

DEPARTMENT OF ENERGY AND ENVIRONMENT

NOTICE OF PROPOSED RULEMAKING

Energy Performance Benchmarking of Privately-Owned Buildings

The Director of the Department of Energy and Environment (DOEE or Department), pursuant to the authority set forth in the District Department of the Environment Establishment Act of 2005, effective February 15, 2006 (D.C. Law 16-51; D.C. Official Code § 8-151.01 *et seq.* (2013 Repl. & 2019 Supp.)); Section 4 of the Green Building Act of 2006 (GBA), effective March 8, 2007 (D.C. Law 16-234; D.C. Official Code § 6-1451.03 (2012 Repl. & 2019 Supp.)), as amended by Section 302 of the CleanEnergy DC Omnibus Amendment Act of 2018 (CEDC Act), effective March 22, 2019 (D.C. Law 22-257; 66 DCR 3973 (April 5, 2019)); Mayor's Order 2010-1, dated January 5, 2010, hereby gives notice of the intent to amend Section 3511 (Exemptions from Green Building Act Requirements), Section 3512 (Expedited Permit Review), Section 3513 (Energy Performance Benchmarking of Privately-Owned Buildings), and Section 3599 (Definitions), and add Section 3514 (Performance Benchmarking Requirements), Section 3515 (Performance Benchmarking Data Verification), and Section 3516 (Performance Benchmarking Penalties And Enforcement), of Chapter 35 (Green Building Requirements) of Title 20 (Environment) of the District of Columbia Municipal Regulations (DCMR).

Summary

These proposed rules amend the existing rules for benchmarking of privately-owned buildings as required by the Green Building Act of 2006 and its amendments. To date, over 1,500 privately-owned buildings have reported their energy performance to DOEE using the U.S. Environmental Protection Agency's (U.S. EPA) ENERGY STAR Portfolio Manager® benchmarking tool (Portfolio Manager). The proposed amendments address changes in District law and to Portfolio Manager, and clarify and streamline the benchmarking process.

These proposed regulations incorporate updates from The Sustainable DC Omnibus Amendment Act of 2014 (SDC Act). For example, they incorporate the use of aggregated utility data in benchmarking reporting requirements; requiring a building owner to benchmark using whole-building utility data for each particular utility; clarifying that a seller must provide a buyer with information necessary for the buyer to timely report required benchmarking data for the full reporting year in which the transfer occurred and failure to do so may be subject to fines; and clarifying that properties are no longer exempt from reporting due to transfer of ownership. These changes are reflected in §§ 3514.4, 3514.1(c)(4), and 3514.3(b) respectively.

The proposed regulations also incorporate updates from The CleanEnergy DC Omnibus Act of 2018. These include lowering the size threshold of buildings required to benchmark to 25,000 square feet effective starting in 2021, and to 10,000 square feet effective starting in 2024 (§ 3513.2), and adding requirements for a building owner to obtain third-party data verification of benchmarking data every three years from a DOEE-approved third-party verifier (§ 3515).

In addition, the proposed regulations address changes in Portfolio Manager and its reporting requirements. In 2017, U.S. EPA released its Water Score for Multifamily buildings. DOEE is

clarifying when and how a building owner should benchmark physically separate buildings that share a common water and/or energy meter (§ 3513.2).

The regulations have been updated to clarify that “benchmark scores” refer to the Portfolio Manager energy performance score. The District Benchmark Results and Compliance Report must now include complete and accurate values for all property use attributes and energy and water consumption entered into Portfolio Manager. It may not include default, estimated, or temporary values unless a reasonable explanation is provided. The Report must also include the DC Real Property Unique Identifier, defined and provided by DOEE; the name and contact information for the building owner/operator; and confirmation that a building owner has run all automated data quality checker functions prior to submission (§ 3514.1). The amendments also clarify that a building owner is not required to request any data from individual residential residents (§3514.3(c)).

Certain spaces may now be exempted from benchmarking if U.S. EPA allows such an exemption for purposes of ENERGY STAR certification (§ 3513.2(a)).

