section 142(l)(4).

Section 142(l)(5)(C) defines “net benefit of tax-exempt financing” as the present value of the interest savings (determined by a calculation established by the Secretary) which result from the tax-exempt status of the bonds.

The Act requires each issuer to maintain, on behalf of each project, an interest bearing reserve account equal to one percent of the net proceeds of any bond issued under sections 142(a)(14) and 142(l) for such project. Not later than five years after the date of issuance, the Treasury Secretary, after consultation with the EPA Administrator, will determine whether the project financed with such bonds has substantially complied with the basic eligibility requirements described in section 142(l)(4). If the Treasury Secretary, after such consultation, certifies that the project has substantially complied with the basic eligibility requirements described in section 142(l)(4)(A), amounts in the reserve account, including all interest, will be released to the project. If the Treasury Secretary determines that the project has not substantially complied with the basic eligibility requirements, amounts in the reserve account, including all interest, will be paid to the United States Treasury.

APPLICATION REQUIREMENTS

Each application for designation of a project as a qualified green building and sustainable design project must be prepared and submitted in accordance with this section. By submitting an application for designation pursuant to section 142(l) and this Notice, the applicant agrees to comply with the requirements of this Notice.

1. State or local government. A project must be nominated by a State or local government or a combination of State or local governments. A “local government” is any county, city, town, township, parish, village, or other general purpose political subdivision of a State. The application must identify the nominating State or local government(s).

2. Signatures. An application must be signed by an authorized employee of each nominating State or local government.

3. Addresses. Applications must be submitted in duplicate to the Internal Revenue Service (IRS), Attention CC:TEGE:EOEG:TEB, 1111 Constitution Avenue, NW, Room 4306, Washington, D.C. 20224. Applications may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to the Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, attention CC:TEGE:EOEG:TEB.

A copy of each application also must be submitted to the Environmental Protection Agency (EPA) at Environmental Protection Agency, Office of Congressional and Intergovernmental Relations, Mail Code 1305A, 1200 Pennsylvania Avenue, N. W., Washington, D. C. 20460.

4. Due date. Applications must be filed with the IRS on or before November 2, 2005. For purposes of section 142(l)(3)(A), if an application for a project is filed with the IRS in accordance with this Notice on or before November 2, 2005, the project will be deemed nominated within 180 days of the enactment of the Act.

5. Project description. Each application must contain a detailed description of the project, including the information required by this subsection 5.

a. Energy efficiency, renewable energy, and sustainable design features. The application must describe the energy efficiency, renewable energy, and sustainable design features of the project.

b. Basic eligibility requirements. The application must demonstrate and provide

written assurances that the project will satisfy each of the following eligibility requirements:

i. Green building and sustainable design.

A. LEED certification. At least 75 percent of the square footage of commercial buildings that are part of the project is registered for United States Green Building Council's LEED certification and is reasonably expected by the applicant (at the time of the designation) to receive such certification, based on all the facts and circumstances, including statements of the United States Green Building Council, opinions of independent experts in green building and sustainable design, and relevant experience of the project developer. The application must include: (1) LEED Letter Templates indicating which LEED credits the applicant plans to pursue and the applicant's planned approach to pursuing such credits; (2) documentation demonstrating the applicant's plans to design and construct LEED-certified, sustainably-designed buildings, including, where applicable, architectural plans, drawings and specifications, policy statements, contracts, leases and other applicable documents, and other related applicable information; (3) information on how plans to build LEED-certified, sustainably-designed buildings will be implemented through the management structure, for example, by placing LEED-accredited professional(s) and other experienced green building professionals in positions of authority over the project to ensure that the applicant's green building plans are realized; (4) information on any plans to attract broader expertise and perspectives to the project that could support the effort to achieve LEED certification through such means as green building design charrettes or consultation with

additional green building experts; and (5) information on financial incentives and penalties that will be included in the design, construction, engineering and other building contracts and subcontracts to tie a part of the contractors' and subcontractors' compensation to their level of success in designing and constructing LEED-certified, sustainably-designed buildings.

B. Certain practices relating to the use of wood for the project. In connection with demonstrating that the project will satisfy the requirement for LEED certification, the application should indicate the extent to which any wood products will be used in the project. In addition, the application should indicate whether such wood products will receive certification under the Sustainable Forestry Initiative Program or the American Tree Farm System, or, in the case of composite wood products, under standards established by the American National Standards Institute, or such other voluntary standards as are published in the Federal Register by the EPA Administrator.

ii. Brownfield redevelopment. The project includes a brownfield site as defined by section 101(39) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601), including a site described in subparagraph (D)(ii)(II)(aa) thereof. For purposes of meeting this definition, applicants may use guidance provided in Appendices 3 and 4 of the EPA Proposal Guidelines for Brownfields Assessment, Revolving Loan Fund and Cleanup Grants. Appendices 3 and 4, which provide guidance on the definition of a brownfields site under section 101(39) of CERCLA, are published by the EPA on its internet site:

http://www.epa.gov/brownfields/pg/appendix3_fy05.htm and

http://www.epa.gov/brownfields/pg/appendix4_fy05.htm.

iii. State and local support.

