

Washington Public Ports Association

Building Performance Standards and Leases

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Climate Aligned Law
Climate work is all we do



This presentation is for educational purposes only and does not constitute legal advice.

Summary

Building Performance and Emissions Standards are important climate action tools, which impose new obligations on thousands of existing buildings in Washington state.

Public entities that own or lease space in impacted buildings need to understand the compliance issues and penalties, and manage the associated risks and opportunities through updated lease strategies.

What are Building Performance Standards (BPS)?

New regulatory tool applicable to existing buildings.

- Outcome-based policies/laws meant to reduce the carbon impact of the existing building stock.
- Require “covered” buildings to meet prescribed energy and/or greenhouse gas (GHG) performance targets within set timelines.
- Requirements are increasingly ambitious / challenging over time.
- Financial penalties for non-compliance.

What are Building Performance Standards (BPS)?

- First time we've really asked existing buildings to perform to a certain level
- Complement building codes (new construction, major renovations, prescriptive, triggered by permit)
- Very little precedent
- First BPS, Washington DC, 2018

The Context has changed

Moving away from...

- Moment in time
- Tied to permit cycle
- Focus on life/safety
- Sustainability voluntary

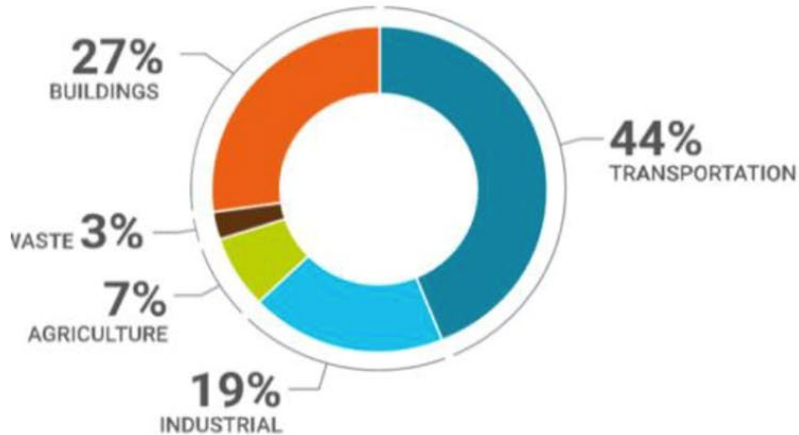
And towards...

- Forward-looking
- Performance or emissions-based
- Set timelines
- Mandatory with real penalties

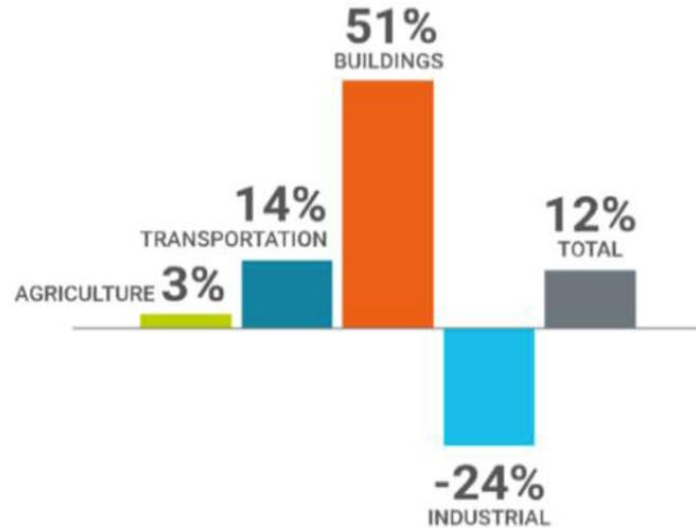
Regulations changing faster than leasing practices

