

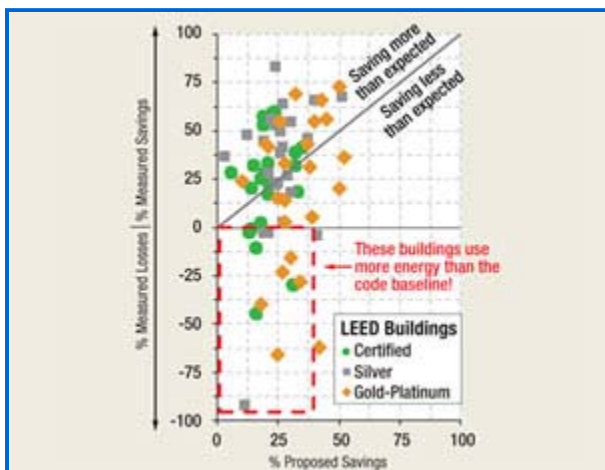
Building Rating System Requirement Raises Concerns

07/08/2009

By [Nadine M. Post](#)

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Though green-building experts and construction lawyers laud the good intentions of the U.S. Green Building Council about its popular Leadership in Energy and Environmental Design green-building rating system, many have serious concerns about at least one new requirement in the latest version of LEED, which went into effect on July 1. The requirement, a “precondition” of certification for all buildings under LEED Version 3, says owners must commit to sharing building energy and water-usage data for at least five years after a new building is occupied or an existing building is certified. Another change sending shudders down the spine of construction lawyers and others is that LEED certification may be revoked if there is noncompliance with this new “minimum program requirement” or any of the other six so-called MPRs.



Source: Source: New Buildings Institute/USGBC’s energy performance of LEED for new construction buildings Measured Vs. Proposed Energy savings: Study only culled data from 121 buildings.

The energy-use reporting requirement applies to the particular project’s type of certification. For example, if a project is seeking certification for new construction, the requirement applies to the entire building. If a project is seeking certification for core and shell, the requirement applies only to energy data for the core and shell. The same goes for commercial interiors.

USGBC plans to use the performance data, which it promises to keep confidential, to compare proposed and metered energy performance as well as performance of different LEED-rated buildings and interiors.

“We are taking the concept of green building and making sure it is real,” says Scot Horst, USGBC’s senior vice president for LEED. “Whether or not LEED-rated buildings are really performing is an extremely important issue for us,” he adds.

Under LEED 2009, sharing energy and water-usage data includes supplying information on a regular basis in a free, accessible and secure online tool or, if necessary, taking any action to authorize the collection of information directly from service or utility providers. The commitment to supply data must carry forward if the building or space changes ownership or lessee.

The “bottom line” is, these conditions “may end up doing more harm than good for the future vitality” of LEED, says attorney Edward B. Gentilcore, a partner of Duane Morris LLP, Pittsburgh. “This would be a significant loss in light of the accomplishments to date,” he adds.

Owners weighing whether to pursue a LEED-rated project will have to consider the potential that the achievement of the rating may be a Pyrrhic victory because decertification may be the ultimate legacy, says Gentilcore.

Construction lawyer Ujval Vyas, a principal with Alberti Group LLC, Chicago, has more concerns. Any third party has the right to initiate noncompliance action by USGBC for any of the MPRs, he says. “This creates a huge risk and provides standing to any entity whatsoever to injure a building owner or tenant,” Vyas says.

All certified projects must commit to sharing with the U.S. Green Building Council and/or Green Building Certification Institute “all available actual whole-project energy and water-usage data for a period of at least five years.”

— LEED 2009 MINIMUM PROGRAM REQUIREMENT 6

Both lawyers say the requirement creates a difficult policing obligation of landlords in relation to their tenants or landowners and developers in relations to subsequent purchasers. “What was once an initial project-performance milestone now has ongoing tail responsibilities that could create extended obligations for the owner itself and possibly, in turn, design and construction teams,” says Gentilcore.

There also are unknowns about the impact of any decertification on the owner’s continuing ability to enjoy tax or other incentives that were triggered based upon the initial achievement of the specified rating goal, say sources.

There also are contractual concerns. “The importance of careful reconsideration of existing contract models for...

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...engagement of the design and construction teams and assigning appropriate responsibilities and risks will be even more acute under this new iteration of LEED,” says Gentilcore.

Vyas says the actual mechanism for how and when the metered or submetered data is to be provided is not established. In some jurisdictions, investor- or public-owned utilities also are not allowed to share metered data with anyone other than the current or potential owner of the property.

Horst says USGBC is planning to work with utilities to remove obstacles to reporting and invites those with concerns about the requirement to e-mail USGBC at leedinfo@usgbc.org. “We’re still developing the best and easiest ways to help owners do this,” says Horst. “This is a new requirement and there is a lot to work out over time.” Horst declines to say when addenda will be issued.

There is support for the requirement, both cautionary and full. “These changes will give credibility to the rating system,” says Gordon Holness, president of the American Society of Heating, Refrigerating and Air-Conditioning Engineers. “As good as the rating system has been, it will quickly tarnish if buildings do not perform as expected.”

Greg Mella, a principal in the Washington, D.C., office of SmithGroup and a member of the American Institute of

Architects' committee on the environment, supports the reporting requirement, with qualifications. "The requirement need not be onerous since owners can simply provide copies of utility bills, and USGBC will waive this requirement for projects that are tied into a central plant where collecting this data can be difficult," says Mella. But USGBC needs to better understand the requirement's potential legal ramifications, he adds.

The conditions may end up doing "more harm than good" for LEED.
— EDWARD B. GENTILCORE, LAWYER

Mella also wants guidelines for overcoming potential legal challenges, which may include providing more exceptions to the rule. He is not too concerned about the risk of decertification, but he agrees with sources who maintain LEED 2009 will, in general, require reconsideration of existing contract models for engagement of design and construction teams.

"LEED requires owners, contractors, engineers and architects to certify certain strategies and/or products were incorporated into a project, to predict how a building will operate and to commit to honoring the claims made to USGBC during LEED documentation," says Mella. "It is almost inconceivable to me to think that something as pervasive as LEED would not have a significant impact on contract models."

The Building Owners and Managers Association also supports the requirement but has concerns about ensuring data access, potential building decertification, ongoing tax considerations and due process for participants. "It is a positive step...and we look forward to learning more details about the requirement," says Henry Chamberlain, BOMA's president.

Energy data will "allow us to collectively say how LEED buildings are affecting climate."
— SCOT HORST, USGBC

BOMA also wants to know if existing meters will be sufficient to supply the performance data and in the format required. "If not, who will bear the costs of new meters?" asks Chamberlain. "BOMA members will almost certainly have other concerns, including how the performance data will be used and especially how the confidentiality of that information will be preserved."

Historically, it has been "very difficult" to get building owners to provide performance data, says Horst. This was the case during a joint energy-performance study with the National Buildings Institute, which was released last year. The report found LEED buildings were performing 25% to 30% better than the national average or modeled baselines. But the study only looked at 121 buildings. USGBC wants to increase that number.

"We've all been talking about how important carbon is," says Horst. The new requirement will "allow us to collectively say how LEED buildings are affecting climate," he adds.

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