

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 July 20 and August 20, 2012 in response to a SECOND Notice of Proposed Rulemaking published in the DC Register on July 20, 2012, along with responses from the District Department of the Environment (DDOE).

1) **Comment:** The 2010 reporting requirement should be waived.

Response: Not accepted. DDOE does not have the legal authority to simply waive the 2010 reporting requirement; this would require new legislation from DC Council. However, DDOE will seek to ease 2010 and 2011 reporting, as outlined below.

2) **Comment:** DDOE needs to clearly outline the reporting requirements for those building owners required to report energy usage data for 2010. In the previous DDOE Response to Public Comments, on page 2, it states that “To ease compliance, buildings that have already benchmarked for 2010 will be permitted to submit the 2010 data as is.” What “as is” means is not clear.

Response: Accepted. DDOE recognizes that for building owners that have already been benchmarking their building, going back and re-doing the 2010 benchmarks in order to add the additional space use and water data that that DDOE is requiring represents an additional burden; the same logic applies to 2011 data submitted in 2013. 2010 data will never be made public. Moreover, it is relevant that the legal requirement to include water data took effect after the 2010 data was originally supposed to have been submitted.

Therefore, in order to ease the burden on the regulated community, for 2010 and 2011 reporting only, DDOE’s reporting requirements will be limited to what is already required under the voluntary EPA ENERGY STAR[®] certification program. This means that for 2010 and 2011, no water consumption data, or optional space use fields will be mandatory. Moreover, any tenants that can be exempted under EPA ENERGY STAR[®] guidelines, but not under the DDOE’s regulations (e.g., ground floor retail tenants in office buildings) do not need to be included for the 2010 or 2011 report—but they will need to be included beginning with the 2012 report that is due April 1, 2013.

DDOE has produced two data collection worksheets, one for 2010-2011 and one for 2012, which make this distinction clear. For buildings that have been benchmarked for calendar year 2010 or 2011 previously, the benchmark results that have already been generated in Portfolio Manager can be submitted—though building owners/managers will have to add the specific building identifier(s) (the Square-Suffix-Lot (SSL) or parcel number(s), entered in the Building ID field).

- 3) **Comment:** Commenters asked how collection of data from tenants that have vacated the building should be handled. Significant concerns were raised about the difficulty of collecting data from such tenants.

Response: There are actually three scenarios, depending on *when* the tenant vacated the building: (1) the tenant vacated the building prior to the final benchmarking rulemaking taking effect; (2) the tenant vacates the building after the rulemaking becomes effective but before the initial submission deadline; and (3) the tenant vacates the building in 2013 or thereafter. Here we mainly focus on the first scenario; the latter two scenarios are discussed in more detail in the response to the comment #4.

The legal requirement for tenants to provide data to their landlord for the purposes of benchmarking will only take effect once the regulations are final and effective (as of the date that the final rulemaking is published in the *D.C. Register*). DDOE does not have authority to require that tenants whose lease ended prior to the effective date of the regulations to provide their former landlord with data. **Therefore, building owners/managers need not, and should not, request data from tenants whose leases ended prior to the finalization of the benchmarking regulations.**

When benchmarking a building for calendar year 2010, 2011, and/or 2012, one of the following three approaches should be used to account for tenants that have since vacated the building. (Note that the operative factor here is *energy* consumption data; whether the building owner has water consumption data that includes a tenant who has vacated the building is not relevant to how the space use attributes for the tenant's space should be entered, because water consumption does not affect a building's Energy Use Intensity (EUI) or 1-100 ENERGY STAR[®] score.)

- A) If the building owner/manager has energy consumption data that includes that tenant (e.g. because they pay the utility bills for that space) for all energy utilities: Portfolio Manager Default Values should be used for all applicable space use attributes for this space. To use default values, check the “use default values” box next to the applicable space use attribute field. EPA also provides a list of all default values for your reference.