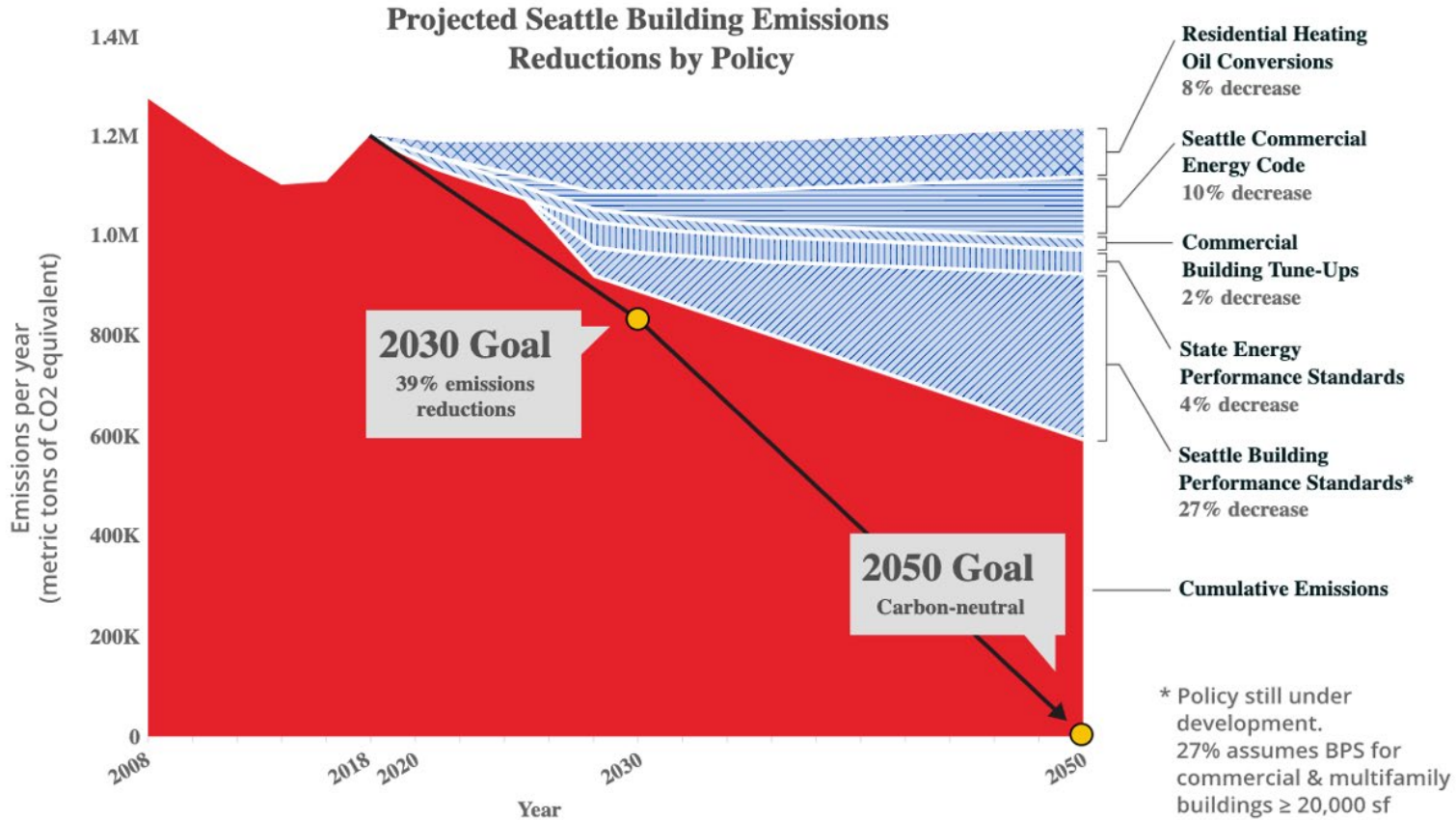
Why do we need Building Performance Standards?

Buildings are the second largest source of greenhouse gas emissions in Washington (2015)



As Washington's population has grown, greenhouse gas emissions from buildings jumped significantly from 1990-2015





