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Building Energy Performance Standards – Coming to A City, County or State Near You?

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On Tuesday, July 20, Montgomery County, Maryland, is holding a public hearing on Bill 16-21 (Environmental Sustainability – Building Energy Use Benchmarking and Performance Standards – Amendments)[1] which requires commercial and some residential buildings to become more energy efficient over time. If the bill is enacted, Montgomery County would be the seventh U.S. jurisdiction (alongside St. Louis, MO,[2] Washington, DC,[3] New York City,[4] Reno, NV,[5] Colorado,[6] and Washington state[7]) and the first U.S. county to adopt such standards.[8] Others are sure to follow.[9] Interested stakeholders – such as building owners and operators and companies that are developing new energy efficient technologies – should pay close attention to the development of the standards over the next few years.

Governments that have Building Energy Performance Standards use information about the energy efficiency of existing buildings in their jurisdiction to develop binding efficiency targets that buildings must meet over a period of time (such as three, four, or five years). After the period is up, the regulator recalculates the targets and the compliance cycle begins anew. Buildings are typically grouped by property type. The regulator sets efficiency targets so that the most efficient buildings already comply, but the least efficient buildings need upgrades in order to come into compliance. Many jurisdictions also offer technical and financial assistance to building owners.[10]

Jurisdictions that implement such standards typically first require buildings to report on their energy use and efficiency for a period of time in order to develop benchmarking data for the standard-setting

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process. Standards are then typically phased in over a period of years, starting with larger commercial buildings. For example, in Washington DC, as of this year, privately owned buildings with at least 50,000 square feet of gross floor area are subject to the standards. By January 1, 2023, the threshold is 25,000 square feet and by January 1, 2026, the threshold is 10,000.

Under the current draft in Montgomery County, by June 1, 2022, the county would develop final performance standards for all building types to be achieved between 2034 and 2037. Interim standards will be phased in on a rolling basis, starting with commercial buildings with at least 50,000 square feet of gross floor area, then non-residential buildings with 25,000 to 50,000 square feet and residential buildings with 250,000 square feet or greater, and finally residential buildings 25,000 square feet or greater.

The consequences of noncompliance differ by jurisdiction; and in some cases, the regulators are still working out the details. In DC, for example, the final penalties for non-compliance have not yet been set, but regulators have been clear that they intend to set the penalties higher than the cost of compliance. In Montgomery County, according to the draft legislation, violations of the regulation are a Class A misdemeanor, which carries penalties of $1000 per day and up to six months in jail if criminal, $500 per day if civil only ($750 for repeat offenders).[11] County officials are seeking state authority to levy "poor performance payments" that would make investment in building upgrades more financially attractive than simply paying the Class A penalties.

In addition to Montgomery County, Boston, MA, Cambridge, MA, Seattle, WA, and Illinois are considering adopting building energy performance standards, with proposals or bills in various stages of the legislative process.

The environmental practice group at Wiley is monitoring these developments. At Wiley, we also have extensive experience in assisting stakeholders who wish to engage in the rulemaking process.

[1] *See generally* Montgomery County Dept. Environmental Protection, Building Energy Performance Standard, https://www.montgomerycountymd.gov/green/energy/beps.html. Interested parties have until tomorrow (Thursday, July 15) to register to provide public comments.

[2] https://www.stlbenchmarking.com/Building-Energy-Performance-Standards.

[3] https://doee.dc.gov/service/building-energy-performance-standards-beps.

[4] https://www1.nyc.gov/site/sustainablebuildings/ll97/local-law-97.page.

[5] https://www.reno.gov/community/sustainability/energy-and-water-efficiency.

[6] https://leg.colorado.gov/bills/hb21-1286.

[7] https://www.commerce.wa.gov/growing-the-economy/energy/buildings/clean-buildings-standards/.

[8] Boulder, Colorado also has a set of standards that apply to rental housing. See City of Boulder, Smartregs, https://bouldercolorado.gov/services/smartregs.

[9] As jurisdictions adopt measures to reduce greenhouse gas emissions, a focus on emissions from buildings is inevitable. According to EPA, commercial and residential buildings account for 13% of greenhouse gas emissions in the U.S. *See* EPA, Sources of Greenhouse Gas Emissions, https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions. These national numbers mask significant regional variation. For example, Montgomery County concludes that buildings account for 50% of county-wide greenhouse gas emissions. *See* Montgomery County's Proposed Building Energy Performance Standards, https://www.montgomerycountymd.gov/green/Resources/Files/energy/beps-one-pager.pdf.

[10] *See,* for example, New York's Retrofit Accelerator Program, https://www1.nyc.gov/site/nycaccelerator/index.page and Green Building Exchange, https://be-exchange.org/, and DC's Building Innovation Hub, https://buildinginnovationhub.org/.

[11] Montgomery County Code, Part II, §1-19.