



**CLIMATE COALITION**  
Montgomery County, MD



**SIERRA CLUB**  
MARYLAND CHAPTER

November 29, 2023

Ms. Emily Curley  
Building Energy Performance Programs Manager  
Montgomery County Dept. of Environmental Protection  
Montgomery County, MD

Climate Coalition Montgomery County, and  
Montgomery County Sierra Club

Dear Ms. Curley,

The Climate Coalition Montgomery County and the Montgomery County Sierra Club are jointly submitting this response to the County draft regulations for Bill 16-21, Environmental Sustainability - Building Energy Use Benchmarking and Performance Standards. The goal of our organizations is to make change happen with urgency to create a livable climate for all, which includes helping the County reach the goals of its Climate Action Plan, reducing greenhouse gas emissions (GHGe) by 80% by 2027 and 100% by 2035 in an equitable way.

In 2022, the County Council enacted Bill 16-21 (the County BEPS law), with the strong support of many of the Climate Coalition's member organizations and the Montgomery County Sierra Club. The law focuses on increasing energy efficiency in buildings over 25,000 sq ft. This represents the majority of the commercial and multifamily home square footage in the County, which account for about 25% of the County's GHGe. Increasing energy efficiency in these buildings plays a key role in the County meeting the targets in the Climate Action Plan. By requiring the buildings to become highly energy efficient, they will by necessity need to switch over the majority of their fossil-fuel powered equipment to electric. This is due to the fact that, for example, electric powered heat pumps have around 3 times greater energy efficiency than the most energy efficient gas-powered space heaters, such as furnaces. Thus, requiring buildings to be more energy efficient both lowers the burden on the energy grid and reduces GHGe.

Our organizations, for the most part, support the regulations as written. Overall, the regulations are fair and equitable for the County's businesses and residents. Our comments underscore specific aspects of the regulations that will be particularly helpful in moving the County forward

to meet its climate goal. We further identify several aspects that should be changed to strengthen the regulations' success and equity.

A. We support the following in the current draft regulations:

1. **Energy Use Intensity (EUI) targets set in the regulations are appropriate to meet the goal of the legislation.** As stated In the County BEPS law (Section 18A-38 (f)), one of the intents of the bill is to “improve the energy performance of covered buildings through established building energy performance standards, therefore, reducing greenhouse gas emissions from the built environment and helping the County achieve its climate action goal of zero greenhouse gas emissions by 2035.” The technical report requested by DEP ([Technical Report Exec Summary](#)) describes a Zero Net Carbon (ZNC) standard, which aligns closely with the EUI targets in the draft regulations. The ZNC standard identifies the EUI targets that support the County in meeting its 2035 zero GHGe goal. ZNC would require buildings to convert most of their fossil-fuel powered equipment to electric, which has a much higher level of energy efficiency. Importantly, the report states buildings can meet the ZNC target using currently available market ready technology. Furthermore, the EUI targets in the draft regulations are similar to the Maryland state goals as required in the Climate Solutions Now Act (CSNA), in which buildings must achieve net zero direct GHGe and increased energy efficiency by 2040.
2. **Energy allowance only for on-site renewable energy generation.** There are several aspects to the use of renewable energy in the draft regulations, each of which we support.
  - a. **Only allowing on-site renewable generation makes perfect sense in promoting renewable energy generation in the County.** This provision aligns with the Climate Action Plan, specifically Section E-3, Promote Private Solar Photovoltaic Systems, which will be the primary mode for on-site renewable generation. On-site renewable reduces the burden of energy use to the grid and does not generate any greenhouse gas emissions.
  - b. **Not giving an energy allowance for the purchase of off-site renewable energy credits (RECs) is critical.** By limiting an energy allowance to on-site generation, the law does not provide for an allowance for off-site RECs. This is appropriate as using off-site RECs has many concerns. Off-site RECs are often only available from distant sources so have no effect on local energy generation and can involve energy generation that produces climate pollution (such as incinerators). Moreover, the benchmarking tool required by the County lacks a verifiable means to assess off-site RECs.