A. In general. The project will receive specific State or local government resources that will support the project in an amount equal to at least \$5,000,000. For this purpose, “resources” includes tax abatement benefits and contributions in kind. The State or local government resources may be provided at any time during the period beginning on October 22, 2001 (three years prior to the enactment of the Act), and ending on the last day that any bond issued for the project as part of an issue under section 142(l) remains outstanding.

B. Determination of amount of State or local government resources.

I. Resources provided prior to issuance of bonds. The amount of State or local government resources that are provided for a project prior to the date of issuance of any bonds subject to section 142(l) for the project and on or after October 22, 2001, is the amount of such resources as of the date the resources were or are provided.

II. Resources provided on or after issuance of bonds. The amount of State or local government resources that will be provided for a project on or after the date of issuance of the first issue of bonds subject to section 142(l) for the project is the present value of such resources, as of the date of issuance of such bonds, using as a discount rate the long-term adjusted Applicable Federal Rate (AFR), compounded semi-annually, for the month in which the bonds are sold.

iv. Size. The project includes at least one of the following: (1) at least 1,000,000 square feet of building; or (2) at least 20 acres. A project shall not fail to qualify as a

green building and sustainable design project solely because it does not lie on contiguous parcels, or is interrupted by streets, highways, or vacant land.

v. Net benefit of the tax-exempt financing. For each issue of bonds subject to section 142(l) that finances the project, the net benefit of the tax-exempt financing will not exceed the present value, as of the date of issuance, of the reasonably expected amount of proceeds of the issue to be expended on the project for the following purposes: (1) the purchase, construction, integration, or other use of energy efficiency, renewable energy, and sustainable design features of the project; (2) compliance with LEED certification standards cited under section 142(l)(4)(A)(i); or (3) the purchase, remediation, and foundation construction and preparation of the brownfields site. The net benefit of the tax-exempt financing for an issue is the present value, as of the date of issuance, of the interest savings that result from the tax-exempt status of the bonds. The interest savings that result from the tax-exempt status of the bonds equal the sum of the annual interest savings for each year the issue is expected, as of the date of issuance, to be outstanding. The annual interest savings for a year are determined by multiplying: (1) the difference between (a) 110 percent of the long-term AFR (semiannual compounding) and (b) the long-term adjusted AFR (semiannual compounding), in each case for the month in which the issue is sold; by (2) the total principal amount of the issue that is expected, as of the date of issuance, to be outstanding in that year. For purposes of this paragraph, present values shall be determined using the long-term adjusted AFR (semiannual compounding), for the month in which the issue is sold, as the discount rate.

vi. Certain prohibited facilities.

A. Certain stadiums or arenas. The project will not include a stadium or arena for professional sports exhibitions or games. For purposes of this Notice and section 142(l), a stadium or arena is a stadium or arena for professional sports exhibitions or games if: (1) it is designed differently, sized larger, built sooner, or constructed in a more costly manner than is reasonably required for amateur exhibitions or games; (2) it is designed or constructed for any professional team or organization; or (3) in any calendar year in which bonds subject to section 142(l) for the project are outstanding, it is used more than five days during such calendar year for professional sports exhibitions or games

B. Certain facilities for the sale of food or alcoholic beverages. If the project is designated, any issue financing the project will not be treated as described in section 142(a)(14) if proceeds of the issue will be used to provide any facility the principal business of which is the sale of food or alcoholic beverages for consumption on the premises.

vii. Employment. Based on projections, the project will provide permanent employment of at least 1,500 full time equivalents (150 full time equivalents in rural States) when completed and construction employment of at least 1,000 full time equivalents (100 full time equivalents in rural States). For purposes of this Notice, a full time equivalent with respect to construction employment is determined based on the average daily full time employment during the construction period. For example, if a project employs an average of 1,200 full-time workers each business day of the

construction period, then the project provides construction employment of 1,200 full time equivalents. In addition, for purposes of section 142(l)(6)(A) and this Notice, a “rural State” means any State that has (1) a population of less than 4,500,000 according to the 2000 census, (2) a population density of less than 150 people per square mile according to the 2000 census, and (3) increased in population by less than half the rate of the national increase between the 1990 and 2000 censuses. The following States (as that term is defined in section 103(c)(2)) meet the definition of “rural State” under section 142(l)(6)(A): Iowa, Louisiana, Maine, North Dakota, and West Virginia. In connection with demonstrating how the project will meet this requirement, the application must include an independent analysis that describes the project's economic impact, including the amount of projected employment.