- B) If the building owner/manager has energy consumption data that includes that tenant (e.g. because they pay the utility bills for that space) for some but not all energy utilities: Portfolio Manager Default Values should be used for all applicable space use attributes for this space. To use default values, check the “use default values” box next to the applicable space use attribute field. EPA also provides a list of all default values for your reference.
- C) If the building owner does not have any energy consumption data for that tenant (e.g. because the tenant was separately metered and paid the energy bills): The building should be benchmarked as a partial building. The space that the tenant vacated should be excluded from the building’s gross floor area, and no energy or space use attributes should be entered for it.

Building owners are required to request data from any tenants whom have an active lease as of the date of the finalization of the regulation, and those tenants are required to provide access to the data—even if the lease expires prior to the actual deadline for submitting data to DDOE.

- 4) **Comment:** A new subsection should be added to the section on vacating tenants to making clear that vacating tenants are also subject to fines under this rulemaking if they do not provide or authorize the release of the requested data.

Response: Not Accepted. It is clear from section 3513.6(b) of the rulemaking that non-residential tenants are subject to fines under this rulemaking if they do not provide or authorize the release of the requested data within 30 days of receiving the request.

When a tenant vacates a building, they already know all the required space use attributes; the only data they do not yet have to provide to their landlord is the most recent month(s) energy and water consumption. To make it easier for vacating tenants to comply with their reporting requirements, the Non-Residential Tenant Information Form now includes guidance that instructs vacating tenants to simply sign the unified utility waiver form in order to grant their landlord access to their utility data. DDOE recommends that provision and completion of the Non-Residential Tenant Information Form become part of the standard exit process for any vacating non-residential tenant.

- 5) **Comment:** How should properties where buildings or shared meters cover multiple tax lots be handled?

Response: DDOE is using tax lots for the purpose of contacting owners of buildings that DDOE believes are covered by the law and for Building ID numbers. However, the regulation does not actually mention tax lots. The requirement to aggregate to the level of the most widely shared meter/system without sub-metering does apply across tax lots the same way it applies within a tax lot. The purpose of the law is to provide an accurate picture of energy used by large buildings. Any other approach, such as pro-rating energy use by tax lot, will not yield accurate results.

Where more than one tax lot is included in building entry in Portfolio Manager, all included tax lot or parcel numbers should be placed in the notes field. The District Data Collection Worksheet contains further guidance about how to report such properties.

- 6) **Comment:** Add language to 3513.3(b) to make the terms under which aggregate data requests should be made of utility companies more specific, including getting written authorization from the tenants.

Response: Not accepted. The commenter conflated requests for aggregate data and requests for individual/meter data. Only requests for individual meter-level data require that the building owner obtain from a tenant written authorization for the release of the data.

- 7) **Comment:** Add language to 3513.5 to clarify from *whom* the data is to be requested from and what forms should be used. According to the commenter: “The revisions further clarify the tenant’s obligation to provide the utility information to the building owner. The tenant can either provide the information directly to the building owner or the *tenant* can authorize the applicable utility to do so. With these changes, it will not be necessary for the owner to provide the utility release form to the tenant. The tenant will have an obligation to seek such authorization if it does not provide such data directly to the building owner.”

Response: Not Accepted. The commenter’s proposed language would remove the affirmative responsibility from the owner to request data of tenants, and instead shift all burden to the tenants. The potential for increased non-compliance from tenants is disproportionately large compared to the minimal reduction of work for the building owner or manager. Only the building owner knows exactly what data is needed, and so they should request it from their tenants if they need it. Furthermore, if the building owner wishes tenants to use waiver forms, they should explicitly provide them to the tenants, rather than expecting the tenants to find them. Because the waiver forms are part of the *Non-Residential Tenant Information Form*, filling it out satisfies the responsibility of the tenant to provide utility data. Due to the way the forms were published online in July, it may not have been clear to the commenter that the utility waiver was *part* of the Non-Residential Tenant Information Form. This has been made clearer in the new Non-Residential Tenant Information Forms.