- c. **Retaining RECs is not required.** The draft regulations do not address whether owners of buildings with on-site renewable energy generation should retain the associated RECs. We support building owners being able to sell their RECs, providing them an independent source of income which supports the installation of new on-site renewable energy generation equipment and an overall reduction of the cost of meeting the EUI target. We understand the regulations' silence on this issue to mean that building owners will be able to sell the RECs; however, to the extent this may need to be clarified, we support amending the regulations to state that specifically.
- d. **Only crediting an energy allowance for electricity generated that is from on-site renewable energy systems and is used on-site is appropriate.** Excess electricity that is sent back to the grid should not be included in the energy allowance. This approach enhances the value of using electricity in the building, incentivizing its use.

B. Several aspects of the regulations should be improved to enhance the effectiveness of the county BEPS law

**1. Rules for initiation of a Building Performance Improvement Plan (BPIP). We support the concept of a BPIP; several aspects of the BPIP, however, should be improved.**

- a. **BPIP eligibility should be sufficiently restrictive to avoid the BPIP becoming a pathway for building owners to not comply with the EUI targets.** The BPIP is a pathway for building owners to negotiate with the County for an alternative target from the standard EUI target. Building owners who do not have the financial means to reach the standard EUI target should be supported in their effort to do as much as they can to reduce their EUI. The regulations state that "economic infeasibility" is a condition that qualifies a building owner to enter into a BPIP (18A.43A.01.10(B)(1)). "Economic infeasibility" is defined to cover a building owner who does "not have the financial ability to implement the improvements needed to meet an interim or final performance standard after considering all possible incentives, financing, and cash flow resources available." (18A.43A.01.10(B)(1)(a)) Our concern is that the terms used to define "economic infeasibility" are vague. We recommend the criteria for meeting this standard should be explicit, clear and narrowly defined, to guarantee access to a BPIP to building owners with real financial hardship while ensuring that the BPIP is not improperly used to circumvent EUI compliance.
- b. **A BPIP developed ahead of the interim target must include a plan to meet both interim and final EUI targets.** Considering the level of effort and expense to verify "economic infeasibility" as well as to develop measures to meet the target EUI, BPIPs should include plans to address all pending EUI targets, i.e., the interim, as appropriate, and the final. This will give a more complete picture of the building's

trajectory and allow a more complete data set for evaluation of the appropriateness of the plan.

- c. **The additional measures or changes that may be required by the Director should include the cost-benefit analysis.** In section 18A.43A.01.11(b), the draft regulations state that “[t]he Director may require that additional measures be assessed, additional documentation be provided, or that additional energy performance improvements be included in the plan.” The Director should be allowed to request modifications to any aspects of the plan, but specifically the Director should be allowed to require a cost-benefit analysis, which may significantly impact which projects to bring a building into compliance will or will not be considered acceptable.
- d. **Data to be used to allow entry into a BPIP must be verified by a third party in all cases.** The regulations state that the Director may request third party verification. Requiring third party verification in all cases would minimize subjective assessments of this critical aspect of entry into a BPIP.
- e. **Cost-benefit analyses of complying should include the social impact of GHGe, as defined by the County.** In determining the cost for a building to comply with the BEPS law, the social cost of the carbon produced from the building burning fossil fuels on-site should be included. As noted above, the BEPS law states that its intent is to decrease energy use and therefore greenhouse gas emissions. In the Maryland CSNA and its proposed regulations for implementation, GHGe are valued by their social cost. The social cost of carbon is the cost of the damages created by carbon dioxide emissions and other climate-warming gasses such as methane. This cost arises from how GHGe changes the climate, and how climate change affects economic outcomes, including changes in agricultural productivity, damages caused by sea level rise, and decline in human health and labor productivity. A building that burns fossil fuel on-site would have its social cost of carbon substantially reduced, or eliminated altogether, when converting to electric-powered equipment, thus reducing the calculated cost of the conversion. As with the CSNA, we cannot ignore the impact of on-site GHGe. Including the social cost of carbon provides a standardized way to address this. The County has access to several sources to determine this value. For example, the United States Environmental Protection Agency assigns a specific number on a per ton basis ([EPA social cost of carbon](#)).

**2. Fee structure for noncompliance should be sufficient to promote compliance.** The County BEPS law provides that any violation of the law is a Class A violation (18A-43B(b)). For civil offenses, the initial fine is \$500 and repeat offenses are \$750 ([Montgomery County Fines and Penalties](#)). While most building owners will plan to comply with the law, the penalties for noncompliance need to be comparable to the cost of compliance to incentivize

compliance. Accordingly, each day of noncompliance, beyond the first fine, should be regarded as a repeat offense. Washington, D.C currently uses this model for BEPS enforcement ([DC Benchmarking Enforcement](#)). The daily fines are assessed every 10 days that the building is out of compliance. We recommend that the County Council amend the BEPS law if this issue is beyond the scope of the regulations.