c. Goals for conservation and technology innovation. The application must describe:

i. The amount of electric consumption (in megawatt hours) reduced by the project as compared to conventional construction and conventional generation. For this purpose, a project will be considered to reduce electric consumption as a result of (1) conservation and energy efficiency in the building system designs; (2) non-conventional generation capacity installed as part of the project (including, but not limited to, photovoltaic, wind, biomass, geothermal and fuel cell generation); (3) the use of thermal output by the project from a cogeneration system that is part of the project in such a way as to reduce electrical consumption (such as waste heat-fired absorption cooling or displaced electric space heating); or (4) avoidance of transmission and

distribution losses of the electrical grid due to the reduction of electric consumption resulting from items (1), (2), and (3) of this paragraph 5.c.i. The application must describe with specificity how the non-conventional design of the building will reduce electric consumption, the sources of energy for the project, the extent to which these sources of energy will reduce the project's need for energy from conventional generation, and the methodology used to determine the amount of transmission and distribution losses avoided. Applicants are encouraged to use the U.S. Department of Energy's Energy Plus software (available on-line at <www.energyplus.gov>) to assist in determining the amount of electric consumption reduced as a result of conservation and energy efficiency in the building system designs.

ii. The amount of sulfur dioxide daily emissions reduced by the project as compared to coal generation. Applicants must determine the amount of sulfur dioxide daily emissions reduced by the project as compared to coal generation by multiplying (1) the sulfur dioxide emission rate set forth in the following table for the North American Electric Reliability Council (NERC) region (or State, in the case of Alaska or Hawaii) where the project is located, by (2) the daily amount of electric consumption reduced by the project as compared to conventional construction and conventional generation (as determined in accordance with paragraph 5.c.i. of this section). A description of NERC regions may be found on-line at <www.nerc.com/regional>.

Sulfur Dioxide (SO₂) Emission Rate (lb/MWh) for Coal-fired Power Plants

| NERC region (as in effect on April 8, 2005) or State | 2000 SO ₂ Emission Rate for Coal-fired Power Plants (lbs/MWh) |
|---|--|
| Alaska | 6.12 |
| ECAR | 14.28 |
| ERCOT | 8.26 |
| FRCC | 8.44 |
| Hawaii | 2.25 |
| MAAC | 16.50 |
| MAIN | 9.96 |
| MRO (formerly MAPP) | 7.81 |
| NPCC | 16.25 |
| SERC | 12.88 |
| SPP | 6.72 |
| WECC | 4.54 |

iii. The amount of the gross installed capacity of the project's solar photovoltaic capacity measured in megawatts. The application must describe in detail the technology and the means and methods of its application that are reasonably expected to produce such capacity. The application also should specify the percentage by which the project will expand the domestic solar photovoltaic market in the United States (measured in megawatts) as compared to the expansion of that market from 2001 to 2002. This percentage must be determined by dividing the project's solar photovoltaic capacity measured in megawatts by 14.424 megawatts, which represents the expansion of the domestic solar photovoltaic market from 2001 to 2002. This figure has been obtained from information contained in Table 26 of the Energy Information

Administration's report titled, "Solar Thermal and Photovoltaic Collector Manufacturing Activities 2003", which is available at

www.eia.doe.gov/cneaf/solar.renewables/page/solarreport/soltable26.html.

iv. The amount, in megawatts, of the project's fuel cell energy generation capacity, which includes the fuel cells' generation of thermal and electrical energy used by the project. The application must describe in detail the fuel cell installed electrical generating capacity, as well as any reduced electrical consumption that will result from the use by the project of the fuel cells' thermal energy output. The application must also describe how the fuel cell electrical and thermal energy will be used by the project.

d. Location of project. The application must indicate the location of the project, including: (i) the State in which the project will be located; (ii) whether the project will be located in, or within a ten-mile radius of, an empowerment zone under section 1391; and (iii) whether the project will be located in a rural State.

6. Plan of financing. The application must contain a detailed description of the plan of financing for the project, including the expected issuer of the bonds, the anticipated date of issuance, the sources of security and repayment for the bonds, and the aggregate face amount of bonds expected to be issued for the project.

DESIGNATIONS

Subject to the availability of eligible projects, the IRS, after consultation with the EPA, will designate qualified green building and sustainable design projects. In order to evaluate an application submitted, the IRS may disclose selected information from the application, pursuant to section 6103(k)(6), in order to verify the application's contents

and the project's eligibility as a qualified green building and sustainable design project. As part of the designation process, the IRS may impose requirements or conditions on a designee that are in addition to those described in this Notice or other published guidance.