The proposed regulations also clarify the violations and enforcement process (§ 3516) and provide clarification that applications for exemption from benchmarking requirements need not be approved by the Green Building Advisory Council (§ 3511.7).

Chapter 35, GREEN BUILDING REQUIREMENTS, of Title 20 DCMR, ENVIRONMENT, is amended as follows:

Section 3511, EXEMPTIONS FROM GREEN BUILDING ACT REQUIREMENTS, is amended as follows:

Subsection 3511.1 is amended by striking the phrase “District Department of the Environment (DDOE)” and inserting “Department of Energy and Environment (DOEE)” in its place.

Subsection 3511.7 is amended to read as follows:

3511.7 Except for an application for an exemption from energy performance benchmarking requirements, an application for exemption under this section shall be submitted through DOEE to the Green Building Advisory Council (GBAC) for comments and recommendations.

Section 3512, EXPEDITED PERMIT REVIEW, is amended as follows:

Subsection 3512.2 is amended by striking the term “DDOE” and inserting the term “DOEE” in its place.

Section 3513, ENERGY PERFORMANCE BENCHMARKING OF PRIVATELY-OWNED BUILDINGS, is amended to read as follows:

3513 PERFORMANCE BENCHMARKING OF PRIVATELY-OWNED BUILDINGS APPLICABILITY

3513.1 Pursuant to D.C. Official Code § 6-1451.03, by April 1 of every year, an owner of a privately-owned building of a building type for which ENERGY STAR® tools are available shall measure the annual performance of the building using the U.S. Environmental Protection Agency (U.S. EPA) ENERGY STAR® Portfolio Manager (Portfolio Manager) benchmarking tool.

3513.2 The requirement described in § 3513.1 shall apply as of:

- (a) January 1, 2010, for a building with over 200,000 square feet (200,000 sq. ft.) of gross floor area;
- (b) January 1, 2011, for a building with over 150,000 square feet (150,000 sq. ft.) of gross floor area;
- (c) January 1, 2012, for a building with over 100,000 square feet (100,000 sq. ft.) of gross floor area;
- (d) January 1, 2013, for a building with over 50,000 square feet (50,000 sq. ft.) of gross floor area;
- (e) January 1, 2021, for a building with 25,000 square feet (25,000 sq. ft.) of gross floor area, or more; and
- (f) January 1, 2024, for a building with 10,000 square feet (10,000 sq. ft.) of gross floor area, or more.

3513.3 When determining the size of a building for the application of § 3513.2, a building owner shall:

- (a) Calculate the gross floor area of a building less any parking or secondary spaces, using the U.S. EPA ENERGY STAR® Portfolio Manager benchmarking tool;
- (b) Include the gross floor area of any structure that shares building systems or at least one common energy or water meter.

3513.4 All notifications regarding privately-owned building benchmarking required to be provided to the Department shall be made by contacting the Department's Energy Benchmarking Program.

A new Section 3514, PERFORMANCE BENCHMARKING REQUIREMENTS, is added to read as follows:

- 3514.1 According to the schedule described in § 3513.2 and the requirements of this Section, by April 1 of each year, a building owner required to benchmark for the previous calendar year shall:
- (a) Use an existing Portfolio Manager account or, if necessary, create a new account to measure the annual performance of the building;
 - (b) A building owner may use an existing Portfolio Manager account created in accordance with D.C. Official code § 6–1451.03(c)(3), for estimating the energy performance of new construction or substantial improvement.
 - (c) Use an existing Portfolio Manager property or, if necessary, create a new property for each building or set of buildings that are served by shared utility systems required to benchmark;
 - (d) Enter complete and accurate information for each building, property, or campus as required by this section or Portfolio Manager including:
 - (1) The name and contact information for the building owner and any operator of the property;
 - (2) The D.C. Real Property Unique Identifier(s) for the property on which the building is located as provided by DOEE;
 - (3) Energy and water utility information (use of estimated values is not permitted without written DOEE permission for instances where DOEE determines that a non-estimated value is not feasible);
 - (4) Complete whole-building utility data as specified in § 3514.3;
 - (5) Values for all property use information (use of default or temporary values is not permitted without written DOEE permission for instances where DOEE determines that it is not feasible to do otherwise); and
 - (6) Any non-residential tenant space use or utility information as necessary to meet the reporting requirements of this section; and
 - (e) When entering complete and accurate information into Portfolio Manager, the building owner shall exclude the gross floor area and energy consumption of property spaces so long as they meet Portfolio Manager criteria for excluding a property space.