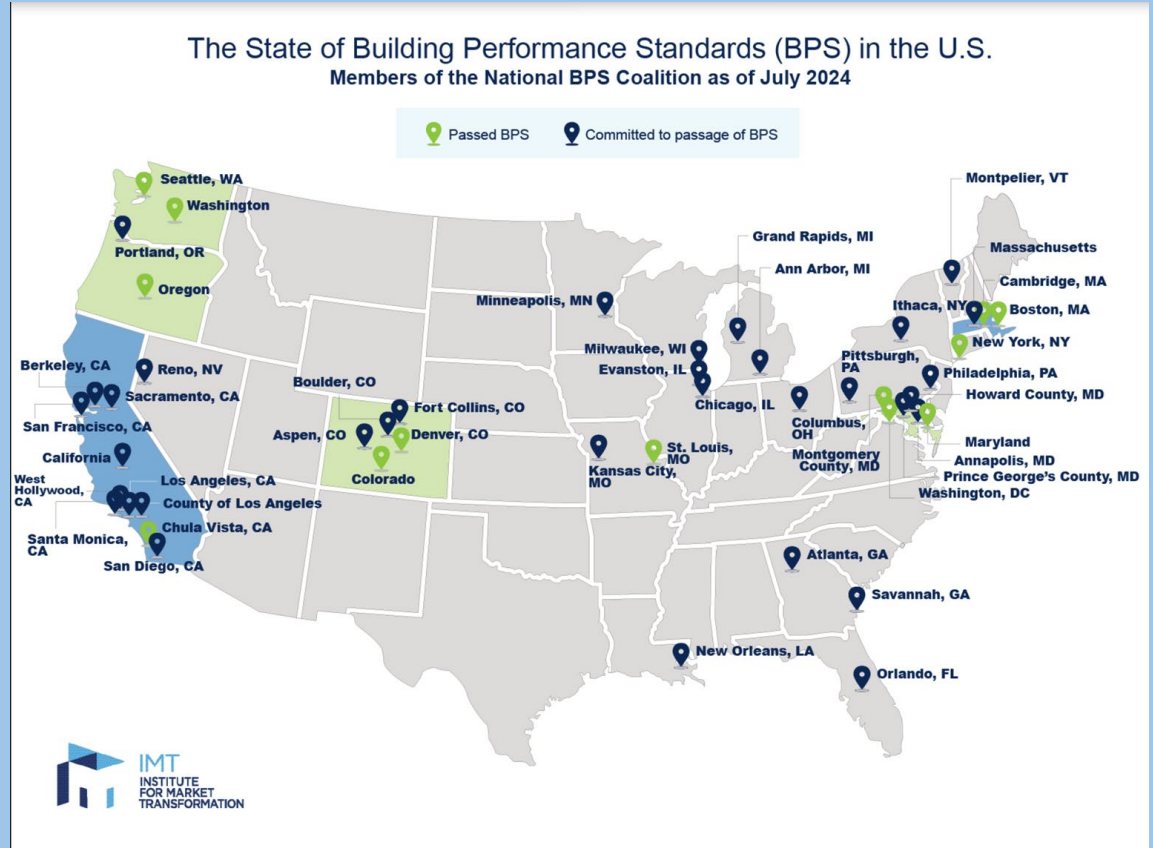
BPS Adoption

Implemented in 13 US jurisdictions

With 34 jurisdictions committed

As of July 2024

Institute for Market Transformation,
www.imt.org/bps



BPS in Washington

Clean Buildings Act (CBA) - Initially passed in 2019, and expanded in 2022

- Statewide (covers both public and private buildings)
- Focused on energy intensity
 - RCW 19.27A.200 - 19.27A.270
 - WAC 194-50

Seattle's Building Emissions Performance Standard (BEPs) - Passed in 2023

- Applies only to Seattle
- Focused on building emissions
- Buildings within Seattle subject to both CBA and BEPs
- Currently in rulemaking process

Clean Buildings Act Applies to Most Existing Buildings in Washington state

- Over 50,000 sqft (Tier 1 - nonresidential)
and
- 20,000 - 50,000 sqft (Tier 2 - includes multifamily)

What does the Clean Buildings Act Require

The Clean Buildings Standard requires that all covered buildings must comply with the Energy Management provisions of ASHRAE Standard 100-2018 that were adopted as part of the WA Administrative Code (WAC) 194-50.

Major provisions of that adopted standard include:

- Designation of an individual as Energy Manager for each building >50,000 ft²
- Adoption of an Energy Management Plan for each covered commercial building
- Implementation of an Operations and Maintenance (O&M) Program in each covered commercial building
- Each building must meet an energy performance standard or Energy Use Intensity (EUI) Target based on building type and end uses.
- Buildings that cannot calculate an EUI Target or are above their EUI must follow the Investment Criteria process outlined in the law to identify and implement cost-effective energy efficiency measures