- 8) **Comment:** Commenter suggests the “Non-Residential Tenant Information Form” be renamed the “Non-Residential Tenant Information Request Form.”

Response: Not Accepted.

- 9) **Comment:** The proposed regulation allowed an owner who has leased a building to a single tenant to, with the consent of the tenant, delegate all benchmarking responsibilities to the tenant, and “notify DDOE accordingly.” The process for notifying DDOE needs to be clearer.

Response: Accepted; no change needed to regulations. DDOE has added language to the guidance documents that further clarifies that the building owner must notify DDOE in a manner that makes clear that the tenant has consented to the delegation. DDOE recommends that the tenant and owner countersign a letter authorizing the delegation of authority and send that documentation to DDOE. A sample delegation authorization letter has been added to the final set of guidance documents, which could be used as a basis for a letter that documents the delegation. As with the *Non-Residential Tenant Information Form*, this form is intended mainly as a reference/guide.

- 10) **Comment:** Clarify that the 3-year data retention requirement applies for each year of reporting, by adding language that the data shall be retained for three years “for each of the years in which the building owner must report the information required by § 3513.3.”

Response: Not accepted. DDOE believes that the current language is clear and means that records must be retained for three years after the reporting year.

- 11) **Comment:** “[The regulations should specify that the Notice of Violation (NOV) must include,] at a minimum: (1) Each deficiency or other factor identified; (2) Any necessary corrective action(s) necessary to prevent imposition of fines and penalties; and (3) Date and time of any scheduled inspection or re-inspection.”

Response: Not accepted. DDOE regulations do not specify the contents of a Notice of Violation.

- 12) **Comment:** Commenters requested the ability to disclose optional contextual information to the public, in order to help explain poor performance.

Response: Accepted; no change needed to regulations. The revised guidance documents make clear that building owners may optionally choose to put additional contextual

information that they wish to be disclosed at the beginning of the notes field. Please see the guidance documents or the District Reporting Template instructions for details on how best to include this data, and clearly distinguish it from other data in the notes field that the owner may wish to not have published. Making this distinction clear is important, because DDOE will err on the side of not disclosing notes field information.

When DDOE publishes the benchmarking data for private buildings, optional statements from the notes field will be part of the data disclosure. DDOE will make sure the optional notes field statements are accessible from the DDOE website. However, DDOE cannot guarantee that all third party applications or websites that incorporate benchmarking results from the District will include these statements.

13) Comment: “The guidance documents should include prefatory language that explains the differences between an Energy Use Intensity (EUI) result and a Portfolio Manager benchmarking score and the various factors that are considered for both. DDOE should also include a description of both terms with the benchmarking information that will be disclosed to the public via the agency’s website.”

Response: Accepted; no change needed to regulations. This is already discussed on our website, and has been added to the District Data Collection Worksheet as well.

14) Comment: “What is the appeal process if the District’s Office of Tax and Revenue incorrectly identifies the square footage of a property, and the building owner is NOT subject to the reporting requirement for a given year? What information will DDOE require to verify the correct square footage number for purposes of determining the applicable benchmarking reporting date?”

Response: If a building owner/manager believes the building should not have to submit a report because they are smaller than the reporting threshold for that year, they should contact DDOE at info.benchmark@dc.gov to discuss what documentation could be provided to demonstrate the building’s gross building area. (Examples could include: copies of building blueprints or copies of floor area audits, approved by a licensed professional.)

15) Comment: Will DDOE prepare a pamphlet that can be disseminated to the tenant (including retail tenants) community?

Response: Yes, DDOE has done this. It will be available on our website prior to or at the same time as the publication of the final rulemaking.

