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Mandatory Energy Benchmarking Coming Into Vogue

By Jesse Greenspan

Law360, New York (February 04, 2010) -- As climate change legislation takes center stage, benchmarking is gaining traction among lawmakers, environmentalists and landlords as a viable first step toward systematically reducing energy use in buildings.

Benchmarking — in which the energy consumption of a building is measured against the average energy consumption of comparable buildings to produce a rating that can then be viewed by other parties — is now mandatory in a handful of U.S. jurisdictions, and voluntary efforts are also being ramped up, according to experts.

"This is a big deal," said Cliff Majersik, executive director of the Institute for Market Transformation, a nonprofit environmental group that takes a market-based approach to energy efficiency issues. "In a tight economy and with tight government budgets, this policy is one of the most powerful policies that any jurisdiction can put in place to improve the economy, create jobs and improve the environment at the same time."

There are terrific rates of return on commercial building energy efficiency retrofits, which is the next step after benchmarking, far better than one can generally get from stocks or bonds, he added.

Wayne Tusa, president of the environmental consulting firm Environmental Risk, said building owners and operators are beginning to realize benchmarking is something they should do not for ethical reasons but because it's cost-effective.

"This benchmarking process allows them to look at their portfolios and say, 'Oh, my God, the guy down the street is using 30 percent less energy than me,'" he said.

Laws that make disclosure mandatory also serve to put public pressure on building owners, according to David J. Freeman, chair of the New York environmental practice group at Paul

Hastings Janofsky & Walker LLP.

"You can't make a big dent in our carbon footprint without addressing buildings," Freeman said. "It's just the beginning, but we think there's going to be a groundswell of legislation in this area."

Benchmarking won't lay out landlords' options for enhancing energy efficiency or, necessarily, help them to calculate what the cost savings might be. However, once building owners tally up and compare their energy use, they can then reduce that use significantly at little to no upfront cost, according to Tusa.

Turning off the office equipment and keeping the heat off at night and installing new lighting are just a few examples of measures that building owners and operators can take at relatively little or no cost to themselves.

"There's no way to stop wasting energy unless you first start looking for ways to save, and benchmarking is all about starting looking," said Lane Burt, an energy policy analyst for the Natural Resources Defense Council.

"There's no reason to be wasting money daily just because you haven't done your due diligence," he added.

However, some kinks with energy benchmarking still need to be worked out, such as the difficulties of coming up with an accurate rating system.

"Some of these measurements are not simple measurements, and they're not self-explanatory," Freeman said. "They have the same defects as a miles-per-gallon calculation because city miles are different from highway miles, and even highway miles can be different from one another. You can drive the same car on the LIE and get a lot better mileage than you can on the Taconic."

Moreover, because tenants usually pay the electricity bill, landlords don't have as much incentive to measure their emissions and perform retrofits, according to Majersik.

He added that there was still a lack of information out there, and as a result it was hard for the market to value energy efficiency.

Thus far, though, benchmarking provisions have been supported by lawmakers across the political spectrum.

"It doesn't mandate anything but disclosure," Majersik said. "You can disclose a 1, which is the worst possible rating ... and there are no consequences for that, other than that other people will know your rating."

In 2007, California became the first jurisdiction to pass a mandatory benchmarking bill, requiring that commercial building owners disclose their benchmark data to prospective tenants, buyers and lenders.

Next came Washington, D.C., which in 2008 mandated annual energy performance rating and disclosure for commercial buildings. But rather than tying that disclosure to a transaction, the city publishes energy performance data in a public online database.

Also in 2008, the city of Austin, Texas, passed an ordinance requiring commercial building energy rating and disclosure, mandatory energy audits for homes, and mandatory audits plus possible retrofits for apartment buildings.

In 2009, Washington state adopted its own building energy rating and disclosure mandate, and New York City passed a law requiring energy rating and disclosure, periodic energy audits, and lighting upgrades, among other things.

And on Feb. 1, Seattle's mayor signed a bill that expanded on the Washington state law.

"A lot of major cities are moving in that direction," said Chris Cheatham, an attorney in Crowell & Moring LLP's government contracts group. "I can see it eventually spreading from the major metropolitan cities to smaller cities and towns."

The U.S. Environmental Protection Agency began to develop a national building rating system in the mid-1990s. As of mid-2009, more than 97,000 buildings — totaling more than 13 billion square feet of commercial building space — were benchmarked in the agency's online energy measuring and tracking tool, according to the agency.

Lauren Pitcher, a spokeswoman for the EPA's Energy Star program for commercial and industrial buildings, said there has been explosive growth in the last three or four years in the number of organizations that are benchmarking.

"All indications that we've seen so far for 2010 show that's going to continue," Pitcher said. "I really do think this is catching on."

Though the EPA has by far the largest benchmarking database, a couple of jurisdictions also

have them, utilities are starting to make their own, and landlords are beginning to do some internal benchmarking of their portfolios, according to Tusa.

He pointed out, though, that only a tiny fraction of 1 percent of all U.S. buildings are reporting their energy use.

"I think it's a great place to start," Tusa said of benchmarking, "but there are a whole bunch of ifs."

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