

San Francisco's Energy Performance Ordinance: Spotighting Commercial Building Energy Use

by David C. Longinotti, LEED® AP

The City of San Francisco has joined New York, Seattle, Austin and other green minded cities in adopting an ordinance designed to track energy performance of existing nonresidential buildings. The City's new Existing Commercial Buildings Energy Performance Ordinance ("EPO")¹, which is the outcome of former Mayor Newsom's Task Force on Existing Buildings, requires owners of nonresidential buildings to conduct standardized energy audits, benchmark whole building energy performance, and report energy performance data to the City. The EPO also requires the City's Department of Environment to make building specific energy performance information available to the public. For building owners, the EPO presents both an opportunity to consider and adopt energy conservation measures to improve bottom line performance, and a new legal requirement to be understood and satisfied.

Energy Performance Evaluation and Reporting

The EPO requires owners of nonresidential buildings greater than 10,000 square feet in size to conduct energy efficiency audits of their buildings every five years and to annually benchmark and report their energy performance to the City. All audits must comply with American Society of Heating, Refrigerating, and Air-conditioning Engineers ("ASHRAE") Procedures for Commercial Buildings Energy Audits (2004 or later). Only auditors that meet the City's qualification requirements, as established in the EPO, may conduct a compliance audit.

There are two levels of ASHRAE defined energy audits that may be required depending on building square footage. Each standard requires, to one degree or another, an on-site survey and the development of specific energy conservation recommendations with attendant

¹ San Francisco Environment Code, Chapter 20, Sections 2000 et seq.

cost/savings analyses.² The auditor must prepare, sign and deliver an ASHRAE compliant report to the owner. The building owner is then required to submit to the City a “Confirmation of Energy Audit” to achieve compliance.³

The EPO also establishes a required protocol for whole building energy benchmarking. Specifically, building owners are now required to use the “EPA Energy Star Portfolio Manager” to track total energy use and obtain an Energy Star Portfolio Manager Energy Performance Rating for their entire building.

There are limited exemptions and rights to extend compliance to both the energy audit requirement and the AEBS (defined below) filing requirement, especially for new and LEED® certified buildings. There is also an exemption for mixed-use buildings. The audit and benchmarking requirements are being phased in over a three-year period. A timeline for implementation provided by the Department of Environment follows as **Attachment A**.

Disclosure of Energy Performance Information

The EPO requires owners to file with the City’s Department of Environment an “Annual Energy Benchmark Summary Report” (“AEBS”). The AEBS must be prepared using the Energy Star Portfolio Manager tool and be based on a trailing 12 month record of continuous data ending no earlier than two months prior to submittal. Because a report as to the entire building is required, owners must now assure that they have the leasehold rights to receive energy usage information from tenants that may be separately metered.

Perhaps the most controversial aspect of the EPO from a building owners' perspective is the public disclosure requirement. The EPO requires the Department of Environment to make

² Buildings less than 50,000 square feet in size must comply with Level I audit standards; all others are subject to Level II standards. San Francisco Environment Code, Chapter 20, Sections 2004(b)(2). The primary difference between these audit levels is the cost of energy conservation measures identified in them; Level I audits identify low cost measures and Level II audits identify all measures. See San Francisco Environment Code, Chapter 20, Sections 2001(12) and (13).

³ The audit requirement is being phased in over three years based on a schedule now being developed by the City’s Department of Environment. S.F. Environment Code Section 2004(b). The Department of Environment will inform building owners of their audit deadline. Id at Section 2004(b)(1)(C).

summary statistics for each subject building from its AEBS available to the public, including average energy use intensity and annual carbon dioxide emissions. Similarly, owners are also required to make the AEBS reports “available” to their tenants.⁴ There is also the issue of whether owner confidentiality can be maintained for documents that are subject to review by the Department of Environment under the EPO’s “Quality Assurance” provisions.