16) Comment: “Because DDOE does not have enforcement authority over federal tenants, will owners be able to request an exemption under DC Official Code § 6-1451.10 and 20 DCMR §3511 for space occupied by federal tenants? The District should, at a minimum, provide a temporary exemption until GSA directs all federal tenants to comply with the District’s benchmarking law.”

Response: Not accepted. With regards to the specific request, the commenter misunderstands the nature of the Green Building Act’s exemption process, as codified in DC Official Code § 6-1451.10 and 20 DCMR §3511. Such an exemption must be requested *by a building owner* with regard to *a particular building*. DDOE and the Green Building Advisory Council review the request. DDOE cannot grant a blanket exemption under this section of the DCMR.

With regards to the general point, building owners should still request data from federal tenants. DDOE is working with the General Services Administration’s National Capital Region office (GSA NCR) to get as many federal tenants to provide data as possible. DDOE requests that any building owners who get a specific refusal to provide from the federal government contact DDOE at info.benchmark@dc.gov as soon as possible, so that DDOE can follow-up with the tenant in question. Contact information for any non-reporting federal tenants should also be included in the notes field when submitting a benchmarking report, just like any other non-responsive non-residential tenant, per subsection 3513.4(b) of the rulemaking.

17) Comment: How should missing data be handled? Can estimated data be used?

Response: It depends on the reason the data is missing, or the manager wishes to use estimated data, as outlined below:

- If a utility company has itself provided estimated data, those estimated values should be used, and the entry should be checked as a “temporary value.” If new, non-estimated data becomes available, then the building owner should come back and update the report within 30 days. This is the only situation when estimated data should be used.
- If a utility company has used billing periods longer than 30 days but less than 60 days, the bill should be entered with the given start and end dates. Portfolio Manager does not accept bill periods longer than 60 days. If a utility company has used a billing period longer than sixty days the consumption data should be pro-rated by month when entering in Portfolio Manager.

- For tenants who are no longer in the building as of the date of the finalization of the regulation, the owner can ignore those tenants, as discussed in the response to comment #3 above.
- For a tenant that is still in the building, the owner can get the tenant to sign a waiver, which will allow the owner to get the data from Pepco, Washington Gas, and/or DC Water, as applicable. The standard waiver grants access to data up to two years before and two years after the date it is signed.
- If data is missing because a tenant refuses to provide the data, then the space should be excluded from the report and the tenant should be identified as non-compliant in the notes field, as already established in the regulation

18) Comment: Space Use can change during the year—guidance docs should acknowledge this.

Response: Accepted. EPA guidance indicates that tenants need only fill out the average numerical value over the course of a year for a space use attribute. However, if a major change (greater than 10%) to a space use attribute occurs, the tenant may optionally record this. The guidance document has been updated to reflect this option.

19) Comment: Commenters asked if buildings can be submitted even if they are not covered in a given year. For example, can a building owner with some buildings over 150,000 sq ft and some buildings between 50,000 and 100,000 sq ft submit 2011 data for all of them in 2012? Can a building less than 50,000 sq ft be submitted? Commenters recommended that building owners be able to indicate if building data they submit voluntarily should be published or just used for DDOE analysis.

Response: Yes, building data can be submitted voluntarily. Any building that can be benchmarked in ENERGY STAR® Portfolio Manager (most buildings over 5,000 sq ft, with some exceptions) can be submitted to DDOE via the District Reporting Template. By default, DDOE will make data public beginning with the second year of data for any building; building owners wishing that data from voluntarily submitted buildings not be published should contact DDOE at info.benchmark@dc.gov.

20) Comment: Commenters suggested additional language be added to the compliance checklist to make clearer how to handle 2010 data, how to optionally report contextual information, and how to optionally report an entire building that is not covered by the law (either in a given year or at all).

Response: Accepted.

21) Comment: Commenters made helpful language and grammatical suggestions on the Non-Residential Tenant Information Form

Response: Accepted.

22) Comment: Commenters made helpful language and grammatical suggestions on the Data Collection Worksheet.

Response: Accepted.