Building Activity Type ^{1,2}			Notes	Climate Zone 4c	Climate Zone 5b	Clean Buildings Performance Standard Definitions
39	Food sales and service	Food Sales Grocery/food market		191	198	Supermarket/Grocery Store refers to buildings used for the retail sale of primarily food and beverage products, and which may include small amounts of preparation and sale of ready-to-eat food. Buildings where the primary business is the on-site preparation and sale of ready-to-eat food should use one of the Restaurant property types. Gross Floor Area should include all space within the building(s), including the sales floor, offices, storage areas, kitchens, staff break rooms, and stairwells. Gross Floor Area should include all space within the building, including court/rink space, all concourse space on which workers or guests can walk, concession areas, retail stores, restaurants, administrative/office areas, employee break rooms, kitchens, mechanical rooms, storage areas, elevator shafts, and stairwells.
71	Office	Office Government office		66	69	Government Office is an office used by employees of Federal, State, County, or City Governments.
78	Public services	Library		56	59	Library refers to buildings used to store and manage collections of literary and artistic materials such as books, periodicals, newspapers, films, etc. that can be used for reference or lending. Gross Floor Area should include all space within the building(s), including circulation rooms, storage areas, reading/study rooms, administrative space, kitchens used by staff, lobbies, conference rooms and auditoriums, fitness areas for staff, storage areas, stairways, and elevator shafts.
77	Public services	Fire Station		65	68	Fire Station refers to buildings used to provide emergency response services associated with fires. Fire stations may be staffed by either volunteer or full-time paid firemen. Gross Floor Area should include all space within the building(s), including office areas, vehicle storage areas, residential areas (if applicable), storage areas, break rooms, kitchens, elevator shafts, and stairwells.

Compliance Timelines - the clock is ticking!

Tier 1 covered buildings: sum of nonresidential, hotel, motel and dormitory floor area exceeds 50,000 gross square feet, excluding the parking garage area. No multi-family.



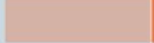




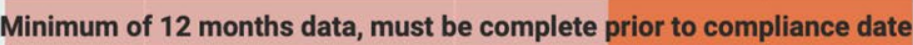


- June 1, 2026: 220,000+ sq.ft.
- June 1, 2027: 90,000+ sq.ft.
- June 1, 2028: 50,000+ sq.ft

Tier 2 covered buildings (expansion law): sum of multifamily residential, nonresidential, hotel, motel and dormitory floor areas exceeds 20,000 gross square feet, but does not exceed 50,000 gross square feet, excluding the parking garage area; and *all multifamily residential buildings where floor areas are equal to or exceed 20,000 gross square feet, excluding the parking garage area.*

- July 1, 2027

Federal buildings and those owned by federally recognized tribes do not need to comply

Example Timeline- 220k sq. ft. building

TASK	2022	2023	2024	2025	2026
Portal access and data confirmation					
Initial Benchmarking and account set up		Benchmark using 12 consecutive months of energy data			
Energy Audit (if applicable)		By Jan 2023			
Planning, budgeting and implementing EEMs		 6-18 months, must be complete by mid 2025			
EMP and O&M Development & Implementation		 Ongoing, must be complete by July 2025			
Measurement and verification		 Minimum of 12 months data, must be complete prior to compliance date			
Conditional Compliance (if applicable)		Shall be applied for no later than 180 days prior to compliance date			
Compliance Date		*Compliance date for buildings greater than 220k sq. ft. is Jun 1, 2026 			

Variable timeline



Minimum timeline



Compliance Date



*Initial compliance dates in accordance with Section Z3.1 of the standard and every five years thereafter.

<https://www.commerce.wa.gov/wp-content/uploads/2022/07/Compliance-Timeline.pdf>

What are the Penalties?

RCW 19.27A.210(10) "The department is authorized to impose an administrative penalty **upon a building owner** for failing to submit documentation demonstrating compliance with the requirements of this section. The penalty may not exceed an amount equal to **five thousand dollars** plus an amount based on the duration of any continuing violation. The additional amount for a continuing violation may not exceed a daily amount equal to **one dollar** per year per gross square foot of floor area."
(emphasis added)

Example of Penalties under CBA

220 GFA Building

+

Noncompliance of 365 days

=

\$335K penalty per compliance period

Where do Leases Fit In?

As the primary agreement between building and owners and tenants, leases are the best tool to ensure compliance with BPS requirements and clearly define expectations and responsibilities.

Tenants use up to 50% of energy in leased spaces

Majority of leases drafted at a time that pre-date BPS (first BPS 2018), issues and requirements not contemplated

Where do Leases Fit In?

