DISTRICT DEPARTMENT OF THE ENVIRONMENT

RESPONSE TO PUBLIC COMMENTS

Energy Performance Benchmarking of Privately-Owned Buildings

The following are summaries of public comments provided between October 21 and November 21, 2011 in response to a Notice of Proposed Rulemaking published in the DC Register on October 21, 2012, and between February 21 and March 6, 2012 in response to public meetings held on February 21, 2012, along with responses from the District Department of the Environment (DDOE).

1) **Comment:** Several comments were received asking for an exemption for small retail tenants. Many building owners make use of an exemption in ENERGY STAR Portfolio Manager that allows users to not include energy use and floor area from "other" spaces if: they are less than 5000 square feet and the total excluded space represents less than 10% of the gross building area's primary space, the data is difficult to acquire, their energy consumption varies sharply from the rest of the building, and if the space does not support the overall function of the building. In particular, commenters were concerned that including energy-intensive restaurants or retail tenants could depress their ENERGY STAR benchmark score below the threshold needed for ENERGY STAR certification, and thus make the building ineligible for a U.S. General Services Administration (GSA) lease.

   Response: The Green Building Act (Act) applies to whole buildings, and requires the inclusion of all spaces in the building. It is not within the authority of the District Department of the Environment (DDOE) to exempt these tenants. The ENERGY STAR exemption for small retail exists because ENERGY STAR is a voluntary program and getting data from these tenants was difficult to impossible. However, the Act requires non-residential tenants to submit data, so the exemption is not needed. If a tenant does not supply data, the landlord can benchmark the building without them and then provide the tenant's contact information to DDOE, which will then contact the tenant directly. Moreover, when aggregate whole-building data is available from the utility companies, building owners will have to use that data, and that data will by definition include these retail tenants. Buildings in other cities with mandatory benchmarking like New York City also are using aggregate data and including retail tenants.

   DDOE does recognize the difficulties created by forcing the inclusion of retail tenants, and the risk to GSA leases. However, it will still be possible to be ENERGY STAR certified under the U.S. Environmental Protection Agency (EPA) rules, so no buildings will lose their certification. DDOE is working with the EPA and GSA so that all parties are aware of these

issues and no leases are negatively impacted. To ease compliance, buildings that have already benchmarked for 2010 will be permitted to submit the 2010 data *as is*.

2) **Comment**: Request for exemption to allow building owners to designate information as confidential business information, including lists of cost-effective energy efficiency measures as well as associated estimated costs and benefits for individual buildings, and to make all tenant information confidential except that the tenant's name may be disclosed in an enforcement action.

   Response: No change. The Act requires the public disclosure of the energy performance of the building, and it is not with the authority of DDOE to simply not include any information a given owner might consider confidential. ENERGY STAR does allow tracking of energy costs, along with energy efficiently improvements and other investments made to a property, but this information will not be included in the data submitted to DDOE. So no confidential business information will be transmitted to DDOE. Data will be published at the building level, so tenant-specific information will be kept confidential by default. DDOE has provided a guidance document specifying each and every field that will be accessed by our reporting template. Moreover, the existing Green Building Act exemption process in Section 3511 of the District of Columbia Municipal Regulations (DCMR) is available to any building owner (20 DCMR 3511.01, *et seq.*).

3) **Comment:** Non-residential tenants vacating space should have to submit data not upon leaving the space, but prior to vacating, or, if such information is not available prior to vacating such unit or space, as soon as practicable, thereafter.

   Response: Accepted

4) **Comment:** Several commenters asked how DDOE is defining "reasonable effort," since that standard is a critical factor in enforcement actions.

   Response: Reasonable effort is subjective, based upon the circumstances of each situation. For example, DDOE anticipates that a reasonable effort with respect to the requirement to request data from all non-residential tenants would include requesting tenant data by the date specified in the regulation (approximately 60 days prior to the deadline for submitting data to DDOE), and making adequate follow-up requests.

5) **Comment:** Some commenters expressed grave concerns about the difficulties that would be incurred by residential multifamily building owners. Meeting the 10% threshold for all apartment tiers was seen as very difficult due to widespread individual metering, large number of units, and the many ways in which the tenant-owner relationship in a multifamily

Response: DDOE recognizes the difficulties posed by the complex extrapolation methodology proposed in the earlier regulation. Therefore, DDOE has responded to these concerns by eliminating the extrapolation process and, with it, the need to contact residential tenants. DDOE believes the best solution is for the utility companies to release whole-building aggregate data to building owners—as in New York City, Seattle, and other cities that have benchmarking laws—and is working with the utility companies, the Public Service Commission, and the Council to enable this in the District. Once this service is available, residential building owners will be required to use it. In the meantime, owners of residential buildings will only have to report data from meters they control—common area usage, plus any whole building information they have from master meters. When the benchmarking results are made public, DDOE will make an effort to ensure whole building and partial building results are displayed separately, so only like items are compared.