Confidentiality

The EPO contains numerous protections to protect the confidentiality of matters disclosed to the Department of Environment. Many of these protections are qualified, however, or require affirmative action by an owner to perfect them, limiting their effectiveness. The EPO requires the Department of Environment to keep the confidentiality of any information submitted by an owner, but only where the owner has taken affirmative steps to protect the information by a certain date after disclosure, and only to the extent permitted by law. The EPO also states that owners shall not be required to disclose “confidential business information,” but clarifies that certain information will not be viewed as confidential, including building specific energy performance statistics.⁵ These protections, though useful, are further limited in effectiveness by the City’s public disclosure obligations under California’s Public Records Act, and San Francisco’s more expansive Sunshine Ordinance. To limit the risk of disclosure of trade secrets, owners should follow the protocols for protecting them provided in the EPO prior to disclosure.

⁴ The EPO leaves open the question whether building owners must deliver copies of their AEBS to all tenants or merely make them available for review at the Manager’s office.

⁵ There is also a covenant by the City to keep confidential any energy related information obtained in a quality assurance review, but that is also limited to the extent permitted by law. S. F. Environment Code Section 2003(f).

Enforcement

The enforcement mechanism provided for in the EPO is modest. Owners of buildings greater than 50,000 square feet in size are subject to a \$100 per day fine, limited to 25 days per year, or a maximum fine for non-compliance of \$2,500 per annum. Owners of buildings smaller than 50,000 square feet in size are subject to a fine of \$50 per day, also limited to 25 days per year for a total fine of \$1,250 per annum.⁶ Non-compliant owners will also be identified in public records of the Department of Environment. As a practical matter, owners will likely comply with the EPO to assure they do not breach the “compliance with law” covenants contained in any financing arrangements.

Conclusion

At least in San Francisco, the EPO should achieve the energy conservation and public disclosure policies of AB 1103, a statewide energy performance disclosure law first passed in 2007 that is currently stalled in implementation. As CALGreen is to new construction, the EPO should be viewed as the first step toward heightened regulation of existing buildings. Although the next step in regulation of existing buildings in San Francisco is unclear, the existing building ordinances of Seattle and Austin that regulate multi-family as well as non-residential buildings could be a road map to where San Francisco is headed.

⁶ At least as expressly provided for in the statute, non-compliance will not constitute a nuisance providing for injunctive or other relief.

Existing Commercial Buildings Energy Performance Ordinance Timeline

1. Energy Benchmark

	Up to 120 Days after Approval	October 1, 2011	April 1, 2012	April 1, 2013	2014 and beyond
Disclose Energy Benchmark	Educate property owners about upcoming requirements. Support early action	All buildings >50k sq feet benchmark First year data is confidential	All buildings >25k sq feet benchmark. Public disclosure for >50k sq ft	Require all buildings >10k square feet to benchmark Public disclosure for >25k sq ft	Continue benchmarking. Re-evaluate options for buildings <10k sq. ft. Public disclosure for >10k sq ft
Lead By Example in Public Facilities	Communicate \$35M 10-year ongoing investment in energy efficiency in public facilities	City facilities benchmarked, with performance made public on the same timeline as private sector facilities. (Energy performance is currently reported at the department level for Climate Action Plans.) Ongoing investment in energy efficiency in municipal facilities.			

2. Energy Efficiency Audit

	Up to 120 Days after Approval	Preparation	Audits Due July 1, 2012 for First Group	Audits Due April 1, 2013 for Second Group	Audits Due April 1, 2014 for Final Group	2015	2016	2017
Energy Audit	Dept of Environment notifies building owners of energy efficiency audit requirement.	12 months before first energy audit due date	Approximately 33% of buildings must obtain an energy audit	Deadline for second 33% of buildings to obtain an energy efficiency audit	Deadline for third 33% of buildings All buildings >10,000 sq ft have clear plan for saving energy	-	-	20% complete a new energy efficiency audit, identifying remaining cost-effective opportunities

Support for Action

Incentives	SF Energy Watch and PG&E programs provide rebates for energy efficiency improvements Federal incentives include accelerated depreciation and 179D tax deduction for qualifying improvements
Training	Free benchmarking training is available from Pacific Energy Center (www.pge.com/energyclasses) and EPA ENERGY STAR (www.energystar.gov/benchmark)

(Energy audit due dates may be revised prior to public notice. Benchmarking dates are explicit in the ordinance.)

Existing Commercial Buildings Energy Performance Ordinance: Overview from the Perspective of a Building Owner