- **Compliance:** Several states and municipalities (including Seattle and Washington) have enacted laws which will start to regulate energy usage and building emissions and impose other sustainability requirements. In many locations it is not a matter of if, but when.
- **Avoid Ambiguity:** Many leases are based on forms that have been in use for over a decade and leave more questions than answers when addressing building efficiency, utility usage, and sustainability.
- **Good Business:** Efficient and "clean" buildings will have lower operating costs, contribute to higher worker productivity, and a greater ROI over time of ownership.

Where do Leases Fit In?

Relevant lease provisions/issues

- Building operations (adaptable hours for HVAC, public lighting)
- Penalties
- Energy budgets
- Costs of efficiency improvements
- Data Sharing (access, format, quality)
- Sharing of incentives

Create clear expectations and delineation of each party's obligations

When should you update your existing lease(s)?

- **Easiest:** Incorporate updates to standard lease form and utilize with all new tenant negotiations.
- **Difficult but Doable:** Incorporate updates when extending a lease or amending for other reasons (e.g. expansion, relocation, etc.).
- **Most Difficult:** Pushing changes in ongoing leases absent other reasons for amending.

What does this mean for you?

As an Owner

BPS requirements - and penalties - almost always fall to owners

See requirements as opportunity to engage with public / align with climate action goals

Understand your building's current performance and necessary upgrades

Research any funding opportunities

Update lease (and templates) to address key BPS issues

As a Tenant

Understand your rights and obligations:

- Penalties
- Capital improvements / costs
- Data access

Request updates to lease language to ensure alignment with expectations

Be ready to work with owners

Consider alignment with climate action goals

What should you do next / resources: Owners

Should have received a notification letter from Department of Commerce

Assess your compliance obligations

Review applicability of any exception(s)

Determine how your existing lease or form leases do or do not assist with compliance

Resources: Department of Commerce and Smart Buildings Center /
Building Potential

What should you do next / resources: Owners

Understand if your building is covered and what your deadline is.

- Determine how current performance measures against Commerce requirements.
- Review your current and template leases to understand what improvements may be needed.
- Conduct tenant outreach to start the conversation about upcoming requirements.

Resources: Department of Commerce and Smart Buildings Center

- Document Library (identify resources and potential exemptions):
<https://www.commerce.wa.gov/growing-the-economy/energy/buildings-archive-page/clean-buildings-performance-standard-document-library/>
- Clean Buildings Performance Standard Helpdesk:
<https://smartbuildingscenter.org/resources/clean-buildings-performance-standard-2/cleanbuildingshelp@smartbuildingscenter.org>; 206-624-7570

What should you do next / resources: Tenants

Read your lease!

Understand your rights and obligations. What is the deadline for your building?

How will your data may be used? What about the PRA?

Get clarification on BPS specific issues.

Understand your own climate goals and consider how your existing space or future space does or doesn't align with those goals.

Financial Support / Incentives

Early Adopter Incentive (Tier 1)

<https://deptofcommerce.app.box.com/s/6qjvuofzq1tgekof67rrr64lhwcfbmw>

Energy Audit Incentive for Public Buildings (see fn. Resource and this resource:

<https://www.commerce.wa.gov/growing-the-economy/energy/buildings/energy-audit-incentive-program/>)

Commerce funding options worksheet (includes information specifically for public buildings): <https://smartbuildingscenter.org/wp-content/uploads/2024/07/Funding-Sources-JUNE2024.pdf>

FundHubWA (fundhub.wa.gov, climate and clean energy funding opportunities)

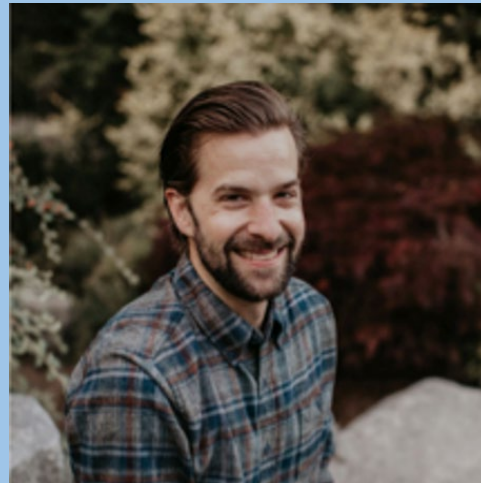
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QUESTIONS?





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