



SNAPSHOT:

New York City's Benchmarking Law: Does It Go Far Enough and Is It Fair To Building Owners?

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On April 1, 2011, the New York City Department of Buildings published final rules establishing annual benchmarking of energy and water use for certain buildings. The regulations implement Local Law 84 (LL84) which was part of the package of laws known as the “Greener Greater Buildings Plan,” enacted in December 2009.

Under LL84, building owners must collect total energy use of their buildings and then enter the information into EPA’s ENERGY STAR Portfolio Manager System (Portfolio Manager). Each non-residential building entered into the Portfolio Manager will receive an ENERGY STAR rating of 1 to 100 that is based on the energy performance of “similar” buildings across the country. Residential buildings will be assigned an Energy Use Index (EUI) rating. The Department of Finance is then required to publish this benchmarking information.

The theory underpinning LL84 is that making benchmarking information publicly-available will create incentives for owners to improve the energy efficiency of their buildings much in the same way that companies that were required to file Toxic Release Inventory forms under the federal Emergency Planning and Community Right-to-Know law quickly reduced the quantity of hazardous materials emitted or discharged by their facilities. However, it is unclear if the current benchmarking rules have the proper mix of sticks and carrots to accomplish the goal of reducing the City’s greenhouse gas emissions by 30% by 2030.

Covered Buildings

A complete analysis of LL 84 is beyond the scope of this article. However, by way of summary, the benchmarking obligations applied to owners of privately-owned buildings over 50,000 square feet and two or more buildings on the same lot, or owned as condominiums exceeding 100,000 gross square feet. The benchmarking rules do not apply to 1-3 family residences on properties classified as Class One under the Real Property Tax Law.

The Mayor’s Office developed a list of buildings that it believed to be subject to LL84 based estimated gross square footage developed by the Department of Finance (DOF) and sent notices to owners of those buildings. Nevertheless, owners should verify the gross square footage calculations since the DOF does not include below grade space and some other space types. If the DOF figure is wrong and not corrected, a building could be compared to the wrong type of building category and given a lower energy performance than it deserves.

Problems With Data Collection

The benchmarking rules require owners to submit actual energy data if access to this information through meters, bills, tenant-supplied data, or can obtain this data from a utility. Con Edison will provide building owners with aggregated building data for both electric and gas consumption up to 24 months, at a fee of \$102.50 per building

LL84 requires property owners to provide non-residential tenants that have their own utility meters with a Non-Residential Tenant Information Collection Form and these tenants are required to complete the information. Owners may also request information from residential tenants and tenants who are not individually metered. However, these tenants are not obligated to respond to the requests. In addition, LL84 does not give a property owner any rights to access tenant space.

Owner of covered buildings are not excused from complying with LL84 if they are unable to obtain the requested data from tenants. Where energy use data is unavailable for some or all dwelling units in a building, the owner may either extrapolate data using representative billing or meter data or by using default values developed provided by the Department of Buildings (DOB).

Some building owner groups claim that the DOB default values could result in inaccurate comparisons because they could be used by building owners to mask energy-intensive building systems and tenant use. However, this approach may only be used for benchmarking reports for residential tenant spaces that must be filed in May 2012 and May 2013 (compliance years 2011 and 2012). Beginning with compliance year 2013, owners must use actual values for non-residential tenant spaces

Problems with Portfolio Manager

At the heart of the LL84 program is the EPA Portfolio Manager but there are concerns that this is not the best tool to measure and evaluate building performance. The Portfolio Manager benchmarks buildings based on data collected from the Commercial Buildings Energy Consumption Survey (CBECS), which is adjusted or normalized for weather variations and basic operating conditions. Currently, there are approximately 5,200 buildings in the CBECS inventory that were chosen to represent the entire stock of approximately 5 million commercial buildings in the United States. The CBECS is supposed to be updated every four years by the federal Energy Information Agency (EIA). The most recent data is based on the results of the 2003 results. EIA intended to update the data based on a 2007 CBECS but the agency recently announced that it had suspended that work because of "statistical" problems and that the 2011 CBECS was postponed because of budget cuts. Thus, buildings complying with LL84 are going to be compared to the energy performance metrics that were collected before the recent wave of high performance buildings became operational and this creates a risk of inflating a property's energy rating