- (f) Complete all automated data quality check functions within Portfolio Manager within seven (7) calendar days prior to submission of a District Benchmark Results and Compliance Report;
- (g) If required by § 3515, provide third-party verification information; and
- (h) Submit a complete and accurate District Benchmark Results and Compliance Report to DOEE by authorizing the transfer of the Report in Portfolio Manager.

3514.2 The District Benchmark Results and Compliance Report shall include one of the following for the building:

- (a) A Portfolio Manager ENERGY STAR[®] score, if a score is available;
- (b) A Weather Normalized Energy Use Intensity (EUI) result, if a Portfolio Manager ENERGY STAR[®] score is not available; or
- (c) An explanation of why the building owner could not provide complete information for calculation of a Portfolio Manager ENERGY STAR[®] score or a Weather Normalized EUI result.

3514.3 A building owner shall collect and enter into Portfolio Manager complete whole-building data for the calendar year in accordance with § 3514.1 as follows:

- (a) For new buildings, consistent with the requirements of § 3513.2, a building owner shall benchmark beginning with the first full calendar year after the building receives its Temporary Certificate of Occupancy or Certificate of Occupancy, whichever comes first;
- (b) If ownership of a building is transferred during a reporting year, the former building owner or owners shall, no later than sixty (60) days after the transfer, provide complete and accurate information necessary to the building owner required to benchmark to complete the benchmark reporting requirements for the full calendar year in which the transfer occurred;
- (c) If necessary to submit a complete and accurate District Benchmark Results and Compliance Report, a building owner shall obtain information from non-residential tenants, master meters, or a utility company;
- (d) If a building owner has made a reasonable effort to obtain information and does not have complete whole-building information to fulfill the requirements of this section, a building owner shall submit an incomplete building District Benchmark Results and Compliance Report containing as much information as is available and shall notify DOEE which set(s) of utility data are incomplete; and

- (e) A building owner who receives updated or corrected information for a reported calendar year after submitting a District Benchmark Results and Compliance Report shall submit an updated Report within thirty (30) days of receiving the new information. A building owner shall notify DOEE when it submits an updated or corrected Report.

3514.4 If a building owner has leased or allowed the sublease of all or part of a building to a non-residential tenant, for the non-residential tenant spaces, the owner shall:

- (a) Provide property use information relevant to the tenant space use type and annual utility data for the non-residential tenant space, either as:
 - (1) Aggregated or single-meter utility data provided directly from the utility companies; or
 - (2) Provided by tenants;
- (b) Upon notice that a non-residential tenant intends to vacate a building before the District Benchmark Results and Compliance Report is due, require from the tenant the necessary information for the period the tenant occupied the building; and
- (c) Provide contact information and gross floor areas leased for any non-residential tenant who did not provided necessary data as required by this section.

3514.5 A non-residential tenant of a building owner required to benchmark shall provide the building owner complete and accurate information, as described in § 3514.4, within thirty (30) days of the date a written request for such information is received by the tenant. Non-residential tenants who sublease their space are responsible for collecting and reporting sub-tenant information to the building owner. A request for information is considered received if:

- (a) The tenant actually receives the request; or
- (b) If the building owner signs a sworn statement that the building owner placed the request in U.S. first class mail, waited at least thirty (30) days, and did not receive notice that the request was returned as undeliverable.

A new Section 3515, PERFORMANCE BENCHMARKING DATA VERIFICATION, is added to read as follows:

3515.1 Every three (3) years, building owners or their designees shall perform third-party verifications of their District Benchmark Results and Compliance Reports.