6) **Comment:** Residential Buildings should be exempt.

   Response: This is not within DDOE's discretion under the law. However, DDOE has made major changes to ease the regulatory burden on the multifamily residential sector, as described above.

7) **Comment:** Residential building owners requested residential benchmarking be delayed until 2013 or later.

   Response: This is not within DDOE's discretion under the law. However, DDOE has made major changes to ease the regulatory burden on the multifamily residential sector, as described above.

8) **Comment**: Propose a one-year delay in implementation due to the administrative burden of data collection.

   Response: This is not within DDOE's discretion under the law.

9) **Comment:** Inspection should occur at the place of business of the building owner.

   Response: Regulations pertaining to the maintenance of records do not generally specify where the records be maintained, since the owner or manager may not be local, and storage

of records on site may be impractical. Records must be produced upon request, regardless of where they are stored.

10) **Comment:** Additional clarity is needed regarding the appeals/enforcement process. A 45-day warning period is requested. Additionally, how will DDOE serve warnings and notices of infraction on building owners and tenants? Will DDOE also send copies of the notice of infraction and warning to the actual building address? Greater clarity is needed to ensure that the appropriate persons receive timely notice and are afforded sufficient time to respond.

    Response: The Notice of Violation language has been expanded and clarified. A 30-day warning period has been provided. For owners who do not submit building data at all, DDOE will serve warnings by mail to both the building address and the owner address, as listed in records of the Office of Tax and Revenue. For building owners who submit incomplete data, DDOE will serve warnings by mail to both the owner address of record and the address provided in the building's benchmarking report. For non-residential tenants who do not provide required data to the building owner, DDOE will serve warnings by mail to the address provided for that tenant by the building owner.

11) **Comment**: Accuracy/Timing of Data: Owners and tenants should have the option to refresh (public) data more than once annually. If significant energy efficiency improvements are completed, the ENERGY STAR benchmark score would be expected to rise.

    Response: Refreshing the data more than once a year will interfere with the ability of those using the data to compare the energy use of the similar buildings over the same time periods. If the building owner discovers that data they provided to DDOE was inaccurate or incomplete, they must update the report with 30 days. If the old data has already been made public, DDOE will endeavor to update the public data as rapidly as possible.

12) **Comment**: Clarify whether a lot or property with several buildings counts as one building or several buildings from the perspective of both the compliance threshold and ENERGY STAR Portfolio Manager.

    Response: If the buildings are separately metered for all utilities, they should be benchmarked as separate buildings and the threshold will be the size of each individual building. If the buildings share utilities such that they constitute one campus and cannot be independently benchmarked, they should be benchmarked as one building and the threshold for compliance will be the combined floor area of all the primary spaces served by a single meter with no sub-metering. This is consistent with the practices adopted by other leading cities requiring private building benchmarking, including New York City and Seattle. DDOE recognizes the benefits of sub-metering, and so encourages building owners to sub-meter

complexes of multiple buildings, even if that causes the building to drop below the reporting threshold. DDOE will make initial mailings to buildings as listed in the Office of Tax and Revenue records. If a building owner believes that a complex of buildings is not subject to the law (either at a given size threshold or at all), the owner should contact DDOE at info.benchmark@dc.gov and submit signed, supporting documentation demonstrating the gross floor area of the buildings and that are separately metered for all utilities. If an owner of multiple buildings that are part of the same campus (such as a walk-up apartment complex) wishes to aggregate the buildings together into a larger building, they can also choose to do so, so long as it is consistent with EPA guidelines.

13) **Comment**: Many private buildings in the District have tenants who are engaged in work affecting national security and revealing their energy consumption may be considered a risk to national security. A process should be offered for owners to seek exemption from the law on national security grounds.

    Response: As the Clean and Affordable Energy Act amended the Green Building Act, this exemption can be handled under the exemption process for the Green Building Act, as a public interest exemption pursuant to 20 DCMR 3511.2(b). This is specifically addressed in the Frequently Asked Questions guidance document.

14) **Comment:** Building owners who are already benchmarking may already have all the data requested on the tenant information forms, and so should not be required to use the forms.

