

Philadelphia Building Owners — It's Time To Benchmark

Law360, New York (October 08, 2013, 4:27 PM ET) -- If you own a commercial building of 50,000 square feet or more in the city of Philadelphia, the time has come to address the city's new energy and water use benchmarking law.

Last year, the city of Philadelphia became the sixth city in the nation to enact mandatory benchmarking legislation (Ordinance No. 120428-A) that requires large commercial building owners to measure and report their annual energy use and water consumption. This benchmarking data will be collected by the Mayor's Office of Sustainability and publicly disclosed on its website.

The ordinance is designed to focus more attention on energy and water use in commercial buildings in order to encourage more informed choices by property owners, tenants and prospective purchasers.

The benchmarking process involves assessing energy use using standardized metrics and comparing performance relative to similar buildings. Regulations and guidance issued this past summer provide key details on program implementation and set the initial compliance deadline at the end of this month.

Coverage and Exemptions: The buildings covered by and subject to the benchmarking requirements include (1) commercial buildings with indoor floor space of 50,000 square feet or more, (2) commercial portions of mixed-use buildings having at least 50,000 square feet of indoor floor space devoted to commercial use, and (3) multiple buildings that are served by a common energy meter (without submetering or other separate tracking) that collectively have at least 50,000 square feet of indoor floor space devoted to commercial use.

Commercial use is defined by the regulations to include any activities that involve any form of trade or commerce, whether or not undertaken for profit, or that require consideration in exchange for any good, service or privilege. The regulations, however, contain three important exemptions and provide that benchmarking is not required for a covered building where any of the following circumstances are met:

- Benchmarking is not required for any calendar year where, in that calendar year, more than 50 percent of the indoor floor space of the building is unoccupied for more than a total of 180 days
- The Mayor's Office of Sustainability finds that benchmarking or disclosure would cause exceptional hardship or would not be in the public interest based upon an application and evidence from the owner

- The building is primarily used for manufacturing or other industrial purposes for which benchmarking results would not meaningfully reflect building energy use characteristics due to the intensive use of process energy (i.e., energy used in the actual manufacturing, production or processing of a good, commodity or other material).

Building owners who have concerns with benchmarking or public disclosure of their energy and water usage should evaluate the potential applicability of these regulatory exemptions. According to the Mayor's Office of Sustainability, no specific criteria have been established for evaluation of eligibility for the last two exemptions; however, those wishing to seek an exemption must complete and submit an Exemption Request Form and requests will be decided on a case-by-case basis.

While the exemptions provide relief from the benchmarking requirements for eligible applicants, it will be very important for applicants to support their request with a strong factual foundation. The regulations require that evidence used to claim an exemption must be retained for at least three years from the reporting deadline. Additional record-retention requirements have also been established under the regulations.

Single-Tenant Delegation: While the ordinance places the benchmarking and reporting obligations squarely on the owners of covered buildings, the regulations provide an option for delegation of responsibilities to a tenant in a single-tenant building. This option is limited to circumstances where a tenant leases an entire building, is responsible for managing all building energy and water use, and agrees in writing to accept the delegation.

The Mayor's Office of Sustainability states that it must be notified in writing of all single-tenant delegations and has issued a Single Tenant Delegation Consent Form for use as a model written agreement. However, as with all legal matters, before using this form, owners and tenants should carefully review their other contractual arrangements and assess whether the form is appropriate for them.

For all other tenant-occupied buildings, the owner retains the responsibility to obtain and report information pursuant to the provisions of the ordinance addressing tenant-occupied spaces.

Data Entry and Deadlines: The ordinance and regulations require owners of covered buildings to enter their energy and water use data into Energy Star Portfolio Manager, the U.S. Environmental Protection Agency's free web-based benchmarking tool.

While many building owners may already use Portfolio Manager, it is important to note that the Philadelphia program requires use of a Custom Reporting Template interface for data entry in Portfolio Manager. The city has issued a Data Collection Worksheet and how-to guide to help owners assemble and properly enter their data.

The data entry process will generate an energy use intensity (EUI) measure for the building, which indicates the building's energy use per square foot (kBtu/square foot) per year. A lower EUI reflects a more efficient building. Owners may arrange for usage information to be electronically transmitted to Portfolio Manager by the utility. Both PECO and Veolia Energy offer automated data transfer services.

According to the ordinance, annual benchmarking information for the prior calendar year is due by June 30 of each year. However, the first deadline (applicable to 2012 data) was delayed to Oct. 31, 2013, in order to allow sufficient time for compliance following issuance of the implementing regulations in July and a recent major upgrade to Portfolio Manager.

The recent federal government shutdown has now caused further delay, as EPA's Energy Manager Portfolio Manager is unavailable for use. According to the Mayor's Office of Sustainability, the city has decided to extend the October 31 deadline by at least the number of days that Portfolio Manager is offline.

Property Transfers: The seller or lessor of any covered building must, upon request, provide prospective purchasers or prospective lessees with a copy of the building's most recent Statement of Energy Performance from Portfolio Manager. Further, a seller of a covered building is required to provide a buyer with all information necessary for the buyer to timely report annual benchmarking information for the entire year.

Disclosure: The Mayor's Office of Sustainability will make benchmarking information for all covered buildings (beginning with calendar year 2013 results) publicly available on its website.

According to the regulations, the information to be posted online will include:

- building address;
- energy use intensity (as reflected in Portfolio Manager);
- water use per gross square foot;
- greenhouse gas emissions from energy use;
- Portfolio Manager Energy Star rating (where applicable); and
- reported facility type.

The Philadelphia benchmarking program is part of the city's larger sustainability effort, as outlined in its Greenworks plan, to make Philadelphia the greenest city in the nation. According to the Mayor's Office of Sustainability, it is intended to promote transparency and drive improvements in building energy efficiency.

For prospective purchasers and/or tenants, the new benchmarking program may provide another basis to compare building performance. For owners, it may provide another basis to prioritize opportunities for enhanced energy and water efficiency and to promote sustainable commercial spaces.

--By Brenda Hustis Gotanda, Manko Gold Katcher & Fox LLP

Brenda Hustis Gotanda is a partner in the firm's Bala Cynwyd, Pa., office. She leads the firm's sustainability practice group.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.