- 3515.2 Third-party verification shall begin in 2024 with verification of District Benchmark Results and Compliance Reports submitted for calendar year 2023 and shall be performed every third year thereafter. Third-party verification shall be submitted as part of the District Benchmark Results and Compliance Report no later than April 1 of each reporting year for which third-party verification is required.
- 3515.3 For each property requiring verification, the building owner of that building, or the building owner's designee, shall make the ENERGY STAR® Data Verification Checklist, and any appropriate supporting documentation, available to an Approved District Data Verifier. The Data Verification Checklist is not required to be submitted with the District Benchmark Results and Compliance Report to meet the requirements of this section.
- 3515.4 An individual is an Approved District Data Verifier if they possess one (1) of the following licenses, credentials, or certifications, and are in good standing with the licensing, credentialing, or certifying entity at the time that the data verification is conducted:
- (1) Professional Engineer (PE);
 - (2) Licensed Architect;
 - (3) Certified Energy Manager (CEM);
 - (4) Building Energy Assessment Professional; or
 - (5) Any other additional data verifier license or training program credentials recognized by the Department and posted to its website.
- 3515.5 The U.S. Environmental Protection Agency is an Approved District Data Verifier for the purpose of this section when it performs data verification as part of an ENERGY STAR ® Certification that uses data including at least six (6) months of the calendar year for which this section requires data verification.
- 3515.6 An Approved District Data Verifier shall not be an employee of the building owner or of the building owner's designee who prepares or submits benchmarking information in Portfolio Manager.
- 3515.7 To meet the requirements of this section, the building owner or building owner's designee may request that the Approved District Data Verifier:
- (a) Review the Portfolio Manager entries and supporting documentation provided by the building owner or building owner's designee to identify any errors or gaps in the data; and

- (b) Work with the building owner or building owner's designee as needed to correct errors and fill gaps.
- 3515.8 Upon completion of verification, the Approved District Data Verifier must certify on the final page of the Data Verification Checklist that the Data Verification Checklist is complete and accurate by signing and dating it and listing any credential, license, or certification information that demonstrates the verifier's eligibility to act as an Approved District Data Verifier.
- 3515.9 Approved District Data Verifiers are not required to conduct a site visit or to complete the waste and indoor environmental quality section of the Data Verification Checklist to meet the requirements of this section.
- 3515.10 The building owner or building owner's designee shall use the Property Notes section or other relevant section in Portfolio Manager to report to the Department that third-party verification is complete by providing the following information:
 - (a) The name, title, telephone number, and email of the Approved District Data Verifier who completed the verification;
 - (b) The date of the verification; and
 - (c) The name of the credential, license, or certification and the license or certification number held by the Approved District Data Verifier.
- 3515.11 A building owner or building owner's designee may use a current EPA ENERGY STAR® Certification, which includes third-party data verification, to meet the third-party verification requirements of this section. To do so, the building owner or building owner's designee shall include the following information within the District Benchmark Results and Compliance Report Property Notes section or other relevant section:
 - (a) The date that the building received ENERGY STAR ® Certification;
 - (b) The date range of the data verified; and
 - (c) The name, title, email address, and the name of the credential, license, or certification, and license or certification number of the licensed professional who verified the data for the ENERGY STAR ® Certification.
- 3515.12 A building owner or building owner's designee shall retain a signed copy of the Data Verification Checklist and all records documenting the information contained in the District Benchmarking Results and Compliance Report for a minimum of three (3) years from the date that the Report is submitted to the Department, and shall provide a copy of those records to the Department upon request.