    Response: The forms are intended as a convenience. The language has been updated to require that the information listed on the forms be collected, while the forms themselves are simply one method owners may use to collect the data.

15) **Comment**: "Data must be from "Actual" bills and not estimated bills. Currently Pepco is having problems launching their 'Smart Meter' technology into commercial buildings. On occasion, bills are estimated so this issue must be addressed accordingly."

    Response: Portfolio Manager allows the marking of meter data as "temporary," and this data can be edited later. A subsection has been added to the regulation to require that building owners who have already submitted benchmarking reports and then receive updated data enter the updated data in Portfolio Manager and re-submit their report to DDOE within 30 days.

16) **Comment**: "Currently DC Water does not give properties credit for green roof applications or stormwater management systems. This issue should be addressed with DC Water if water

usage is to be accurately tracked. Also, water evaporation by cooling towers is not addressed appropriately either."

Response: ENERGY STAR Portfolio Manager only tracks water consumed from the local utility. Green roofs and stormwater management systems affect stormwater run-off from a property, but do not affect water used by tenants. If water was reused within the building (e.g. reusing captured stomwater or processed greywater), then the quantity of water utility water consumed would be reduced by an equal amount, and thus these savings would be reflected in Portfolio Manager. Moreover, Portfolio Manager does currently not include water use in the calculation of a buildings 1-100 benchmark score; the District is requiring the collection of water consumption data for tracking purposes only. If EPA elects to include a water efficiency score within Portfolio Manager in the future, EPA will certainly consider these factors.

17) **Comment**: "How can data center usage be tracked appropriately if tenants do not install sub-meters on the Uninterruptable Power Supply (UPS) equipment?"

Response: Portfolio Manager can handle data centers even if those centers are not separately metered. The building owner/manager enters in space use attributes indicating the size of the data center, how many computing units it contains, and other relevant data outlined in the Data Collection Worksheet. This information is used to benchmark the building against other buildings with similar data centers. However, this method is imprecise. Beginning in June 2012, if a building owner wishes to pursue ENERGY STAR certification for a building with a data center, then they must put the data center on its own internal sub-meter. DDOE agrees that sub-metering data centers is a best practice. However, the option to simply assign energy use to the data center by gross floor area will remain an option for the purpose of submitting benchmarking data to DDOE.

18) **Comment:** If DDOE will require the use of aggregate data once the utility companies have made the service available, sufficient time must be allowed before the requirement become effective; recommend 90 days.

Response: DDOE will require the use of aggregate data only if this service is available prior to February 1 of that calendar year. This is an approximate 60-day window prior to DDOE's deadline, which should be sufficient. (For example: The deadline for submitting to DDOE remains April 1 (beginning in 2013). So if Pepco begins offering aggregate data on February 15th, residential building owners would not have to use whole building electricity data for that utility until the following year.) This also simplifies the regulation by setting the deadline for requesting data from utility companies to the same date as the deadline for requesting of data from non-residential tenants.

A building owner with a small number of non-residential tenants could still opt to request utility data from each tenant rather than from the utility company if they preferred—but their non-residential tenants would not be liable for failing to provide the requested utility data, as the owner could have obtained it from the utility company instead. The tenants would still need to provide space use data.

19) **Comment:** Commenters were concerned about the impact of this regulation on rent control, and the risk of owners of rent-controlled properties being viewed negatively on account of their low score, despite them not having the funds necessary to improve the property.

Response: This relates to a much larger discussion about the need for capital access for improving affordable and rent-controlled housing. DDOE looks forward to working with AOBA, building owners, other District agencies, and private finance to address this concern. No regulatory change was requested, and none is proposed.

20) **Comment**: Recommend editing definition of 'tenant' to more closely match that in DC Official Code § 42-3501.03.

Response: Definition edited accordingly.

21) **Comment**: Request the use of the term "apartment tier" instead of "apartment line," for consistency with industry usage.

Response: This term only applied to the section on extrapolation of energy and water use for residential buildings. As the extrapolation requirements have been eliminated from the regulation, this term has also been removed from both the regulation and the definitions.

22) **Comment**: A commenter suggested small changes to increase the clarity of the definitions for "Director" and "tenant" to harmonize them with how these words are defined in other parts of the DC Official Code and DCMR.

Response: Definitions edited accordingly.

23) **Comment**: A commenter suggested words be added to the definition of a "building owner" to provide specific examples of the sort of entities that can act as agents.

Response: This definition applies to whole chapter, not just to the section on benchmarking, so the definition of a building owner's agent needs to remain broad, rather than being narrowly tailored for this section.