CERTIFICATION OF USE OF TAX BENEFIT

No later than 30 days after the completion of a project, each issuer of qualified green building and sustainable design project bonds for the project must submit to the Internal Revenue Service, Attn: SE:T:GE:TEB:O, 1111 Constitution Ave., NW, PE - 5T2, Washington, DC 20224, the following certification: "The [insert name of issuer] hereby certifies that the net benefit of the tax-exempt financing received pursuant to section 701 of the American Jobs Creation Act of 2004 for [insert name of project] was used for the purposes described in section 142(l)(4)(v) of the Internal Revenue Code." Each issuer must submit documentation supporting the certification, including documentation describing the calculation and allocation of the net benefit of the tax-exempt financing for the project in accordance with paragraph 5.b.v. of the "APPLICATION REQUIREMENTS" section of this Notice.

REPORT OF COMPLIANCE

Twenty-four months after the completion of a project, but not later than 48 months after the date of issuance of bonds subject to section 142(l) that financed the project, the issuer of the bonds must submit to the Internal Revenue Service, Attn: SE:T:GE:TEB:O, 1111 Constitution Ave., NW, PE - 5T2, Washington, DC 20224, and to the Environmental Protection Agency, Office of Congressional and Intergovernmental

Relations, Mail Code 1305A, 1200 Pennsylvania Avenue, N. W., Washington, D. C. 20460 a written report together with attachments listed below that: (1) describes with specificity whether the project has complied (and is expected to comply in the future) with the basic eligibility requirements of section 142(l)(4)(A) and currently meets (and is expected to meet in the future) the commitments with respect to conservation and technology innovation set forth in the application for the project; (2) provides the identity of, and contact information for, a person duly authorized to represent the issuer before the IRS relating to the issue; and (3) includes Form 8821 (Tax Information Authorization) authorizing the IRS to disclose any information relating to the project to the officers and employees of the Environmental Protection Agency and the United States Department of Energy for the purpose of determining whether the project is accomplishing the goals for conservation and technology innovation set forth in the application for the designation of the project . The issuer shall attach to this report a copy of the Form 8038 filed with respect to the issue, as well as a copy of the application for designation by the IRS that was submitted in accordance with the requirements described above.

ACCOUNTABILITY

Each issuer must maintain, on behalf of each project, an interest bearing reserve account in an amount equal to one percent of the net proceeds (as defined in section 150(b)(3)) of any bond issued under sections 142(a)(14) and 142(l) for such project. Not later than five years after the date of issuance of the bonds, the IRS, after consultation with the EPA, shall determine whether the project has substantially

complied with the basic eligibility requirements described in section 142(l)(4)(A). The IRS may extend the five-year period by up to two years if the project is not placed in service, as determined under § 1.150-2(c), within 48 months after the date of issuance of any bonds issued under section 142(l) to finance any part of the project. If the IRS, after receipt of the compliance report and consultation with the EPA, certifies that the project has substantially complied with the basic eligibility requirements of section 142(l)(4)(A), amounts in the reserve account, including all interest, shall be released to the project. If the IRS determines that the project has not substantially complied with the basic eligibility requirements, amounts in the reserve account, including all interest, shall be paid to the United States Treasury.

COORDINATION WITH OTHER RULES GOVERNING QUALIFIED PRIVATE ACTIVITY BONDS.

Except as otherwise provided in this Notice, nothing in this Notice shall be construed as overriding any requirements or limitations applicable to exempt facility bonds found in sections 103, and 141 through 150 of the Code and the applicable regulations thereunder, or affecting the ability of the IRS to examine the bond issue for compliance with those requirements or limitations.

REQUIRED DECLARATIONS

Each application, certification, report or other document submitted under this Notice must include the following declaration signed by an individual who has personal knowledge of the relevant facts and circumstances: "Under penalties of perjury, I declare that I have examined this document and, to the best of my knowledge and

belief, the document contains all the relevant facts relating to the document, and such facts are true, correct, and complete.”

INFORMATION REPORTING

An issuer of qualified green building and sustainable design project bonds must complete Form 8038, *Information Return for Tax-exempt Private Activity Bond Issues*, in accordance with the instructions and complete Part II by checking the box on Line 11m (Other), writing “qualified green building and sustainable design project bonds” in the space provided for the bond description, and entering the amount of the bonds in the Issue Price column.

DRAFTING INFORMATION

The principal author of this Notice is Timothy L. Jones of the Office of Associate Chief Counsel (Tax Exempt & Government Entities). However, other personnel from the IRS, the Treasury Department, the Environmental Protection Agency, and the Energy Department participated in its development. For further information regarding this Notice contact Timothy L. Jones at (202) 622-3980 (not a toll-free call).