Section 3516, PERFORMANCE BENCHMARKING PENALTIES AND ENFORCEMENT, is added to read as follows:

- 3516.1 Any of the following shall be a violation of D.C. Official Code § 6-1451.03(c)(2)(D):
- (a) § 3514.1(g) (failure to submit accurate and complete benchmarking information in a District Benchmark Results and Compliance Report);
 - (b) § 3514.1 (failure to submit a District Benchmark Results and Compliance Report to DOEE by April 1 for the preceding calendar year);
 - (c) § 3514.3(b) (failure of a former building owner to submit complete and accurate benchmarking information to the building owner);
 - (d) § 3514.3(e) (failure to update or correct information for a submitted District Benchmark Results and Compliance Report within thirty (30) days of receiving the new information); or
 - (e) § 3514.5 (failure of a non-residential tenant to submit complete and accurate benchmarking information to the building owner within thirty (30) days of a written request from the building owner).
- 3516.2 A building owner or non-residential tenant who fails to submit benchmarking information as specified in § 3516.1 shall be assessed a penalty by DOEE of not more than one hundred dollars (\$100) for each calendar day the required submission has not been made.
- 3516.3 DOEE may enforce the requirements of this section by issuing one or more of the following:
- (a) Notice of violation; or
 - (b) Notice of infraction.
- 3516.4 DOEE may issue a notice of infraction without first issuing a notice of violation.
- 3516.5 A building owner, former building owner, or a non-residential tenant who receives a notice of infraction may request a hearing or adjudication pursuant to the Office of Administrative Hearings Establishment Act of 2001 (D.C. Official Code § 2-1831.01 *et seq.*) and the Office of Administrative Hearings rules (1 DCMR § 2800 *et seq.*).
- 3516.6 A building owner, former building owner, or a non-residential tenant may appeal to the District of Columbia Court of Appeals only after exhausting all administrative remedies.

Section 3599, DEFINITIONS is amended as follows:

The following definitions are amended to read as follows:

Director – the Director of the Department of Energy and Environment (DOEE), or the Director’s representative, agent, designee, or successor.

District Benchmark Results and Compliance Report – The Portfolio Manager report that includes benchmark and ENERGY STAR® statements of energy performance, identifies reporting methodology, and contains data verification information when required by section 4 of the Green Building Act of 2006, effective March 8, 2007 (D.C. Law 16-234; D.C. Official Code § 6-1451.03).

District Benchmark Reporting Template – the template developed by DOEE in partnership with the United States Environmental Protection Agency (U.S. EPA), that exports from Portfolio Manager the building information required for building owners to fulfill District benchmarking requirements.

Tenant – a person or entity entitled to the possession, occupancy, or the benefits of any rental unit owned by another person or entity, or the owner of an individual condominium unit within a condominium association.

The following definitions are added:

Department – the Department of Energy and Environment (DOEE).

ENERGY STAR® Data Verification Checklist – a U.S. EPA ENERGY STAR ® form used to complete the third-party verification of District Benchmark Results and Compliance Reports.

ENERGY STAR® score – a 1-to-100 score provided to buildings by the U.S. EPA ENERGY STAR ® Program to assess how buildings perform in relation to similar buildings nationwide.

Portfolio Manager Data Collection Worksheet – the list of data fields required to fulfill District benchmarking requirements, which includes the information needed for a building owner to request information from a non-residential tenant. This worksheet can be found on the U.S. EPA ENERGY STAR® website.

Property use information – the characteristics, such as the conditioned floor area, weekly operating hours, number of occupied units, and number of computers in use, described by Portfolio Manager for a particular building type.

Whole-building utility data – information about all energy and water consumed on the premises, including in common areas, tenant-controlled areas, and residential living

areas, but not including spaces that meet all exclusion criteria described in the Portfolio Manager Data Collection Worksheet.

The following definitions are stricken:

District Data Collection Worksheet.

Non-Residential Tenant Information Form.

Non-Residential Tenant Notification Letter.

Space use attributes.

All persons desiring to comment on the proposed rulemaking should file comments in writing not later than thirty (30) days after publication of this notice in the *D.C. Register*. Comments should be clearly marked “Public Comments: Energy Performance Benchmarking” and e-mailed to [info.benchmark@dc.gov. Comments may also be filed with DOEE, Benchmarking, 1200 First Street, N.E., 5th Floor, Washington, DC 20002, Attention: Katie Bergfeld. Copies of this Notice of Proposed Rulemaking may be obtained by contacting DOEE at (202) 535-2600 or at info.benchmark@dc.gov.