Another problem with the Portfolio Manager is that it appears to have insufficient classifications of building types. The CBECS database categorizes commercial buildings into 12 major "principal building activities" or PBAs. However, many building owners and energy professionals feel that CBECS database does not properly take into account important differences among buildings based on large ranges in energy performance of buildings within a category. For example, for office buildings in the CBECS, the EUI (spell out) ranges from 60 to 300 kBtu/sf per year, with a national average for the category of 92.9

kBTU/sf per year. These significant differences in energy consumption suggest that the CBECS building categories may be too broad and encompass too many different building types within a particular category.

Another concern is that the CBECS database is biased towards smaller-sized and older buildings. More than one-third of the buildings in the database have less than 10,000 square feet and nearly three-quarters of the buildings are more than 20 years old.

Another problem is that the CBECS inventory is limited to commercial buildings yet LL 84 also applies to residential buildings. These multi-family buildings pose their own unique set of problems since vacancy rates may vary and individual tenant energy consumption may vary considerably.

Unfortunately, there simply is no data tool with a sufficient track record for benchmarking commercial and residential buildings. Earlier this year, ASTM did publish its E-2707 Standard Practice for Building Energy Performance Assessments for a Building Involved in a Real Estate Transaction (BEPA) which was designed to obtain more representative data standardizing the collection and analysis of building energy data. BEPA takes into account the specific building type and use, completion date of the last major renovation, monthly occupancy rates, previous energy audit reports, labels and certifications. Furthermore it requests interviews with building managers and a walk through, which are not part of the Energy Star process. The site inspection can be particularly useful since it will help obtain site specific building characteristics and operating conditions such as actual floor space, vacant spaces, tenant energy and the major building energy-use systems.

LL84 does allow the Mayor's Office of Long-Term Planning and Sustainability (OLTPS) to designate other benchmarking tools that may complement the Portfolio Manager. Since OLTPS is required to provide a report to the Mayor and the City Council by the end of 2011 that evaluates the accuracy of the benchmarking data and the effectiveness of the benchmarking tool, it would seem to make sense for OLTPS to consider if BEPA could generate more representative energy-use and cost data. If so, OLTPS could recommend allowing building owners to use BEPA to address the deficiencies with the EPA Portfolio Manager.

Disclosure and Enforcement

As discussed, one of the underpinnings of LL84 is that marketplace forces will cause building owners to improve the efficiency of their buildings because they will not want tenants, banks and other market participants to learn that their buildings are inefficient. However, the benchmark rules provide that the DOF will not begin publishing individual energy performance information for privately-owned buildings until September 2012 for non-residential buildings and September 2013 for residential buildings whose primary use is residential.

Coupled with the delay in making the benchmarking information public is the relatively paltry fines for non-compliance. The benchmarking rules provide that failure to benchmark is a "lesser violation" under the Construction Codes, punishable by a fine of \$500. Continued failure to benchmark may result in additional violations on a quarterly basis and an additional penalty of \$500 per violation. The maximum penalties that can be issued per year are \$2,000.

Given the relatively minor penalty for non-compliance, there is little incentive for owners of inefficient buildings to comply with LL84 until at least 2013. As a result, LL84 may become more like the City's Property Condition Disclosure Law which also has penalty for non-compliance is \$500. Instead of possibly becoming liable for misrepresentation, many sellers are advised by their attorneys to simply reduce the sales price by \$500 in lieu of preparing the Property Condition Disclosure Statement. The fear is that without significantly higher penalties, LL84 may be honored more in the breach.

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