**3. Fees collected for not complying with BEPS should be used to support compliance by owners of affordable housing.** The cost of complying with BEPS may be challenging for the owners of affordable housing, including both designated and naturally occurring. The fees collected from BEPS noncompliance should be used exclusively to support implementation of the law. Multifamily housing, which is a substantial portion of the buildings covered by BEPS, faces many unique challenges to complying with BEPS. Further, the owners of affordable housing may face even more challenges, such as limited access to loans or cash reserves. Using the BEPS noncompliance fees to assist compliance by affordable housing buildings would strengthen the equity aspects of the BEPS law. We recommend that the County Council amend the BEPS law if this issue is beyond the scope of the regulations.

**4. Enhanced public access to BEPS compliance data.** We applaud the public disclosure of individual benchmarking data that are available on the County website ([Benchmarking Information](#)). However, individuals seeking to determine if a specific building is meeting its BEPS target would need to do a deep dive into the website data set to find the building and then compare its EUI data to the building's EUI target. This is not a trivial task, and one that most members of the public will be unlikely to undertake. Nonetheless, members of the public should be able to easily access the compliance of individual buildings. And owners should be able to readily share when their buildings are highly efficient and meeting the BEPS targets. For these reasons, the regulations should require each building to display a standardized indicator of energy efficiency at a readily accessible and easily found location, such as at or near the building entrance. This is currently required in New York City, using Energy Star Scores, where buildings must display a standardized Building Energy Efficiency Rating label provided by the city ([NYC Building Energy Efficiency Grades](#), [NYC Energy Efficiency Labels](#)). The labels must be displayed in a conspicuous location near each public entrance and updated on an annual basis. Replicating this in Montgomery County would allow both the public to better engage with the County's climate mitigation activities and raise the profile of buildings that are excelling in this area. We also strongly suggest that the displayed labels indicate an easily interpreted letter grade, as they do in New York City, showing the extent that a building is compliant with energy efficiency goals.

**5. Clarifying EUI targets in mixed-use buildings that include a building type that would exclude the building if it represented greater than 50 percent of the floor area.** The BEPS law identifies several building types that exclude a building from the legislation if the building type represents over 50% of a building's total gross floor area: "public assembly in a building without walls; industrial uses where the majority of energy is consumed for manufacturing, the generation of electric power or district thermal energy to be consumed offsite, or for other process loads; or transportation, communications, or utility infrastructure" (BEPS Bill 16-21, 18A-34B). Because they are excluded, there is no assigned EUI target. If the excluded building type accounts for less than 50% of the square footage, however, the building is covered and an EUI must be identified. The draft regulations do not appear to address this situation in which the excluded building type must be included in the EUI target. We recommend that the regulations be expanded to address how the EUI is calculated for this type of multi-use building.

The Climate Coalition of Montgomery County and the Montgomery County Sierra Club thank the County for this opportunity to provide comments on the draft BEPS regulations. We hope they are useful in developing the final regulations for the implementation of this very important law that is part of the County's efforts to be a leader in addressing climate change.

Sincerely,

Karl Held

On behalf of the Climate Coalition

Mark Posner

On behalf of the Montgomery County Sierra Club

The Climate Coalition includes the following organizations:

350 Montgomery County

ACQ Climate (Ask the Climate Question)

Bethesda Green

Biodiversity for a Livable Climate

Chesapeake Climate Action Network

Elders Climate Action

Environmental Justice Ministry Cedar Lane Unitarian Universalist Church

Environmental Study Group

Friends of Sligo Creek

Glen Echo Heights Mobilization

Green Sanctuary Committee of the Unitarian-Universalist Church of Silver Spring

Montgomery County Faith Alliance for Climate Solutions

One Montgomery Green

Poolesville Green

Safe Healthy Playing Fields

Sugarloaf Citizens' Association

Transit Alternatives to Mid-County Highway Extended/M-83 (TAME)

The Climate Mobilization Montgomery County

Takoma Park Mobilization Environment Committee (TPMEC)

Zero Waste Montgomery County